THE CANONICAL INSTITUTE OF SEPARATION OF SPOUSES WITH THE BOND REMAINING AND CIVIL SEPARATION AND DIVORCE IN THE UNITED STATES OF AMERICA: CANONICAL DEVELOPMENT SINCE THE LATE NINETEENTH CENTURY WITH PARTICULAR REFERENCE TO THE ARCHDIOCESE OF CHICAGO

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ABSTRACT

This thesis examines the canonical institute of separation of spouses with the bond remaining, tracing its historical development, legislative evolution, and practical application, with particular attention to the United States from the late nineteenth century through the promulgation of the 1983 Code of Canon Law. Rooted in medieval concepts drawn from property and contract law, separation developed as a juridical means of regulating the rights and obligations of the common life while preserving the indissolubility of the marital bond. Although formally distinct from civil divorce and civil separation, the canonical treatment of separation became increasingly intertwined with questions of recourse to the civil authorities in late nineteenth- and twentieth-century canonical literature.

The study highlights the tension between universal ecclesiastical law and American particular practice, marked by the watershed of the Third Plenary Council of Baltimore (1884). It identifies the emergence of a widespread but unfounded norm in American canonical discourse: the transformation of the Council's requirement of consultation prior to civil separation into an alleged obligation to obtain episcopal permission for civil separation and divorce. The thesis demonstrates that this interpretation was not grounded in the legislative text itself, but arose from a convergence of misapplied Roman responses—originally shaped by the political circumstances of France—and pastoral concern in the United States over the increasing prevalence of civil divorce.

The transition from the 1917 Code to the 1983 Code of Canon Law is then examined, with particular attention to the movement away from a fault-based and penal

framework toward a personalist understanding of marriage and an explicit preference for civil authorities to adjudicate the civil effects of separation.

A detailed case study of the Separation Court of the Archdiocese of Chicago (1940s–1985) provides insight into the Church's application of norms regarding separation and divorce, describing an institution created to address a specific juridical context and tracing its continued operation after that context had substantially changed. Publications, administrative documents and records from real cases are compared to the procedural and substantive norms.

The thesis concludes that the disappearance of such institutions, together with developments in codified law, reflects a reconfiguration of jurisdiction rather than a repudiation of principles. It thus raises broader questions about the conditions under which canonical norms concerning separation of spouses with the bond remaining can function as operative law in contemporary ecclesial and civil contexts.

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ABBREVIATIONS

ACA	Archdiocese of Chicago Archives
ACA SC	Archdiocese of Chicago Archives, Separation Court case records
ASV	Archivio Segreto del Vaticano (as of 2019, renamed the Vatican Apostolic Archive)
CCC	The Catechism of the Catholic Church
CFCS	Catholic Family Consultation Service [of the Archdiocese of Chicago]
CIC/17	*Codex iuris canonici, Pii X Pontificis Maximi iussu digestus*
CIC/83	*Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus*
CLSA	Canon Law Society of America
CLSA Comm1	J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary*
CLSA Comm2	J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*
CLSGBI	Canon Law Society of Great Britain and Ireland
DLTA	Dicastery for Legislative Texts Archives
DV	SECOND VATICAN COUNCIL, Dogmatic Constitution on Divine Revelation *Dei Verbum*
Exegetical Comm	Á. MARZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen. ed. of English translation), *Exegetical Commentary on the Code of Canon Law*
NCCB	National Conference of Catholic Bishops [of the United States]
USCC	United States Catholic Conference

GENERAL INTRODUCTION

> When a marriage […] is valid, and yet a separation from bed and board becomes necessary […] would it be lawful in that case to apply to the civil courts for an absolute divorce, if this result could not be achieved by a partial divorce? We think with Kenrick that it could be done.
>
> Not that there could be any real intention of absolutely severing the bond of marriage, which is supposed to be firm and valid; since the parties only make use of the law in order to obtain exemption from unjust burdens. Kenrick says:
>
> > "In these cases, it seems justifiable to seek divorce in the civil court, not thereby recognizing any such power in these tribunals, or intending actually to dissolve the bond, but merely to escape unjust annoyances and demands" (Mor. vol. ii. tract. xxi. cap. iv).
>
> For the same reasons, it is evidently allowed to procure a civil divorce from bed and board.[1]

Thus concluded Sebastian Bach Smith, premier canonist in the United States in the late nineteenth century. Yet seventy years later a different verdict was given:

> I have even heard married people say that priests have told them that it was permissible for them to separate on their own authority provided they did not seek a civil divorce, or, what is worse, that it was permissible to seek a civil divorce on their own authority provided they did not attempt to remarry. This is a far cry from the doctrinal and juridical position of the Church.[2]

This opinion is but one of dozens of similar examples which could have been given from the same era. How did this complete reversal in prevailing opinion happen? Was each correct at the time it was written, perhaps due to a new law in the intervening period? Moreover, which would be correct today?

"Spouses have the obligation and the right to maintain their common conjugal life, unless a lawful reason excuses them" (c. 1151, *CIC/83*). The "right" was codified in 1983, with the "obligation" having been expressed in positive law for the first time in

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[1] S.B. SMITH, *Notes on the Second Plenary Council of Baltimore*, New York, P. O'Shea, 1874, 252–253. Smith's quotation of Kenrick (which appears to be a reference to F.P. KENRICK, *Theologia moralis*, vol. 2, Mechlin, H. Dessain, 1861, 305–306) is a paraphrase rather than a true quotation, but is nevertheless an accurate summary of Kenrick's view.

[2] J.P. KELLY, "Separation and Civil Divorce," in *The Jurist*, 6 (1946), 188.

CIC/17 c. 1128. Despite its late appearance in universal legislation, the idea that conjugal living is an obligation not solely within the authority of the parties themselves is not new, and in fact goes back at least to the Middle Ages. The *Liber extra* in particular contains many examples of decretal letters pointing to ecclesiastical involvement in the suspension of conjugal living while leaving intact the bond of the marriage. These papal norms established many of the legal institutes which remained the law of the Church until codification and even to the present day. Notable among these is the distinction between legal separation (which ends the obligation of mutual support while often making specific financial provisions, and which can only be established on the basis of personal fault of a party, and—apart from adultery—requires the intervention of ecclesiastical authority), and departure from conjugal living (where the obligation of mutual support remains, but fault is not required, and nor—in urgent cases—is the intervention of ecclesiastical authority). What is particularly notable is that these papal enactments are rooted in property law: both practically, as the Church decided property settlements in matrimonial disputes, and by analogy, as other principles of property law, many derived from Roman law, were used to flesh out the canon law regarding the obligations consequent to a valid marriage bond.

Developing later, and often in parallel to the legal foundations previously established regarding marriage, was the Church's reaction to the attempted usurpation by civil governments of the Church's rule over the marriages of Catholics—not only regarding separation with the bond remaining, but even extending to "divorce of the bond." State-sanctioned "divorce" was a challenge to the exclusive authority of the Church over marriage and to the indissolubility of the bond—a challenge which was met with fierce political and social resistance from Church authorities. But the very impossibility of

dissolving the true bond of marriage meant that at the individual, pastoral level it was often ignored as having no effect.

The canonical response of the Church in the United States to marital breakdown from the late nineteenth century to the mid-twentieth century takes place against these two factors; longstanding ecclesiastical regulation of conjugal living, and the new threat posed by civil authorities' attempts to exercise jurisdiction regarding marriage. All time limits are by their nature somewhat arbitrary; but there are good reasons for choosing the span covered by this thesis. The fundamental object of this thesis is the explosion of canonical interest in divorce and separation, both in literature and in practice, in the Church in the United States in the middle decades of the twentieth century, at its peak in the 1940s and 1950s. Literature and practice of this era frequently cite as their authorities the Third Plenary Council of Baltimore of 1884 and various responses of the dicasteries of the Apostolic See, especially of the 1880s to 1906, and therefore significant attention is given to these sources and the context in which they were created.

The law and literature of the *CIC/83* regarding separation of spouses with the bond remaining are also ripe for deeper reflection; the varied opinions of the revisers as well as the literature of the revised Code demonstrate a certain continuity of law (and, in places, continuity of its misinterpretation), as well as diverse opinions about the nature and purpose of the canonical institute of separation of spouses. Observing this continuity, we must then ask whether developments in the juridical understanding of marriage itself are relevant to the law regarding separation of spouses, particularly in the example of whether or not spouses may be ordered to reconcile.

The publication of Helmholz's *Marriage Litigation in Medieval England* in 1974[3] was a watershed moment in the historiography of canon law. Using collections of acts of real cases, he explored how the Church's law was actually understood and applied, demonstrating canon law as a functioning legal system, not merely abstract theories derived from philosophy and theology. While later scholars have continued Helmholz's examination of ecclesiastical court archives, developing understanding of the relationship between legal text and legal practice,[4] this approach has been almost entirely limited to historians (albeit, often specialists in medieval canon law) rather than scholars of the *ius vigens*.[5] In this thesis I have considered the secondary literature (and often the responses and legislative texts issued by ecclesiastical authority) not only for their legal value but also as mutually-influential, historically contingent documents; and, therefore, the methodological boundary separating the study of canon law from the study of history has been crossed.

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[3] See R. HELMHOLZ, *Marriage Litigation in Medieval England*, London, Cambridge Studies in English Legal History, Cambridge University Press, 1974.

[4] Book-length studies include C. DONAHUE, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, Cambridge, Cambridge University Press, 2007; L. SCHMUGGE, *Marriage on Trial: Late Medieval German Couples at the Papal Court*, A.A. LARSON (trans.), Studies in Medieval and Early Modern Canon Law, Washington, DC, The Catholic University of America Press, 2012; W.P. MÜLLER, *Marriage Litigation in the Western Church, 1215-1517*, Cambridge, Cambridge University Press, 2021. Focused especially on separation with the bond remaining is G. MARCHETTO, *Il divorzio imperfetto: i giuristi medievali e la separazione dei coniugi*, Annali dell'Istituto Storico Italo Germanico, Bologna, Il Mulino, 2008. Slightly predating Helmholz in publication, and—perhaps due to its structure as a series of vignettes—capturing more attention outside of medieval and legal historians, is J.T. NOONAN, *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia*, Cambridge, MA, Belknap Press of Harvard University Press, 1972.

[5] An exception proving the rule may be seen in the recent thesis for a doctoral degree in canon law, N. MUENKS, The Court of Conscience: Transferring Cases from the Contentious Forum to the Forum of Conscience in Medieval Canonical Jurisprudence and Praxis, JCD thesis, Washington, DC, The Catholic University of America, 2021. Over the course of several hundred pages, Muenks thoroughly examines the authoritative medieval legal texts and jurists regarding the question of referring a party to his or her own conscience in marriage cases, while consideration of real cases (outside of those which generated the decretal letters) is addressed in an appendix. See ibid., 417-449.

It seems appropriate also, therefore, to complete this task by asking whether and how the canonical literature regarding separation and divorce, especially the great wave which arose in the 1940s and 1950s, was put into practice. It is also worthwhile to consider, in turn, how the practice may have affected the canonical texts and commentary. An overview of the practice in multiple dioceses would have been both impractical and perhaps also (due to a lack of depth) less useful; and therefore, the thesis focuses on a single diocese. The Archdiocese of Chicago was chosen due to its size, the availability of its records, and its influence on the literature. Administrative records from the diocese and records of individual cases in its "Separation Court" are evaluated in light of the law as it actually was, and of the law as it was claimed to be. Furthermore, especially when the practice seems to have diverged from any recognizable description of the law, the norms apparently in practical use are inferred. An examination of this kind is especially relevant since, in the present day, most U.S. canonists' relationship with this field of the law is much more theoretical than practical; it is therefore highly instructive for the present-day canonist to look back at the most recent period in which a serious attempt was made to apply canon law regarding separation and divorce in the United States.

Indeed, it is my conviction that separation of spouses with the bond remaining, and the closely related issue of the civil authorities and civil divorce, are topics which in Anglophone canonical literature have long been *assumed* more than rightly understood. Therefore, my aim in the thesis and its envisaged principal contribution to the field of canon law is the explanation of how the great bulk of US canonical literature of the twentieth century on these subjects is seriously misleading. My explanation for this relies on a new examination of the key source texts, which has not been previously attempted in such

depth, and certainly not since the heyday of canonical literature in the middle decades of the twentieth century in hyperbolic opposition to divorce. Some key areas of confusion, such as the distinction between departure and legal separation (acknowledged in literature originating outside of the Anglosphere, but persistently misunderstood within it) have been addressed in my previous work[6] but have received deeper explanation here.

The second major contribution attempted in this thesis is the examination of the Separation Court of the Archdiocese of Chicago as an institution. This author is not aware of any other study conducted directly from case records of any other ecclesiastical marriage court in the United States, nor of anywhere else in the world since codification. Beyond what it contributes to the precise issue of mid-twentieth century canonical practice and literature regarding divorce and separation with the bond remaining, the findings of this thesis may also be useful to historians and sociologists studying the role of canon law and Church teaching regarding marriage in the lives of the faithful.

The third major area of relevance of this thesis may be its illustration and exploration of the relationship between canon law and social forces. For example, the reintroduction of divorce to France and the Third Plenary Council of Baltimore led to specific canonical texts which caused a sea change in canonical literature regarding separation and divorce, but which were also largely misinterpreted, and it was these misinterpretations which took root and were applied in place of the legal texts themselves. Separation of the spouses with the bond remaining as a legal institute provides an excellent illustration of the role of law in ecclesial society: the institute was formed in a time when

[6] See V. GARDINER, "The Separation of the Spouses: Old Law, New Questions," in *Proceedings of the Canon Law Society of America*, 81 (2019), 160–191.

the Church needed to provide legal resolution to troubled marriages without dissolving the bond; it later evolved into a crucible of Church-state conflict as the Church demanded adherence to its own norms and authorities in opposition to the competing jurisdictional claims of the modern state; and finally, as the Church largely lost the primary allegiance of the faithful regarding this matter, the institute retreated to the status of a vestigial remnant, yet nevertheless still influenced by both the legal structures and secondary literature of prior eras. All of this demonstrates the limitations of approaching the study of canon law solely from a juridical perspective.

To resolve the above-stated objectives, the thesis is organized into four chapters. Chapter One describes the state of the canonical concept of separation of spouses with the bond remaining in the late nineteenth century, with particular focus on the United States. In order to understand better the mindset of American legislators and commentators, as far as possible the opinions of dominant canonical commentators—as primary witnesses to the law *as it was seen at that time*, rather than as secondary commentators on the *Corpus iuris canonici*—are used in preference to primary legislative texts. The distinction between departure and separation is observed, as is the allowance made for departure on a spouse's own authority. Also noted is the possibility of separating not out of necessity, but in order to punish a wayward spouse and encourage reformed behavior. Texts of the *Liber extra* are examined, to demonstrate that the institute of separation of spouses with the bond remaining is rooted in property law. Attention is then turned to the United States in particular, beginning with the work of noted canonical authors of the nineteenth century. Particular councils are considered, culminating in the Third Plenary Council of Baltimore of 1884. Canon 126 of this council is examined in depth, to show that the text of the canon

is limited to civil separation and not divorce, and that only consultation, not permission, is required. Extrinsic factors on the understanding and application of the law such as the Reformation, Catholicism as a minority religion in the United States, the difficulty in establishing functioning ecclesiastical institutions on a new continent, are noted, as is the implicit distinction between *disciplinary* and *jurisdictional* norms regarding approach to the civil authority.

Chapter Two addresses separation with the bond remaining in the codified era; that is, from the immediate preparation for the *CIC/17* through the *CIC/83*, to the present. Proposed canons for the *CIC/17* are considered, including a suggestion to require the *licentia* before approaching the civil authorities for separation in order that the civil authority might decide practical mutual support and care of the offspring. Both the fundamental continuity and the occasional novelties in the codified law from the decretal law are identified; in particular, the continued reliance upon property law from the decretals and earlier sources. The revision of the *CIC/17*, in the *Coetus de matrimonio* (ultimately leading to *CIC/83* cc. 1151–1153) is discussed, observing the great variety of opinions regarding the nature and purpose of separation with the bond remaining among those directly responsible for the revision and the bishops and canon law faculties of the world to illustrate a weakness in the ability to understand and apply the law. The innovation of the removal of punitive reasons for separation, reducing the reasons for separation to what is minimally necessary to protect the spouses and offspring is also analyzed. The possibility that by changes to more fundamental texts, the *ius* can change even where the text of an individual *lex* does not appear to change, is addressed in the context of whether personalism allows ecclesiastical authority to order a spouse to reconcile against his or her will.

Chapter Three examines the ecclesiastical relationship with the civil authorities regarding separation and divorce. The particular challenges faced by the Church in the United States are noted and the contemporaneous situation of the Church in France is examined to show that the reintroduction of divorce to France in the 1880s was treated as a threat not only to individual marriages, nor even to marriage in general, but to the relationship between the Church and the faithful. This context is essential to show that the responses of the Sacred Penitentiary and the Holy Office in the 1880s regarding France were applicable *only* in France. The opinions among commentators outside of the United States regarding divorce in this era, with the principal dispute being whether or not divorce could *ever* be morally permissible, are also taken into account. An analysis of the Third Plenary Council of Baltimore concerning the relationship with the civil authorities regarding marriage, especially as found in canons 124 and 126 of the council, is undertaken, while the influence of the Fourth Provincial Council of Cincinnati of 1882 is observed regarding these canons. The two councils, and the events in France around the same time, are seen as a turning point in US commentary; a permissive attitude which treated divorce as a canonically irrelevant matter which could be utilized when necessary was replaced by motivated reasoning leading to confabulated obligations to receive episcopal permission. Diocesan particular laws are also examined. The centerpiece of this chapter is the in-depth examination of mid-twentieth century US literature, critically evaluated in light of the key source texts as previously described in this chapter. The work of the *Coetus de processibus* (culminating in cc. 1692-1696) is considered, including both the opinions of those participating in the process, as well as the textual revisions themselves and a likely typographical error which found its way into the Code. Finally, the current law

is explored, with particular focus on canon 1692, §2: whether the law's mention of the *licentia* (often translated as "permission") to approach the civil authorities indicates or imposes an obligation on the part of the faithful to seek this permission any time they would approach the civil authorities for separation or divorce.

Chapter Four examines the Separation Court of the Archdiocese of Chicago as a specific ecclesiastical response to separation and divorce within the legal and social conditions of the United States. The chapter presents how this institution functioned in practice, how it related to the law, and what its story reveals about the places of legal separation, authorization to suspend conjugal living, and permission to divorce as juridical concepts in the twentieth century in the United States. Key themes addressed regarding the Chicago Separation Court include the procedural operation of the court, the legal basis for its authority and its decisions, and how its work was viewed by different constituencies. These questions are answered based on both the institutional records of the court and on surviving documentation of individual cases.

1. THE LAW OF SEPARATION WITH THE BOND REMAINING PRIOR TO THE CODIFICATION OF ECCLESIASTICAL LAW

From the time of the apostles, the Christian community has provided for situations of matrimonial disharmony and separation.[1] "The ancient peoples, such as the Hebrews, Greeks, and Romans, when they allowed for divorce in terms of dissolving the bond of marriage, did not have explicit laws based on natural law regarding only separation from bed and cohabitation. Instead, they were content with severe penalties established in criminal law against adultery."[2] Separation with the bond remaining as an institute in the Church was "originally intended to prevent divorces [termination of the bond] granted under the Roman law in force in the first centuries after Christ."[3]

1.1. The Law for the Latin Church Prior to 1917

This work is principally concerned with explaining the law applicable to separation of spouses with the bond remaining, for the Latin Church, in the United States, from the late nineteenth century onwards; and therefore at times it is less concerned with what the law may have been in a legal, abstract or textual sense, than with what was perceived or

[1] "To the married, however, I give this instruction (not I, but the Lord): A wife should not separate from her husband—and if she does separate she must either remain single or become reconciled to her husband—and a husband should not divorce his wife" (1 Cor 7:10-11). All quotations from Sacred Scripture in English are taken from D. SENIOR, J.J. COLLINS, and M.A. GETTY-SULLIVAN (eds.), *The Catholic Study Bible: The New American Bible, Revised Edition*, 3rd ed., New York, Oxford University Press, 2016.

[2] F.X. WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, altera editio emendata et aucta, vol. 4, t. 2, Rome, Prati, 1912, 656, fn. 109. Minor editorial modifications, e.g., capitalization and spelling, have been made in this and other quotations to conform to the adopted style for this work.

[3] E. SZCZOT, "Separacja małżeńska – fikcja nierozerwalności czy szansa trwałości związku?" in *Ius matrimoniale*, vol. 32, no. 2 (2021), 50.

claimed to be the law at that time.[4] For this reason we will, for the era prior to the 1917 Code, primarily examine not the applicable legislative texts themselves (among which the *Corpus iuris canonici* is the foremost collection), but instead the contemporary canonical manuals or commentaries which summarized and synthesized not only the *Corpus iuris canonici* and later texts with legislative or at least exemplary import, but also the works of prevailing moralo-canonical manualists such as Tomás Sánchez, Alphonsus Liguori and Franz Schmalzgrüber.

1.1.1. Perspectives on Separation Influenced by Social and Religious Context

Introducing the concept of separation with the bond remaining (or, "partial divorce, that is as to bed, table and dwelling only"[5]) in his synthesis of matrimonial law immediately prior to codification, Pietro Gasparri contrasts the law of the Catholic Church regarding separation with the bond remaining with the teaching of the Protestants.[6] Catholic authors in the United States in the nineteenth and twentieth centuries more commonly compared the Catholic Church's firm opposition to marital disruption of any kind, to an alleged laxity in U.S. society dominated by mainline Protestantism with a marriage discipline presented as more lenient than the Catholic Church regarding matters such as separation and the

[4] For example, we must set aside Noonan's argument that the original version of X 4, 19, 7 *Quanto te novimus* regarding *divortium* was significantly different from the text as edited by Raymond of Peñafort, with evidence of the difference surviving in the *glossa ordinaria* but not in major editions of the *Corpus iuris canonici* until the recovery of the original to mainstream scholarship by Friedberg—of which Gasparri was allegedly oblivious. See J.T. NOONAN, *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia*, Cambridge, MA, Belknap Press of Harvard University Press, 1972, 364fn. For our purposes, the conclusions reached by Gasparri regarding the *Corpus iuris canonici* are more relevant than whether Gasparri was right or wrong, or working from an accurate or inaccurate text.

[5] "De divortio semipleno idest quoad torum, mensam et habitationem tantum" (P. GASPARRI, *Tractatus canonicus de matrimonio*, 3rd ed., vol. 2, Paris, Beauchesne, 1904 (=GASPARRI, *Tractatus canonicus de matrimonio [1904]*, 324, §2)).

[6] See ibid., 324–325, no. 1363.

indissolubility of marriage. Yet Gasparri offers a different perspective. He begins by saying that in comparison to the bond of marriage,

> […] the communion of bed, table, and habitation is more easily dissolved. Protestants were teaching [*docebant*] that this partial divorce [*semiplenum divortium*] can only occur due to adultery, and that the Church errs by allowing other causes. The Council of Trent condemned them, at session XXIV, canon 8: "If anyone says that the Church errs when it permits for many reasons the separation of spouses as to bed or habitation for a certain or uncertain period; let him be anathema." Such causes include adultery, heresy or schism, any grave danger, and mutual consent.[7]

Gasparri argues that this assertion of ecclesiastical dominion over marital separation for reasons other than adultery does not contradict the words of the Lord.[8]

Gasparri's use of the imperfect tense indicates that he was referring to Protestants of the sixteenth century, prior to the Council of Trent, rather than at the turn of the twentieth century when he was writing. It is notable that Gasparri begins his commentary on separation with the bond remaining by emphasizing the relative *willingness* of the Catholic Church to allow separation for reasons other than adultery; a position which could be characterized as lax in comparison to the Protestant position he uses as a contrast. It seems unthinkable that a US author of the same era would have chosen to make the same point.

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[7] Ibid.: "[…] communio tori, mensae et habitationis facilius solvitur. Protestantes docebant hoc semiplenum divortium fieri posse tantum ob adulterium, et errare Ecclesiam quae alias quoque causas admittit. Eos damnavit Conc. Trid., sess. XXIV, can. 8: «Si quis dixerit Ecclesiam errare cum ob multas causas separationem inter conjuges quoad torum seu quoad cohabitationem ad certum incertumve tempus fieri posse decernit, a.s. [anathema sit]». Ejusmodi causae reducuntur ad adulterium, haeresim seu schisma, quodvis periculum grave, mutuum consensum."

[8] Gasparri refers (ibid., 325) to Matt. 5:19: "Neque id obstat verbis Christi D. Matth., V, 19: «Quicumque dimiserit uxorem suam, excepta causa fornicationis […]»", though this must be both an incorrect citation and a misquotation. The relevant passage is Matt. 5:31–32: "Dictum est autem: Quicumque dimiserit uxorem suam, det ei libellum repudii. Ego autem dico vobis: quia omnis qui dimiserit uxorem suam, excepta fornicationis causa, facit eam mœchari: et qui dimissam duxerit, adulterat" (*The Vulgate New Testament with the Douay Version of 1582 in Parallel Columns*, London, Samuel Bagster, 1872, 6). Gasparri's revised version of *Tractatus canonicus de matrimonio*, updated to reflect the codification of the law, contains the same erroneous scriptural reference. See GASPARRI, *Tractatus canonicus de matrimonio*, ed. nova ad mentem Codicis I.C., vol. 2, Typis polyglottis Vaticanis, 1932 (=GASPARRI, *Tractatus canonicus de matrimonio [1932])*, 242, no. 1171.

The discrepancy between Catholic and Protestant teaching identified by Gasparri is best understood as not rooted in theology of marriage *per se*, but ecclesiology. As Gasparri cited the fifth chapter of the Gospel according to Matthew, wherein Our Lord provided for the severance of conjugal living due to adultery, the *sola scriptura* principle of the Reformers understood this to be the only possible reason for the legal disruption of the common life, and rejected the authority of the Church either to establish different reasons for separation, or to judge separation in individual cases. For Gasparri, however, the Church's marriage law regarding separation is a reflection of the fundamental nature of marriage according to divine law, but also the product of a millennium of ecclesiastical law, issued by the authority given to the Church to govern her members.

According to social identity theory and the phenomenon of intergroup comparison, members of a group define themselves in contrast to the perceived characteristics of other groups, and attribute the characteristics of one's own group as positive features.[9] Canonical commentators in different circumstances may be influenced to propose or emphasize different aspects of the law depending on how they understand the Catholic Church, which is in turn influenced by their understanding of what is *outside of* the Catholic Church. For Gasparri, the Council of Trent was as though within touching distance, in the very recent legislative past (indeed, it was considerably more recent than the source texts comprising the *Corpus iuris canonici*), and Protestantism was defined by the errors of the sixteenth century Reformers as repudiated by Trent. Furthermore, Gasparri was writing in the shadow of the Kingdom of Italy, which—prior to 1929—denied civil recognition of

[9] See J.C. TURNER, "Towards a Cognitive Redefinition of the Social Group," in H. TAJFEL (ed.), *Social Identity and Intergroup Relations*, European Studies in Social Psychology, Cambridge, Cambridge University Press, 2010, 17.

ecclesiastical marriages, in response to which the Church encouraged Catholics not to register their marriages with the state and to continue to rely on the Church as the exclusive arbiter of marriage.

But for American Catholics in the late nineteenth century, Protestantism was a less theoretical phenomenon; it was the religion of the dominant majority in a society which frequently discriminated against Catholics and whose theological tenets (regarding marriage and divorce) were increasingly both divergent from those of the Catholic Church, and steadily being enacted into the laws of the states. Furthermore, civil matrimonial causes were formed according to the beliefs and customs of the Protestant majority, and were not recognized as a matter of law by the Catholic Church (at least regarding the marriages of Catholics). In this situation the aim of Catholic clergy and canonists in the United States was often to discourage or prevent Catholics from being influenced by, or utilizing, civil divorce laws which were enacted by the Protestant ruling class; and toward this end, they vigorously opposed anything which could suggest laxity regarding marriage. And therefore, anything which suggested that the Catholic Church might allow divorce (even "partial divorce") in wider circumstances than permitted by (some) Protestants was better left unsaid.

1.1.2. Separation, Civil and Ecclesiastical

Wernz gives the clearest explanation of the effects of ecclesiastical separation, first distinguishing separation of bed and cohabitation[10] as a public matter, from separation of

[10] "[…] separatio[ne] […] a thoro et cohabitatione" (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 656, no. 707).

bed alone[11] as a private matter, in the circumstance of mutual consent or if there is a just cause such as the morally certain but hidden adultery of the spouse.

Unlike Gasparri and Lega, Wernz also addresses the issue of approaching the civil forum for separation, disapproving of the faithful who, contemptuous of ecclesiastical authority, are content with separation from bed and cohabitation obtained in the civil forum.[12] Indeed Wernz cites canon 126 of the Third Plenary Council of Baltimore as a supporting source, though Wernz's audience is not only in the United States. While Wernz is neither providing nor claiming to provide a precise legislative text, nevertheless it is important to parse his words closely. The denounced abuse is not, precisely, the obtaining of a merely civil separation; it is *contentment with the merely civil separation while being contemptuous of ecclesiastical authority*. The key to understanding Wernz here is the sentence in the paragraph immediately following: "After the ecclesiastical judge has duly pronounced the sentence of perpetual or temporary separation, it produces its canonical effects in the ecclesiastical forum as to the rights and duties of the spouses."[13] Spouses have responsibilities toward each other which they cannot modify unilaterally, or often even bilaterally. Notwithstanding many situations in which the spouses may, by way of exception, modify the fulfillment of the marital obligations of their own initiative, marriage is a public matter governed by public authority; specifically (for Catholics), by the Church.

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[11] "Separatio a solo thoro" (ibid., 663, no. 714). Although it is not explained as such, we may deduce that this amounts to the suspension of the obligation to render the marital debt (in "bed"), without suspension of the rights and obligations to cohabit which Wernz otherwise mentions, and to render mutual assistance.

[12] "Quare abusibus est adnumerandum, si fideles contempta auctoritate ecclesiastica contenti sunt separatione a thoro et cohabitatione in foro civili obtenta. Qui contemptus eo magis castigatione dignus est, cum ex disciplina vigente in hisce causis nequaquam solemnis vel ordinarius processus canonicus adhiberi debeat, sed summarius usui esse possit, imo quandoque extraiudicialis procedendi modus toleretur." (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 663, no. 714).

[13] "Postquam a iudice ecclesiastico sententia separationis perpetuae vel temporaneae rite lata est, suos producit canonicos effectus in foro ecclesiastico quoad coniugum iura et officia" (ibid., 663-664).

A spouse, or even both spouses together, cannot abandon their obligation of mutual support and other rights and obligations; this modification (again, with some exceptions which are provided for in law) must come from the competent public authority. While matters such as "the return of dowry after divorce and expenses to be paid for the education of offspring and other purely temporary and civil effects, […] civil tribunals decide according to their legitimate competence"[14] even among the baptized, fulfillment of the obligations of marriage pertaining to the bond itself is decided for Catholics by the Church (at least insofar as the law provides). A civil decision does not "produce […] its […] effects in the ecclesiastical forum as to the rights and duties of the spouses," and therefore a spouse who acts as though it does, usurps the authority of the Church and betrays his own marital obligations. On the other hand, a spouse who makes recourse to the civil authority regarding his marriage (even when that same civil authority overreaches in its claims about its authority) but observes the canonical expectations regarding his fulfillment of the marital obligations, does not violate a fundamental ecclesiastical norm; and this remains true whether he makes explicit recourse to ecclesiastical authority for separation, or operates within one of the concessions of law from the general obligation to approach ecclesiastical authority regarding a separation.

As Wernz explains it, recourse to the civil authority *per se* is not a delict, sin, or disciplinary infraction; the misconduct is in attributing to the civil power an ability which belongs properly only to ecclesiastical authority. This hermeneutical key is necessary for

[14] "At de restitutione dotis post divortium et expensis solvendis pro educatione prolis aliisque effectibus mere temporalibus et civilibus, nunc tribunalia civilia pro sua legitima competentia decernunt; in resolvenda vero questione cuinam coniugi proles sit tradenda in ordine ad educationem religiosam, standum est favori fidei atque iuri divino" (ibid.).

an authentic understanding of almost all canonical and moral texts regarding civil separation (and divorce). Much later confusion, both in the literature and ingrained in local ecclesial culture, is rooted in a misunderstanding of this distinction.

1.1.3. Nature, Effects, and Terminology of Separation

The Sacred Congregation of the Council, which held competence over these matters by virtue of the Decree on the Reformation of Marriage from Session 24 of the Council of Trent, heard (or at least published) these matters under the title *Separationis tori et habitationis*,[15] or "separation of bed and dwelling." Gasparri states that by partial divorce (*semiplenum divortium*) the communion of bed, table and dwelling are dissolved,[16] but does not further explain how the marital rights and obligations in respect of each of these is affected.[17]

All commentators distinguish between permanent separation and temporary separation, including circumstances in which a previously-temporary separation could become permanent via the entry into religious life or the clerical state by one of the spouses. In addition to the "private" separation from bed alone mentioned by Wernz, there is also discussion of departure from the home without ecclesiastical intervention as somewhat distinct from the separation more generally discussed.

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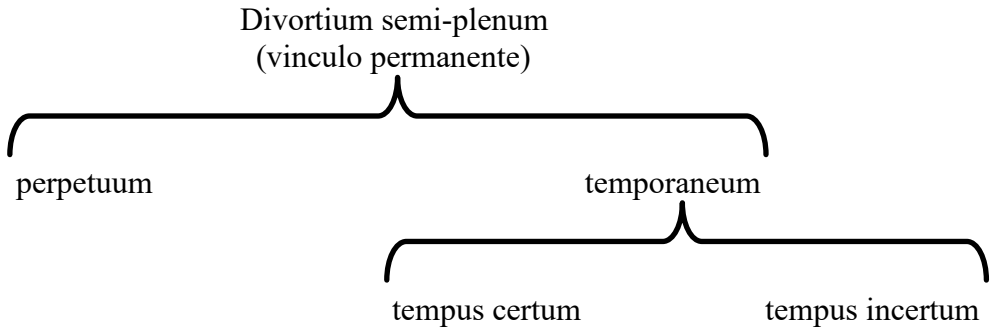
[15] See SACRED CONGREGATION OF THE COUNCIL, Separationis tori et habitationis, in *Acta Sanctae Sedis*, 1 (1865), 213.

[16] "[C]ommunio tori, mensae et habitationis […] solvitur;" GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 324, no. 1363.

[17] Lega refers to separation of table and bed: "[S]eparatio mensae et tori" (M. LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis*, vol. 3, Rome, Typis polyglottis Vaticanis, 1899, 214, fn. 2).

Separation *with the bond remaining* is a species of separation of spouses; and "separation of spouses" most generally can therefore include separations ending the bond, in cases of dissolution of a nonsacramental or unconsummated bond. Or from another perspective, *divortium semiplenum* (partial divorce) is a counterpart to *divortium plenum* (full divorce); but both are equally species of *divortium*, sometimes translated as divorce despite that word's usage today as referring exclusively to *divortium plenum*. "The tribunal [of the Roman Rota] uses the words *divortium semi-plenum vinculo permanente* to describe what is involved, and immediately classifies this divorce as *perpetuum vel temporaneum*,"[18] illustrated in this manner:[19]



Wernz states that divorce is divided into two classes: full divorce or complete divorce (*divortium plenum (perfectum)*), in which the bond of marriage is truly dissolved[20]; and partial divorce or incomplete divorce (*divortium semiplenum (imperfectum)*), in which the bond of marriage remains but there is a separation in the right to the marriage bed or

[18] W.A. GENUARIO, "Rotal Criteria for Granting Separations," in *The Jurist*, 22 (1962), 334.

[19] See ibid.

[20] Undoubtedly in context, this refers to true ecclesiastical dissolution of the marriage bond, and not civil divorce which claims to break the bond of marriage but which does not do so, at least regarding anything more than the merely civil effects.

dwelling which previously existed.[21] Yet when the kinds of divorce with the bond remaining are further distinguished, Wernz changes the name to less-than-full divorce (*divortium minus plenum*), which is divided into perpetual and temporary; while also making a distinction of degree: partial, which is a separation only of the bed (by implication, of the *ius in corpus*) and total, which is a separation of bed and dwelling at the same time.[22]

1.1.4. Heresy, Apostasy and Schism as Reasons for Separation

"It is a commonplace of ecclesiastical writers to compare infidelity, idolatry, heresy to fornication or spiritual adultery and on this ground to admit separation"[23] writes Charles Augustine Bachofen, citing three canons of the *Decretum Gratiani*; and commentators prior to 1917 are especially influenced toward this end by the texts of the *Corpus iuris canonici* which make this association. Therefore where they address separation with the bond remaining, pre-codification canonists immediately follow after adultery—or arguably, include within adultery—the issue of religious defects in a spouse. One of the more comprehensive contemporary works regarding marriage was Pietro Gasparri's *Tractatus canonicus de matrimonio*, first published in 1891[24] and reaching its final pre-

[21] "Divortium dividitur: In divortium plenum (perfectum), quo vinculum matrimonii obiective existens vere dissolvitur; et divortium minus plenum (imperfectum), quo matrimonium manente vinculo coniugali quoad thorum vel cohabitationem de iure antea existentem separatur" (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 604, no. 695).

[22] "Divortium minus plenum subdividitur in separationem perpetuam, si causa est perpetua, et in separationem temporaneam, si causa ad tempus certum vel incertum tantum subsistit. Quae separatio potest esse partialis quoad solum thorum aut totalis quoad thorum et cohabitationem simul" (ibid., 604).

[23] A.C. BACHOFEN, *A Commentary on the New Code of Canon Law*, 3rd rev. ed., vol. 5, Saint Louis, MO, Herder, 1923, 376 and fn. 14. Although his words are a direct commentary on the *CIC/17*, "Augustine, more than any other author in English, attempted to explain the 1917 Code in light of pre-code law" (E. PETERS, "Researching the 1917 Code in English," xxxi-xxxiv, in E. PETERS [ed.], *The 1917 Pio-Benedictine Code of Canon Law: In English Translation with Extensive Scholarly Apparatus*, San Francisco, CA, Ignatius Press, 2001, xxxiii).

[24] See P. GASPARRI, *Tractatus canonicus de matrimonio*, Paris, Institut Catholique, 1891.

codification edition in 1904. Gasparri describes the circumstances in which a spouse who lapses into heresy, apostasy or schism gives the right to legal separation, using the analogy of "spiritual fornication,"[25] and discussing in quite some detail the circumstances in which a spouse separated due to the spiritual fornication of the other, could or could not enter into religious life.[26] Wernz addresses the same question,[27] placing it among adultery and separation by mutual consent to pursue holy orders or religious life, as reasons for perpetual separation, in contrast to the reasons that follow which justify only a temporary separation.

Gasparri notes that where the heretic, apostate or schismatic poses a threat to the faith of the Catholic party, there is not merely a right to depart but an obligation to do so "according to natural law,"[28] and still provided for under heresy or schism as a title of separation, although not in respect of other reasons for separation. Perhaps surprisingly, Gasparri allows departure from an atheist only when the lapsed spouse attempts to draw the other spouse into his or her errors; one cannot depart from an atheist spouse to teach him a salutary lesson as one could with a heretic, apostate or schismatic, the reason for this distinction presumably being that only the latter three are mentioned in the cited chapters

[25] GASPARRI, *Tractatus canonicus de matrimonio (1904),* 320, no. 1369.

[26] See ibid., 321–322, no. 1370.

[27] See WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 658-659, no. 709.

[28] "[…] sed si vitae consuetudo ipsi praebet proximum perversionis in fide periculum, non solum potest, sed ex ipso naturali jure debet divertere." GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 330, no. 1369.

of the *Corpus iuris canonici*.[29] In general we might say that Gasparri most precisely summarizes the *Corpus iuris canonici* and limits himself to its provisions, while Wernz cites more of the intermediate manuals and more often applies the principles he finds in the *Corpus iuris canonici* to situations not directly addressed in the original texts. For example, Wernz mentions an obligation to separate (in certain cases, and judged by character and proximity) under the broader title of danger to the body or soul, and furthermore, organizes under this title heresy, apostasy or schism when the separation is exercised by private authority,[30] in contrast to Gasparri who places these causes primarily among those requiring direct ecclesiastical intervention.

Lega states that conjugal rights, like other legal rights ("'lex' utputa iura coniugalia")[31] are not affected by the obligation to avoid an excommunicate, but notes exceptions to this, as circumstances in which separation would be obligatory of the spouses. First, if legal separation was established prior to the excommunication being inflicted, the

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[29] Though Gasparri softens his conclusion with the admission *ut videtur*, admitting that he draws an inference from a lacuna in the law as provided by the decretal letters.

In a response from the Commission for the Authentic Interpretation of the Code of Canon Law signed by Gasparri, it is declared that joining an atheistic sect is equivalent (in its effects regarding marriage) to adherence to a non-Catholic sect. Although given after codification, this response nevertheless illustrates the fine distinctions drawn by Gasparri regarding separation, and his close reliance on the decretal law. Atheism *per se* does not give rise to a cause for separation, except (as a matter of natural law) if the atheist threatens to draw the other spouse from the Faith. But giving one's name to a non-Catholic sect (not excluding an atheistic sect) is treated as a specific cause of positive ecclesiastical law, for punitive or salutary separation, specifically in the codified law but not inconsistent with the decretal law (COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CANONS OF THE CODE, Response on Joining an Atheistic Sect, in *AAS*, 26 [1934], 494). The question of atheism, whether as a personal ideology or as a characteristic of a sect, is not addressed in the 1932 edition of Gasparri's *Tractatus canonicus de matrimonio*, where paragraph 1176 (vol. 2, 246-247) replaces paragraph 1369 (vol. 2, 329-330) of the prior version.

[30] "Causae separationis temporaneae a thoro et cohabitatione generatim sunt gravia pericula animae vel corporis, quamdiu durant. Quae pericula possunt quandoque esse adeo gravia et proxima, ut non solum separatio temporanea sit permissa, sed etiam praescripta. Sub duplice illo genere causarum multae causae in specie continentur, ut patet ex cit. can. 8. Conc. Trid., quarum taxatio prudenti, non arbitrario iudicio tribunalium ecclesiasticorum est relicta. Huc spectant: I. Compartis apostasia a fide, lapsus in haeresim vel schisma, si separatio ex propria auctoritate coniugis innocentis facta sit" (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 661, no. 713).

[31] See LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis*, vol. 3, 214, no. 142.

spouse who is not excommunicated cannot return to the excommunicate.[32] Second, "if the other spouse is excommunicated for heresy in particular, marital life must be broken off due to the danger of perversion without waiting for a *divortium* verdict to be pronounced by the ecclesiastical judge"[33]; this statement of an *obligation* to separate in the face of threat to the Faith is consistent with the reasoning already mentioned from Wernz and Gasparri. Third, "if excommunication has been incurred on account of an illegitimate marriage, if the spouses were to make use of conjugal rights, they would be taking part in a criminal offense."[34] Perhaps it is the final of these exceptions which conforms to Bachofen's unsourced claim that "the power of the Church extends to the *vinculum perdurans* or marriage as a legal status [including] […] the prohibition of the use of the conjugal act as a punishment for crimes committed."[35] However, Lega's example seems more to be the natural consequence of an illegitimate marriage, rather than Bachofen's unqualified assertion which seems to be an altogether stronger claim of the power of the Church to intervene directly regarding conjugal rights in marriage.

1.1.5. Other Reasons for Separation

In comparison to heresy, apostasy and schism, the attention given to legal separation for other causes is relatively brief. "Serious danger, either to the soul or body,

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[32] "At si concessa iam sit coniugibus separatio mensae et tori, ante inflictam censuram, coniux non censuratus non potest alteri adhaerere dum subiacet censurae et est citandus." (LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis*, vol. 3, 214, fn. 2).

[33] "At si concessa iam sit coniugibus separatio mensae et tori, ante inflictam censuram, coniux non censuratus non potest alteri adhaerere dum subiacet censurae et est citandus. Item si alter sit nominatim excommunicatus propter heresim, abrumpenda est vita coniugalis ob periculum perversionis quin expectetur sententia divortii a iudice ecclesiastico pronuncianda" (ibid.).

[34] "[…] si excommunicatio lata sit ob illegitimas nuptias, si sponsi uterentur juribus coniugalibus, communicarent in crimine criminoso" (ibid.).

[35] BACHOFEN, *A Commentary on the New Code of Canon Law*, 24.

gives the innocent spouse the right to divorce or [*seu*] separation."[36] Serious danger to the soul is exemplified by the husband leading the wife into theft or adultery,[37] and is therefore understood in a moral and even soteriological sense, not as a euphemism for every mental or emotional trouble.

Danger to the body is illustrated in several ways:

> […] if one spouse plots against the life of the other; if the husband pursues his wife with deadly hatred [X 2, 13, 8] or the wife [pursues] the husband; if either spouse suffers from a contagious disease, unless the healthy one knowingly and willingly marries the diseased; if the husband denies his healthy wife food or the sick [wife] medicine; finally, if the husband exerts physical or moral cruelty on the wife [X 2, 13, 13], either because the cruelty once exercised announces others, or in punishment of the injury inflicted on the wife. What kind of cruelty can be a legitimate cause for separation should be judged differently according to individuals: for what is grave in the case of a noble woman is light in the case of a woman of low condition.[38]

"Serious danger to the body," then, is shown by a number of specific examples. According to Gasparri's arrangement, this is not a taxative or exhaustive list; and furthermore the juridical category of "danger to the body" includes cruelty, either physical or moral (*saevitias sive physicas sive morales*), and is therefore not only literally "to the body."

With more detail regarding disease, Schmalzgrüber writes "besides the cause of fornication there are also other reasons for which divorce can occur for a determinate or

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[36] "Praeterea etiam periculum grave seu animae seu corporis praebet conjugi innocenti jus divortii, seu separationis" (GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 331, no. 1371).

[37] "*Animae*, e.g., si vir pertrahit uxorem ad furta, adulteria, ex *can*. 5, c. 28, q. 1, in *Decreto* […]" (ibid).

[38] "[…] *corporis*, e.g., si alter alterius vitae struxerit insidias, ex *cap*. 1 *cit. tit*.; si capitali odio vir uxorem prosequatur, ex *cap*. 8, *De restit. spoliat*. [in X], aut uxor virum; si morbo contagioso alteruter laboret, nisi sanus talem duxerit sciens volens; si vir sanae uxori alimenta negaverit aut aegrotae medicamina; tandem si vir saevitias sive physicas sive morales in uxorem exerceat, ex *cap*. 13, *De restit. spoliat*., sive quia saevitiae semel exercitae alias annuntiant, sive in poenam injuriae uxori illatae. Quaenam saevitiae legitima divertendi causa sint, varie ex personis existimari debet: nam quae graves sunt respectu foeminae nobilis, leves sunt respectu foeminae humilis conditionis" (GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 331, no. 1371). Gasparri's inline citations are replaced with modern citations conforming to the approved format.

indeterminate time, and among these is leprosy, and any other contagious disease, on account of which divorce can be made, as long as that disease lasts."[39]

The issue of contagious disease as a reason for legal separation (rather than mere departure) illustrates that it was not necessary to identify *moral* fault against a party when giving the reason for legal separation. Yet even in the case of disease, one party must be identifiable as the one posing a threat, however blamelessly, to the health of the other spouse; and even in the hypothetical scenario where both parties would simultaneously have different communicable diseases with which each could infect the other, there would still be an identified host and a potential victim for each disease. The question of disease as a cause for separation does not seem to have received much attention, and does not seem to impinge on the evaluation of separation due to danger stemming from other causes.

The description of "physical or moral cruelty" allows separation not merely to protect the innocent spouse from further cruelty, but as a punishment for the cruelty already inflicted. The concept of "cruelty" [*saevitia*] is an important one, around which much of the commentary and jurisprudence of the era revolves,[40] and remains important under the era of the 1917 *Code* also. However, Gasparri does not further define cruelty, except to say that "what kind of cruelty can be a legitimate cause for separation should be judged differently according to individuals: for what is grave in the case of a noblewoman is light

[39] "[…] praeter causam fornicationis etiam sunt aliae, ex quibus divortium fieri potest ad tempus certum vel incertum, et inter istas etiam est lepra, ac quivis alius morbus contagiosus, ob quem divortium fieri potest, quamdiu is morbus durat" (F. SCHMALZGRÜBER, *Jus ecclesiasticum universum*, Rome, Tipographia Rev. Cam. Apostolicæ, 1845, book 4, part 2, 6 [pars 3, tit. 8, no. 15]).

[40] "What makes [the emergence of cruelty (*saevitia*) as a ground for marital separation] so unusual is that it first appeared in the writing of Bulgarus, a teacher of civil law, was then adopted and developed by later twelfth and thirteenth-century canonists and theologians, and was widely accepted by church courts as a legitimate basis for granting separations long before it was formally approved and incorporated into the official texts of canon law" (J.A. BRUNDAGE, "Review: Il divorzio imperfetto: i giuristi medievali e la separazione dei coniugi," in *The Catholic Historical Review*, 95 [2009], 600).

in the case of a woman of low social status"[41]; a rather striking turn of phrase to the modern reader, but which indicates essentially that the kind of cruelty sufficient to give rise to legal separation is relative to the one suffering it. It is not possible to define the cruelty by listing exhaustively the words or actions which are or are not grave enough to give cause for legal separation. Perhaps one can imagine that a certain manner of acting is commonplace and considered a remediable issue between some parties, but a gravely offensive breach of propriety among others.

Cruelty as described above gives reason for legal separation in two ways: "either because the cruelty once exercised announces others, or in punishment of the injustice inflicted on the wife."[42] This is an important distinction, since according to the first reason, past cruelty is not merely a past event with no future relevance, but carries with it a presumption that it can be repeated and therefore continues to pose the "serious danger to the body" which is the root of this title of legal separation. Alternatively and distinctly, however, "physical or moral cruelty" may be a reason for legal separation "in punishment of the injustice inflicted on the wife"; legal separation may be imposed as a punitive or

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[41] "[…] nam quae graves sunt respectu foeminae nobilis, leves sunt respectu foeminae humilis conditionis" (GASPARRI, *Tractatus canonicus de matrimonio [1904]*, 331, no. 1371).

[42] Ibid. In the context of reasons for separation, *injuriae* as it appears here and in other literature is often translated as "injury." While not incorrect, this translation can be misleading since it may suggest especially a physical injury, when this is not the sole or even principal meaning of the original. According to Lewis and Short, *iniuria* means "any thing that is done contrary to justice and equity, injury, wrong, violence" or "injurious, unlawful, or unjust conduct," in addition to its solely physical meanings (C.T. LEWIS and C. SHORT, *A Latin Dictionary*, Oxford, Clarendon Press, 1879, s.v. *injuria*). In a specifically legal context, Lewis and Short cite the Digest of Justinian, 47, 10, 1: "injuria ex eo dicta est, quod non jure fiat! omne enim, quod non jure fit, injuria fieri dicitur: hoc generaliter. Specialiter autem injuria dicitur contumelia. Interdum injuriae appellatione damnum culpa datum significatur: interdum iniquitatem injuriam dicimus, etc. [wrong is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This in general. But, specifically, 'wrong' is the designation for contumely. Sometimes again, by the term 'wrong' there is indicated damage occasioned by fault […] then, too, we sometimes call unfairness wrong; for when someone delivers judgment unfairly or unjustly]" (translation taken from *The Digest of Justinian*, A. WATSON [trans.], rev. English-language ed., Philadelphia, PA, University of Pennsylvania Press, 1998, vol. 4, 285).

salutary measure in response to the husband's fault, even without specific consideration of the role of separation in protecting the wronged spouse into the future.

This echoes and illustrates a distinction between two reasons for legal separation already mentioned: a spouse falling into heresy, apostasy or schism; and grave danger to the soul. If heresy, apostasy or schism gave reason for legal separation solely in virtue of the danger they would pose to the soul of the Catholic party, it would have been superfluous to enumerate them as distinct causes for legal separation. Prior to 1917, then, the law provided for the use of marital separation as a punishment to correct an error extrinsic to marriage, and distinct from the question of any danger—of whatever kind—the reproved behavior may or may not pose to the other spouse.

1.1.6. Departure as Distinct from Legal Separation

What has been discussed so far pertains almost entirely to legal separation; that is, the formal establishment of the status in canon law of spouses separated with the bond remaining, and the apportionment of rights and obligations especially financial, together with the establishment of a duration for the separation, whether for a determined period of time or permanently. Commentators also address, however, the situation of separation (for reasons other than adultery) not established by any formal procedure or ecclesiastical involvement.

Not meriting a separately numbered entry, but nevertheless distinct within his discussion of reasons for formal separation due to danger (which includes cruelty), Gasparri, citing the *Theologia moralis* of Saint Alphonsus Liguori, notes that

> […] if the danger is such that it cannot wait, the spouse can leave of their own authority: but, when the danger is removed, they should return, and they can be forced by the ministry of the judge. In practice, it can hardly be believed that "the danger ever ceases, if the spouse

> is insane and furious, or so prone to anger that there is often a risk of harm, and sometimes the wife has been wounded, or if he has given poison even once."[43]

It is envisioned, then, that a spouse may depart from the common life even for reasons other than adultery and without the active intervention of ecclesiastical authority.

Legal separation (*seu* divorce) due to adultery is prescribed by divine positive law, "as Christ the Lord Himself teaches," Gasparri maintains, citing the Gospel according to Matthew;[44] Wernz going further and adding the nature of the matrimonial contract to the divine positive law given in the Gospel.[45]

In contrast, the nature and derivation of the right to depart the home or for legal separation for other reasons, such as bodily danger or cruelty, does not appear to have been a point of discussion in this era. Even if it could be argued that the right *to depart the home* in certain circumstances is based on the natural law, this does not change the fact that *legal separation* for such reasons is fundamentally of ecclesiastical law since legal separation (except for adultery) is itself an institute maintained by positive ecclesiastical law. Positive ecclesiastical law is enacted and then enforced not only for the benefit of each married couple (and their offspring) whose particular situation may come for judgment, but also as a matter of public order for society as a whole. Perhaps not infrequently, these motivations are in tension; what may be beneficial, or even just, for the spouses themselves may

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[43] "Si periculum tale est ut moram non patiatur, conjux potest propria auctoritate discedere: sed, remoto periculo, redire debet, et ministerio judicis cogi potest. In praxi vix credi potest «quod cesset unquam periculum, si conjux fuerit amens et furiosus, vel ita pronus ad iram ut saepe intervenerit periculum damni, et aliquando uxorem vulneraverit, vel si dederit venenum etiam semel»; S. Alphonsus. l.c. [vol. 6, no. 971]" (GASPARRI, *Tractatus canonicus de matrimonio [1904]*, no. 1371).

[44] "Adulterium unius partis esse legitimam hujus divortii causam pro altera parte, patet […] ipse Christus D., *l.c.* [Matt. 5:19], tradit" (ibid., 325, no. 1364). N.B. Again Gasparri's reference to Matt. 5:19 is an error, and most likely rightly refers to Matt. 5:31–32.

[45] "Etenim ius ad separationem oritur ex *natura* contractus matrimonialis et lege evangelica" [emphasis in original] (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 660, no. 711).

redound to the detriment of society, and vice versa. We see this implicit in a judgment of the Roman Rota prior to codification:

> [11.] […] It has been the constant jurisprudence of this Sacred Tribunal and of the Sacred Congregation of the Council that great caution should be used in granting separations from bed and board, because separation is directly opposed to the very purpose and ends of marriage; it gives rise to scandal; it destroys the family; it exposes the consorts to the danger of incontinence; and it inflicts a severe loss on offspring, if there are any. […]
>
> [12.] The Most Reverend Auditors of this Tribunal are convinced therefore that they must adhere even more rigidly to this very wise jurisprudence of the Holy See, now when modern customs are tending to scuttle with facility all conjugal rights, either *per divortium plenum sive per divortium semiplenum.* There is no one who does not know that if *divortium semiplenum* is easily granted, the way is made easy for *divortium plenum*.[46]

Certainly among the given reasons for caution are those directly related to the spouses themselves and to their offspring. But also there are others which are clearly not, that is, scandal[47] and in particular, the danger that readily granted legal separations [*divortium semiplenum*] may lead to a more widespread practice of the complete divorce [*divortium plenum*] then becoming more popular according to "modern customs." There is a reluctance to grant legal separation in individual cases due to the social effects outside of the spouses and their offspring. From this we might conclude (again, setting aside the issue of adultery) that there is not a right of natural law or of divine positive law to a legal

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[46] TRIBUNAL OF THE ROMAN ROTA, *coram* LEGA, 5 July 1910, 244, nos. 11–12, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 2 (1910), English translation from GENUARIO, "Rotal Criteria for Granting Separations," [ellipses added to translation accurately to reflect the original text]: "Quare constans iurisprudentia fuit et huius S. O. et S. C. Concilii caute admodum procedendum esse ad indulgendam thori separationem, quippe quod separatio opponatur directe fini ipsius matrimonii […] scandalum gignit, familiam pessumdat, periculo incontinentiae coniuges exponit, prolemque—si quae sit—damnis afficit […] [12.] Cui sapientissimae iurisprudentiae tum H.S.O., tum S.C. Concilii, fortius adhaerendum esse considerarunt RR. PP. AA. quo hodierni mores ad facile pessumdanda coniugalia iura sive per divortium plenum, sive per divortium semiplenum, inclinant. Et nemo non scit quomodo per divortii semipleni facilem concessionem, via sternatur facilis et veluti necessaria ad divortium plenum."

[47] We should presume that *scandalum* here is not mere wonderment, but the scandal in the narrow sense which leads another into sin: "According to St. Thomas (II-II:43:1) scandal is a word or action evil in itself, which occasions another's spiritual ruin. […] Still less can that be considered scandal, which only arouses comment, indignation, horror etc." (A. VANDER HEEREN, art. "Scandal," in C.G. HERBERMANN [ed.], *The Catholic Encyclopedia*, vol. 13, New York, Robert Appleton, 1912).

separation; not least because the very nature and consequences of legal separation cannot but be a matter of merely ecclesiastical law. Legal separation is first of all a matter of public policy; and the judgment in individual cases will be based on the laws and customs which reflect this public policy, not primarily on a consequentialist estimation of the *salus animarum* of the spouses *in casu*.

Apart from the absence of temporal provisions, the principal distinction between departure on one's own authority and legal separation established by ecclesiastical authority is the duration of the separation. A legal separation lasts as long as is specifically provided for; either indefinitely, or for a determined time. With separation as departure on one's own authority, on the other hand, in principle the obligation to return arises immediately the reason for it ceases. "In practice," however, Gasparri approvingly quotes Saint Alphonsus to the effect that in many of the circumstances which would have originally given reason for immediate separation the danger posed will likely continue indefinitely,[48] and therefore so may the separation even without the intervention of ecclesiastical authority. This should not be mistaken for complete legal separation with all its effects in law; it is merely the suspension of the obligation to maintain a common life. In contrast, Gasparri continues, a separation established permanently by ecclesiastical authority remains in place even when the offending spouse "returns to worthiness" (*ad*

[48] "[…] in praxi vix credi posse, quod cesset unquam periculum, si coniux fuerit amens et furiosus, vel ita pronus ad iram, ut saepe intervenerit periculum damni, et aliquando uxorem vulneraverit, vel si dederit venenum, etiam semel" (A. DE LIGUORI, *Theologia moralis S. Alphonsi M. de Ligorio universalis Ecclesiae doctoris episcopi S. Agathae Gothorum et fundatoris Congregationis Ss. Redemptoris*, F. ZACHARIAE (ed.), vol. 2, Augustae Taurinorum, 1891, 706–707, no. 971 q. 2).

meliorem frugem redeunte), without prejudice to the right of the "innocent" spouse to choose to restore the common life.[49]

Wernz states as a general principle that separation from bed and cohabitation is a public matter and therefore cannot be effected by one's own authority, unless the case is specifically excepted or there is danger in delay.[50] He does not echo Gasparri's commentary on what may constitute danger in delay, and nor does he distinguish this kind of separation as mere departure from the home, instead using exactly the same language as he does to describe any other separation with the bond remaining. He therefore leaves unaddressed the possibility that this kind of separation is not entirely distinct from other separations. However, he does state that the separation produces its effects in the canonical forum as to the rights and duties of the spouses after the ecclesiastical judge has given judgment, perhaps implying that not all of these—though again, without stating which—take hold after the licit but merely private separation of bed and cohabitation.[51]

Gasparri also addresses the issue of separation by mutual consent, without any question of danger posed by either spouse.[52] He discourages this for two principal reasons. First, he notes the danger of scandal, which prevents the spouses from deciding privately to separate. Second, he notes the dangers of incontinence, and therefore advises mature

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[49] See GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 331, no. 1371.

[50] "At separatio a thoro et cohabitatione etiam mere temporanea, sed diuturna, cum sit res publica et naturae matrimonii contraria, non obstante iusta et proportionata causa sine interventione iudicis ecclesiastici propria auctoritate fieri nequit, nisi constet de casu specialiter excepto, vel periculum sit in mora" (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 663, no. 714).

[51] "Postquam a iudice ecclesiastico sententia separationis perpetuae vel temporaneae rite lata est, suos producit canonicos effectus in foro ecclesiastico quoad coniugum iura et officia" (ibid., 663-664, no. 714).

[52] See GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 332, no. 1372.

deliberation and long experience before the spouses would make a mutual vow of chastity.[53]

Finally, Gasparri explains the principles for education and maintenance of the offspring.[54] The innocent spouse is to educate the offspring (which amounts to what may be called "residential custody" in modern parlance), at the financial expense of the guilty party, though the judge may decide otherwise in individual circumstances. However, if one of the spouses is not Catholic, the Catholic party is to educate the offspring, even if guilty; and Gasparri does not mention the possibility of the judge deciding otherwise in individual cases. Wernz similarly, if less explicitly, simply states that "the favor of faith and divine law should be adhered to."[55]

The process (or processes) for establishing separation of the spouses with the bond remaining is described in some detail by Wernz, as one among the various matrimonial causes also including the dissolution of a betrothal, and the accusation of nullity against the bond of the marriage itself.[56] A judicial process is prescribed.[57] Other commentators devote little attention to the process for separation with the bond remaining.

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[53] Chastity (*castitatis*) presumably meaning "continence" in the modern usages of those words, since chastity, properly speaking, is always an obligation of married persons.

[54] See GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 332, no. 1373.

[55] "[I]n resolvenda vero quaestione cuinam coniugi proles sit tradenda in ordine ad educationem religiosam, standum est favori fidei atque iuri divino" (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 664, no. 714).

[56] See ibid., 689-691, no. 743.

[57] See ibid., 688-696, nos. 742–749.

1.1.7. Origins in Property Law of Rights and Obligations regarding Separation

The law regarding the ending of a separation, broadly defined, was found mostly in the Decretals of Gregory IX, or the *Liber extra*. Although, as discussed above, mistreatment between the spouses (under the title of cruelty) could provide a reason for separation, the texts of the *Corpus iuris canonici* which address the termination of a state of separation refer to only separations due to heresy or similar.

The most-cited decretal source regarding separation is X 4, 19, 6 *De illa vero*, attributed to a letter of Urban III to the Bishop of Florence.[58] The chapter addresses the question of whether a woman whose husband fell into heresy and therefore she rejected his company herself without the judgment of the Church, should be forced to reunite the marriage upon his return to Catholic unity. He responds that in such a circumstance she should be compelled to restore the marital relationship, especially if her intention in departure was that fatigue and discomfort would convert him from his error;[59] and when he returns to the Faith she is to be compelled to give him his due, even if she does not want

[58] See E. FRIEDBERG (ed.), *Corpus iuris canonici*, 2nd ed., vol. 2, Leipzig, B. Tauchnitz, 1879, reprint, Graz, Akademische Druck – u. Verlagsanstalt, 1959 (=*FRIEDBERG2*), col. 722. The same chapter begins *De illa quae* in the *Editio Romana* (*Corpus iuris canonici emendatum et notis illustratum. Gregorii XIII. pont. max. iussu editum*, Rome, In aedibus Populi Romani, 1582, col. 1556).

[59] "[…] si ea intentione decessit, ut lapsus in haeresim taedio pariter et confusione affectus se ab errore suo converteret" (*FRIEDBERG2*, col. 722).

to return to the conjugal life. But if she withdrew by the judgment of the Church, without hope of restoring the marriage, she should not be compelled to receive him.[60]

The *glossa ordinaria* to *De illa vero* has a number of *allegationes* to texts other than regarding marriage. From *confusione affectus*, in explanation of the principle that the disobedient are to be deprived of their possessions in order that they may respond due to the discomfort they feel,[61] X 2, 6, 5, 6 *In aliis* is cited, which states that the plaintiff may be sent to obtain possession of the claimed property, so that the defendant might come to answer the complaint through a sense of discomfort at its absence[62]—originally applied to physical property, but here applied to the rights of marriage.

Similarly, the ordinary gloss to X 4, 19, 6 *De illa vero* cites C.7.39.8.3 *Sed et si quis non per vim*[63] in the Codex of Justinian. This title of the *Codex Justinianum* on prescription (*De praescriptione triginta vel quadraginta annorum*) provides here that "if a person detains [the property] not by violence but pursuant to a judicial verdict rendered when the prior possessor was absent,"[64] then his liability for possession is significantly reduced in

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[60] Noonan and Thompson translate this canon incorrectly. They have it, "[w]e direct that she should be compelled to receive him, even if she withdrew at the judgment of the Church […]." This error perhaps has its origin in a misunderstanding of the rubric to the same canon, translating *propria auctoritate divertit* as "separated from her husband by proper authority," which could be technically correct if *propria* were used in its meaning of "of one's own" rather than "rightful"; but it seems that Noonan and Thompson have taken the latter interpretation of the rubric and then applied this to the canon itself, assuming that the only rightful authority is the public ecclesiastical authority (J.T. NOONAN and A. THOMPSON, *Selected Canons from the Decretum of Gratian and the Decretals, Sext, Clementines and Extravagantes*, Oakland, CA, Dominican Liturgy Publications, 2016, 188).

[61] "[…] ad similitudinem contumacis, qui possessione privatur, ut taedio affectus veniat responsurus" (*Corpus iuris canonici emendatum et notis illustratum,* col. 1556).

[62] "Si reali, mittendus est utique actor in rei petitae possessionem, ut taedio affectus reus veniat responsurus" (*FRIEDBERG2*, col. 264).

[63] See P. KRUEGER et al. (eds.), *Corpus iuris civilis*, vol. 2, Berlin, Weidmannsche, 1892, 312.

[64] F.H. BLUME et al. (eds.), *The Codex of Justinian: A New Annotated Translation, with Parallel Latin and Greek Text Based on a Translation by Justice Fred H. Blume*, Cambridge, Cambridge University Press, 2016, 1905.

comparison to one who took possession of a disputed property without a judicial decision. These *allegationes* from *De illa vero* support the principle that one who takes possession of a disputed property (in this case, by analogy, the marital obligations) on her own initiative is obliged to return them more readily than if she had previously obtained a decision authorizing her to do so.

From *reddenda*, the glossator references X 3, 32, 1 *Praeterea utrum laicus* as an example of a case where a spouse can be compelled to return to his wife, emphasizing especially the role of ecclesiastical authority over that of the spouses themselves. The husband entered into religious life "with the bishop being ignorant but with the authorisation and permission of his wife"; to which the response was that the bishop could order the husband to return to the wife, if the wife would not accept the exhortation to enter religious life herself.[65] The glossator contrasts this with the case from the same title X 3, 32, 21 *Mulier quae in*[66] where the wife wishes to enter into religious life with the judgment of the Church after her husband's adultery and is therefore free to enter religious life even if her husband does not.

1.2. Ecclesiastical Separation with the Bond Remaining in the United States Prior to 1917

Especially prior to codification in 1917, the observance of the law in the United States—and in particular cases, arguably the law in force—was at variance with the norms of the universal Church. This fact was not lost on the US ecclesiastical hierarchy, who struggled at times to implement the universal law of the Church in the United States, or to

[65] See *FRIEDBERG2*, col. 579.

[66] See ibid., col. 587.

obtain new legislation more appropriate, as they saw it, for the particular situation in their country. This tension, between a Roman expectation that the Church in the United States would conform to the norms and practices of the rest of the Latin Church—in fact, to the norms and practice of the Latin Church in Europe—and, on the other hand, a tendency on the part of many in the US church to argue that their situation was unique and that the laws of the Church universal could not be applied there, at least in the immediate future, [67] is especially evident regarding situations of troubled marriages.

1.2.1. U.S. Commentators on Conjugal Cohabitation and Separation

One of the first significant attempts to interpret the norms of the universal Church for the United States was that of Francis Patrick Kenrick, Archbishop of Baltimore, 1851–1863, and president and Apostolic Delegate at the First Plenary Council of Baltimore.[68] He was described as "the leading American moral theologian of his generation"[69] or even "[t]he first moral theologian in the United States."[70] He published *Theologiae*

[67] For example, continued resistance to promulgation of *Tametsi*, and the refusal to establish canonical parishes. On the latter issue the Fathers of the Third Plenary Council of Baltimore claimed that "it is obvious that in countries like our own […] the full application of these laws [of the Church on clerical tenure of office] is impracticable," nevertheless pleading that "it is our desire, not less than that of the Holy See, that they should go into effect" (Pastoral Letter of the Archbishops and Bishops of the United States Assembled in the Third Plenary Council of Baltimore to the Clergy and Laity of Their Charge, in *Acta et decreta Concilii Plenarii Baltimorensis Tertii, A.D. 1884*, Baltimore, MD, Typis Joannis Murphy et sociorum, 1886, lxxx). Of course, both of these issues were resolved not at the initiative of the U.S. hierarchy but by the Apostolic See, with the promulgation of *Ne temere* in 1907 and the 1917 Code, respectively.

[68] See H.J. NOLAN, art. "Kenrick, Francis Patrick," in *New Catholic Encyclopedia*, 2nd ed., vol. 8, Detroit, MI, Washington, DC, Thomson/Gale, Catholic University of America, 2003, 145.

[69] Ibid., 144.

[70] J.T. NOONAN, *Power to Dissolve*, 365. Noonan characterizes Kenrick's endorsement of the possibility of the dissolution of the marriage of a Catholic to an unbeliever, contracted with the required dispensation, as "unique" and contrary to the practice of the Roman Curia at that time. "Kenrick, writing in Philadelphia, had only Saint Paul at his fingertips, not the Roman documents. His teaching may have reflected what he had learned as a pupil at the College of the Propaganda [Fide] in the 1820s; perhaps missionaries in the field acted on this teaching without asking Rome again" (ibid.).

dogmaticae[71] and *Theologiae moralis*[72] circa 1840 while Bishop of Philadelphia, and these were republished—mostly identically, but with some revealing changes—as *Theologia dogmatica*[73] and *Theologia moralis*[74] circa 1860 when he was Archbishop of Baltimore. They were, as the titles suggest, primarily guides to theology rather than law *per se*, but are nevertheless indispensable to our study since the works of Kenrick seem to have held, collectively, a unique position in both reflecting and shaping understanding and interpretation of the law of the Church in the United States in the mid-nineteenth century. Kenrick cites as his sources the same chapters of the *Corpus iuris canonici* as the purely canonical commentators, and Kenrick's works are in turn cited by canonical commentators (one of whom described him as "our American theologian"[75]); theology and canon law are clearly seen to be at least overlapping disciplines.

In his *Theologiae moralis* of 1841, Kenrick states that the marital debt may be denied when adultery is known with certainty; "but where the authority of the Church is exercised in matrimonial cases, following the form of judicial procedures, the judge must usually be approached, and the sentence awaited"[76] for a complete legal separation. Kenrick states, then, that the obligation to approach the ecclesiastical judge exists only "where the authority of the Church is exercised in matrimonial cases" (*ubi Ecclesiae*

[71] See F.P. KENRICK, *Theologiae dogmaticae*, Philadelphia, PA, L. Johnson, 1839.

[72] See F.P. KENRICK, *Theologiae moralis*, Philadelphia, PA, Eugenium Cummiskey, 1841–1843, 3 vols.

[73] See F.P. KENRICK, *Theologia dogmatica*, Mechlin, H. Dessain, 1858.

[74] See F.P. KENRICK, *Theologia moralis*, Mechlin, H. Dessain, 1860-1861, 2 vols.

[75] S.B. SMITH, *Notes on the Second Plenary Council of Baltimore*, New York, P. O'Shea, 1874, 253.

[76] "[Licet innocenti conjugi debitum denegare adultero, habita criminis notitia: imo juxta plerosque, potest divortium facere, quando certum omnino est delictum:] sed ubi Ecclesiae auctoritate in causis matrimonialibus exercetur, servata judiciorum forma, debet plerumque judicem adire, et sententiam expectare" (KENRICK, *Theologiae moralis*, vol. 3 [1843], 324).

auctoritate in causis matrimonialibus exercetur).[77] At the risk of reading too much into a single word (*exercetur*)—and indeed in a very narrow context—it is notable that the applicability of the obligation depends not only on divine law or the Tridentine legislation,[78] but also on the practical fact of whether or not this authority of the Church does not merely exist nominally, but is in fact exercised in a given time and place. Similarly, *Theologiae dogmaticae*[79] and *Theologia dogmatica*[80] state that it is permitted to separate due to adultery "especially [*praesertim*] with the intervention of a sentence from an ecclesiastical judge," without making this intervention an obligation. Kenrick's 1861 edition, under the title *Theologia moralis*, is the same in respect of this paragraph.[81]

Kenrick writes about *divortium* as a legal separation, without addressing whether or when a spouse may licitly depart from the conjugal life for reasons other than adultery without the intervention of civil or ecclesiastical authority. The authority of the Church regarding matrimonial causes never received civil enforcement in the United States, as it did in many other countries at various times, and therefore any exercise of the authority of the Church in the United States was, at most, subject to the voluntary cooperation of her members. The question of whether without real enforcement, the authority of the Church is truly exercised in a legal sense seems to be at the heart of the recurring conversation

[77] Kenrick states this in regard to adultery, and does not make a similar statement regarding separation for other reasons. Nevertheless, the same principle would seem to apply.

[78] See COUNCIL OF TRENT, Session 24, Canons on the Sacrament of Marriage, e.g. cc. 8, 12, in N.P. TANNER (ed.), *Decrees of the Ecumenical Councils*, vol. 2, Washington, DC, Georgetown University Press, 1990, 755.

[79] "Et quidem imprimis ob adulterium, licet enim innocenti sese a consortio adulteri separare, praesertim interveniente judicis ecclesiastici sententia" (F.P. KENRICK, *Theologiae dogmaticae*, vol. 4, Philadelphia, PA, L. Johnson, 1840, 128).

[80] See F.P. KENRICK, *Theologia dogmatica*, vol. 3, Mechlin, H. Dessain, 1858, 390.

[81] See F.P. KENRICK, *Theologia moralis*, vol. 2 [1861], 308.

between law and morality regarding the role of ecclesiastical intervention in marriage. But as of the early-mid nineteenth century in the United States, a leading opinion appears to have been that an ecclesiastical decision regarding the separation was not a universal obligation, and which furthermore would not seem to apply in the United States.

In his *Theologiae dogmaticae* of 1841 Kenrick discusses reasons for separation, going into some detail regarding adultery and briefly providing a conventional list of other reasons for separation recognized in canon law. He also notes that these reasons are "established by civil laws in some provinces."[82] By 1858 he had modified this paragraph slightly, making it more specific to the United States, without otherwise changing the substance.[83] What is more notable is that in none of the four works mentioned, all of which discuss separation of spouses, does he attach any significance to the distinction between civil and canonical separation, nor does he address the issue of the faithful approaching the civil authorities for separation without first seeking the approval of the Church (either for the separation, or to approach the civil authorities). These simply do not seem to have been issues for Kenrick as they were for authors after the Third Plenary Council of Baltimore.[84]

After Kenrick, Smith's 1874 *Notes on the Second Plenary Council of Baltimore* is—despite its rather restricted title—a more-or-less complete commentary on canon law

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[82] "Causae praecipuae recensentur immoderata saevitia, morbus contagiosus, amentia et furor conjugis, vis adhibita ut conjux a necessariis religionis muniis absterreatur, vel ad crimina patranda inducatur. Pleraeque hae causae divortii a vinculo legibus civilibus quarundam provinciarum statuuntur: nonnullis divortium a thoro tantum ob alias praeter adulterium causas concedentibus, aliis penes judices arbitrium relinquentibus alterutrum divortium concedendi, pro injuriae ratione, et petitione laesi conjugis" (KENRICK, *Theologiae Dogmaticae*, 129).

[83] "Pleræque hæ causæ divortii a vinculo legibus civilibus *Fœderatarum nonnullarum* provinciarum statuuntur […]" (KENRICK, *Theologia dogmatica*, 390–391). Emphasis added. Translatable as "Most of these reasons for divorce are established by civil laws of some states of the Union."

[84] Though there is an intriguing discrepancy between *Theologiae moralis* and *Theologia moralis* regarding recourse to the civil authorities for divorce of the bond, to be discussed in Chapter Three.

as to be applied in the United States. Smith relies heavily on Kenrick's writings, many of them published before the Second Plenary Council took place in 1866. Smith discusses at some length the possibility of seeking civil divorce or separation, and concludes that "when grave reasons nevertheless demand a separation, a partial divorce may be sought for"[85] from the civil authorities, without mention of any prior ecclesiastical intervention. In another work, Smith observes that

> [I]n the United States the ecclesiastical judge […] is rarely invoked by Catholics for divorces *a thoro*. In most cases they either apply to the civil court or separate of their own accord. They should be instructed at least to take the advice of their rector or confessor. We think that, considering our peculiar circumstances, the permission given by the rector or confessor is usually sufficient, at least *pro foro interno*. Rectors or pastors should carefully weigh cases of this kind brought before them, consult the bishop, and, if possible, keep a record of the testimony collected by them.[86]

This balances a practically-motivated derogation from the norm of having the case heard by the proper ecclesiastical judge, with a certain expectation of formality inasmuch as "testimony" is to be collected—at least by the rector or pastor, since it is not clear how a "confessor" *sensu strictu* could gather testimony. The "advice" of the rector or confessor is to be taken, and any "permission" he gives is effective "at least *pro foro interno*," recognizing perhaps the distinction between departure from the home, and legal separation with public effects in law.

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[85] SMITH, *Notes on the Second Plenary Council of Baltimore*, 254.

[86] S.B. SMITH, *Elements of Ecclesiastical Law*, 5th ed., vol. 2, New York, Cincinnati, OH, and Chicago, IL, Benziger Brothers, 1887, 385, no. 1439.

1.2.2. Separation in Councils in the United States Prior to the Third Plenary Council of Baltimore

The three plenary councils of Baltimore were preceded by six provincial councils of Baltimore, which functioned similarly to national[87] plenary councils for the whole of the United States since they represented the views of the bishops of, and legislated for, more-or-less the whole Catholic Church in the United States.[88] The first such council to address the question of marital difficulties in the broadest sense was the Fifth Provincial Council of Baltimore in 1843, which addressed divorce[89] in both its canon 3[90] and in its pastoral letter.[91] The "enormous scandal" of "new engagements"[92] during the lifetime of a prior legitimate spouse is denounced, as well as the attempt at remarriage after a divorce—but with no specific mention of the obligations such as the maintenance of the conjugal

[87] "National council" is not a canonical category. Nevertheless, the description "national" will be used in this thesis to indicate an institution or particular law applicable specifically to the whole of the United States of America. For example, the three plenary councils of Baltimore and the six provincial councils which preceded them are described as effectively "national councils." The decrees of provincial councils and of plenary councils required *recognitio* or confirmation from the Apostolic See. As particular legislation approved by the Apostolic See, the legislation of the councils was not generally abrogated at codification (see c. 6, *CIC/17*).

[88] Even after the elevation of the Diocese of Saint Louis to metropolitan rank in 1847 and the attendance of its archbishop at the Seventh Provincial Council of Baltimore in 1849, the Archbishop of Baltimore presided and "the Council was not plenary in nature" despite including the metropolitan archbishop of another province. See J. HENNESEY, art. "Baltimore, Councils of," in *New Catholic Encyclopedia*, 2nd ed., vol. 2, 45.

[89] In context, absolute divorce or *divortium plenum*; already "divorce" and *divortium* were beginning to lose the canonical ambiguity of reference inclusive of separation with the bond remaining, and acquiring from the vernacular usage an almost exclusive meaning of dissolution or severance of the bond itself.

[90] See FIFTH PROVINCIAL COUNCIL OF BALTIMORE, Concilium Baltimorense provinciale V, decreta Concilii, in *Concilia provincialia, Baltimori habita ab anno 1829 usque ad annum 1849*, editio altera, Baltimore, MD, Joannis Murphy, 1851, 216–7. See P. GUILDAY, *A History of the Councils of Baltimore (1791–1884)*, New York, Macmillan, 1932, 142.

[91] See FIFTH PROVINCIAL COUNCIL OF BALTIMORE, *Pastoral Letter of the Most Reverend the Archbishop of Baltimore and the Rt. Rev. the Bishops of the Roman Catholic Church in the United States of America Assembled in Provincial Council in the City of Baltimore in the Month of May 1843 to the Clergy and Laity of Their Charge*, Baltimore, MD, John Murphy, 1843, 12.

[92] The reference to "engagements" appears to mean not only the agreement of another imminent marriage, as in that word's modern usage, but any kind of intimate or romantic relationship.

life, nor of separation whether practical, ecclesiastical or civil.[93] Canon 3 of the Fifth Provincial Council of Baltimore exhorted diocesan bishops to legislate in their synods to accomplish the excommunication of those who attempted remarriage after divorce, but did not address separation. The Sixth Provincial Council of Baltimore in 1846 addressed the celebration of marriage,[94] while the Seventh Provincial Council in 1849 and the First Plenary Council of Baltimore in 1852 did not mention marriage at all.[95]

Marriage is next mentioned at the Second Plenary Council of Baltimore of 1866. The Fathers wrote in their pastoral letter,

> No State law can authorize divorce, so as to permit the parties divorced to contract new engagements; and every such new engagement, contracted during the joint lives of the parties so divorced, involves the crime of adultery. We refer with pain to the scandalous multiplication of these unlawful separations, which, more than any other cause, are sapping the foundations of morality and preparing society for an entire dissolution of the basis on which it rests.[96]

"These unlawful separations" are, in context, civil divorces which facilitate the parties to contract new "engagements"; there is no specific reference to "separation" as civil or canonical legal institutes, nor as a *de facto* situation of rupture in conjugal living. The issue is not addressed by legislation, but merely through a pastoral exhortation.

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[93] See FIFTH PROVINCIAL COUNCIL OF BALTIMORE, *Pastoral Letter of the Fifth Provincial Council of Baltimore*, 12.

[94] See GUILDAY, *A History of the Councils of Baltimore (1791–1884)*, 149–150.

[95] Although the decrees of the First Plenary Council were approved by the Apostolic See, "a private letter was sent to Archbishop Kenrick in which he was warned that the asking of exceptions to general Church law should be kept to a minimum, lest the U.S. church take on the appearance of a national church" (HENNESEY, "Baltimore, Councils of," 45). It is possible that this exhortation, or others like it, may have influenced Kenrick's removal of key paragraphs regarding civil divorce present in *Theologiae moralis* (1841) from *Theologia moralis* (1860), to be discussed in Chapter Three.

[96] SECOND PLENARY COUNCIL OF BALTIMORE, Pastoral Letter of the Archbishops and Bishops Assembled, to the Clergy and Laity in Their Charge, in *Acta et decreta Concilii Plenarii Baltimorensis II in Ecclesia Metropolitana Baltimorensi a die VII ad diem XXI Octobris A.D. MDCCCLXVI*, secundis curis editum, Baltimore, MD, Joannis Murphy, 1868, cxiv. "Engagements" here cannot simply mean a new arrangement to marry in the modern use of the word, but any new intimate or romantic relationship.

The specific provisions of these councils regarding civil divorce of the bond will be addressed in Chapter Three. For now, it is sufficient to observe that marriage is a matter of recurrent concern, but that separation does not appear to be of interest. Where marital difficulties are addressed, either in pastoral letters emanating from a council or in particular legislation, it is largely in terms of civil divorce. Separation apart from divorce was not addressed in the councils of Baltimore prior to the Third Plenary Council; nor issues such as the canonical and/or moral problems of marital cohabitation and the other obligations of marriage; nor ecclesiastical separation when cohabitation breaks down; nor civil separation (despite the fact that civil separation was a much more relevant issue in the nineteenth century than it is today, since civil divorce did not exist or was very difficult to obtain in many states, making civil separation comparatively more attractive to spouses with marital difficulties).

1.2.3. The Third Plenary Council of Baltimore (1884)

The Third Plenary Council of Baltimore was the largest council of the Church in the United States, owing to significant growth in the number of dioceses since the previous plenary council. Unlike the prior provincial and plenary councils of Baltimore, each of which was succeeded by another after a few years or, at most, a couple of decades, the Third Plenary Council's eventual status at the last effectively national council gave its deliberations and decrees a more enduring importance. "The Council had wide influence in the English-speaking world,"[97] and this is certainly true regarding its decrees on

[97] HENNESEY, "Baltimore, Councils of," 46.

marriage, which continued to be cited (and often, misquoted) as normative well into the middle of the twentieth century.

1.2.3.1. The Instruction of the Sacred Congregation for the Propagation of the Faith *Causae matrimoniales*

The Instruction for Ecclesiastical Judges regarding Marriage Cases *Causae matrimoniales*[98] was provided for use in the United States[99] immediately prior to the Third Plenary Council of Baltimore, and was published together with the acts of the council.[100] It was provided by the Sacred Congregation for the Propagation of the Faith in response to the visit of the archbishops of the United States to Rome in preparation for the Council.

The Instruction mentions separation in its second paragraph, when providing for the competence of the diocesan bishop to decide any matrimonial cause. The spouses are

[98] See SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, Instruction for Ecclesiastical Judges regarding Marriage Cases *Causae matrimoniales*, in *Acta et decreta Concilii Plenarii Baltimorensis Tertii,* 262–278. Also published as Instr. S.C. de Prop. Fide, 1883, de processu matrimoniali, in *Collectanea S. Congregationis de Propaganda Fide, seu, Decreta, instructiones, rescripta pro apostolicis missionibus*, vol. 2, Rome, Typographia Polyglotta, 1907, 172–179, no. 1587.

[99] "Although there is no title of address prefaced to this Instruction in the *Fontes* or the *Collectanea*, it follows immediately upon another Instruction to the bishops of the United States regarding the manner of procedure in criminal and disciplinary cases of clerics. Many authors refer to it as directed to the bishops in the missionary territories of the world, but the better opinion confines it to the bishops of the United States. This view is substantiated by a response of the Sacred Congregation of the Holy Office, which refers to it as sent to the hierarchy of this country—cf. S.C.S. Off. (*Colonien.*), 23 iun. 1903, no. 2—Fontes, no. 1266" (J.P. KING, *The Canonical Procedure in Separation Cases: A Historical Synopsis and a Commentary*, Canon Law Studies, no. 325, Washington, DC, The Catholic University of America Press, 1952, 42, fn. 7). The response *Colonien.* of the Holy Office, as mentioned by King, refers to an instruction "pro Statibus Foederatis Americae," of June 23, 1903, in *ASS*, 36 (1903), 166, and includes a quotation from the second paragraph of *Causae matrimoniales* as published with the acta of the Third Plenary Council of Baltimore.

[100] "In the handling of these cases, due to the seriousness of the matter, both the Constitution *Dei miseratione* of Benedict XIV, dated November 3, 1741, and the Instruction communicated to us by the Sacred Congregation for the Propagation of the Faith, which begins *Causae matrimoniales*, must be precisely observed" (THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis Tertii*, no. 304).

generally subject to the diocesan bishop in whose diocese the husband has domicile; however,

> […] [a]n exception is made if the conjugal life has been disrupted either by separation from bed and board or by malicious desertion committed by the husband. In the former case, either party has the right to bring an accusation against the other, which must be exercised before the bishop of the diocese where that party has domicile. In the latter case, the wife may initiate proceedings with the bishop within whose diocese her domicile is situated.[101]

When the paragraph mentions separation from bed and board (*separatio a thoro et mensa*), it must mean some form of legal separation, since the second exception, that of malicious desertion (*desertio malitiosa*) by the husband, presupposes a separation in the practical order and therefore would be superfluous if "separation from bed and board" already included every occurrence of practical separation. A tangential reference to legal separation, which in context must mean civil and not canonical separation, is made regarding what would now be called the Pauline privilege.[102]

The Instruction is situated within a canonical context in which separation of spouses exists as a concept and has some effect, at least procedurally. Nevertheless, despite the incipit referring to matrimonial causes in general, the Instruction does not devote significant attention to separation as a species of matrimonial cause, but appears to address nullity of marriage in particular. Most of the Instruction addresses specific grounds of nullity of marriage, with occasional references to dissolution. Most of the procedural canons address primarily nullity of marriage, though some could apply equally to separation. The contrast with, say, the so-called "Austrian Instruction"[103] of 1855 which

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[101] SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, Instruction for Ecclesiastical Judges regarding Marriage Cases *Causae matrimoniales*, §2.

[102] "Si vero coniugum separatio acciderit absque ullo iudicio […]" (ibid., 277, §45).

[103] See J. VON RAUSCHER, Instruction for Ecclesiastical Judges regarding Marriage Cases, in *Acta et decreta sacrorum conciliorum recentiorum Collectio Lacensis*, vol. 5, Fribourg, Herder, 1874, 1286–1318.

has the same formal title as *Causae matrimoniales*, is striking: for in the latter, more than forty of the 251 paragraphs specifically address separation, in a context where these decisions were enforced by the civil authorities.

It could therefore be inferred from this Instruction—both from what is expressly provided, but also from what is *not* said regarding separation despite the opportunity to do so—that the Church in the United States was not seriously expected to adjudicate causes of separation with the bond remaining, and that separation with the bond was already a vestigial legal institution which, practically speaking, was mentioned only when relevant as a point of comparison to nullity or dissolution of marriage.

1.2.3.2. Preparation for the Canons on Marriage

Preparation for the chapter on marriage was entrusted to the bishops of the ecclesiastical province of Cincinnati.[104] Only shortly before the Third Plenary Council of Baltimore of 1884, the bishops of that province had addressed marriage at the Fourth Provincial Council of Cincinnati of 1882. They demonstrated an interest in separation, and in the reservation of cases to the ecclesiastical judge, which until this point eluded the Fathers of the councils of Baltimore. The Fourth Provincial Council of Cincinnati legislated that

> Since it has been defined in Catholic doctrine that matrimonial cases pertain to ecclesiastical judges (Council of Trent, Session 24, Canon 12), it is not allowed to go to civil tribunals to seek separation from bed and board [*ad separationem a mensa et thoro petendam, tribunalia civilia adire non licet*], unless the cause has been previously proven by an ecclesiastical judge [and] for the reason of establishing civil legality. Therefore, absolution should be denied to those seeking such separation from a civil tribunal without

[104] See G.P. FOGARTY, "The Historical Origin of the Excommunication of Divorced and Remarried Catholics Imposed by the Third Plenary Council of Baltimore," in *The Jurist*, 38 (1978), 429.

> consulting ecclesiastical authority [*separationem a tribunali civili, inconsulta auctoritate ecclesiastica*], and the case is reserved to the bishop.[105]

It was not allowed to seek separation from bed and board from a civil tribunal, unless the cause has already been proven by an ecclesiastical judge, indicating that the ecclesiastical courts were expected to be ready to address the matter. It is not sufficient for liceity that a petition merely be submitted to the ecclesiastical judge, but the cause must be proven. Furthermore, even having proven the cause before the ecclesiastical judge, the civil petition is allowed only to establish civil legality; the civil court does not fundamentally determine the matter, which belongs to the ecclesiastical judge according to the Council of Trent as cited.

The consequence of violation of the norm, however, is moral as much as strictly penal; it is the denial of absolution—but only to one who has not consulted ecclesiastical authority. According to the letter of the text one violates the law by seeking separation from the civil authorities *without having first proven the cause before the ecclesiastical judge*; but absolution is to be denied only to one who *has not consulted ecclesiastical authority*; and therefore, one who consulted ecclesiastical authority prior to seeking civil separation was not to be denied absolution, even as he violated the norm by not first *proving* his case before the ecclesiastical judge. Consultation is different from, and generally a lesser burden

[105] FOURTH PROVINCIAL COUNCIL OF CINCINNATI, Decreta Concilii Provincialis Cincinnatensis IV, in *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882 adjectis pluribus decretis, rescriptis aliisque documentis*, Cincinnati, OH, Benziger Brothers, 1886, title IV, 223.

than, proving a case or receiving approval.[106] This is the reading according to a necessarily restrictive interpretation as a legal text.[107]

Yet as an historical matter, perhaps it should not be assumed that the Fathers of the Council intended for this distinction to be made between the two clauses; they may have understood the second clause to be something of a gloss on the first, rather than as two precisely-worded texts to be understood according to canonical norms. The possibility—in some instances, likelihood[108]—that legal texts of the era may not be worded with sufficient precision to be interpreted according to the customary methods of legal textual analysis is certainly frustrating. Nevertheless, it is better to acknowledge the uncertainty than to claim a certitude which is simply not present in the text when seen in its context. A recurring theme throughout this work is the repeated demonstration that American legislators and commentators regarding separation and divorce have often been relatively unconcerned with textual precision; until the mid-twentieth century they were principally concerned with discouraging separation and divorce, which took priority over fidelity to text; and after this, mostly concerned with emphasizing the practical desuetude of the law, even while not challenging the former's understanding of the text of the law.

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[106] According to Lewis and Short, the meanings of *inconsultus* are "not consulted, unasked," "not regarded, not respected," "without advice, not advised," "unadvised, inconsiderate, indiscreet," "unadvisedly, inconsiderately" (LEWIS and SHORT, *A Latin Dictionary*, s.v. *inconsultus*). No meaning implies any connotation of approval or any other specific response from the one consulted.

[107] "Odia restringi, et favores convenit ampliari" (*RJ* 15 *in VI°,* in *FRIEDBERG2*, col. 1122); see *CIC/17*, c. 19, *CIC/83,* c. 18.

[108] See SMITH, *Notes on the Second Plenary Council of Baltimore*, 69–71, for an early discussion of the canonical imprecision of the Second Plenary Council of Baltimore's claim that the vicar general "cannot […] do anything except by episcopal delegation" (ibid., 69), a description which Smith euphemistically acknowledges as being "difficult of understanding" (ibid., 70).

There is perhaps further confusion in the fact that the Fathers chose only to address separation from bed and board (*separatio a mensa et thoro*), not divorce. While the title on marriage addresses several themes of recurrent interest to US bishops throughout the nineteenth century, including the establishment of freedom to marry, mixed marriages, the instructions to be given prior to marriage, the preference for marriage at Mass with the nuptial blessing rather than the evening wedding, and civil marriage,[109] the paragraph mentioning separation from bed and board is the only place at which the Fathers directly addressed marital problems. It is therefore perhaps surprising that there is no legislation addressing divorce of the bond, which had already been mentioned numerous times by other councils (though not in the three previous provincial councils of Cincinnati) and indeed the distinction between divorce and separation is acknowledged and addressed in the pastoral letter of the same Fourth Provincial Council:

> When the married couple can not live in peace and Christian love, both Church and State may, for good and sufficient reasons, grant divorce from "bed and board," as it is called; but divorce by which parties once validly married can again, while both parties are living, legitimately and validly remarry is impossible.[110]

It therefore seems implausible that the Fathers of Cincinnati could have believed they were addressing divorce of the bond by their legal provision regarding separation; but their reason for *not* addressing legally the objectively more serious issue of divorce remains obscure. The Fathers of Baltimore made a number of suggestions and comments regarding various draft canons proposed by the bishops of the Province of Cincinnati; but regarding

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[109] See FOURTH PROVINCIAL COUNCIL OF CINCINNATI, Decrees of the Fourth Provincial Council of Cincinnati, in *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 221–223, title IV.

[110] FOURTH PROVINCIAL COUNCIL OF CINCINNATI, Pastoral Letter of the Fourth Provincial Council of Cincinnati, 254.

what was to become canon 126 in particular, the only suggested change was of little significance.[111]

1.2.3.3. Canons on Marriage in General of the Third Plenary Council of Baltimore

The decrees of the Third Plenary Council of Baltimore concerning marital breakdown are found in Chapter II, *De matrimonii sacramento*, of title IV, *De sacramentis*.[112] Canons 128-129 concern the dissolution of non-sacramental marriages, and canons 130-133 concern marriage between a Catholic and a non-Catholic Christian or a non-baptized person, illustrating the lack of textual precision in including non-sacramental marriages in a chapter on the sacrament of marriage. Reading these canons together with canons 123-127 on marriage which are examined in more detail below, it appears that the attention of the Fathers regarding marriage is set on stemming the tide of influence of non-Catholics, and of non-Catholic ideas, on Catholic marriage.

In the background is the looming issue of *Tametsi*, and particularly the fact of its non-promulgation in most of the United States, meaning that the canonical form of marriage was not required for validity of marriage, even those in which at least one party was Catholic. While the bishops' enduring policy against the promulgation of *Tametsi*[113]

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[111] Canon 126 of the approved canons had been canon 138 of the draft. See THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis Tertii in Ecclesia Metropolitana Baltimorensi habiti a die IX. Novembris usque ad diem VII. Decembris A.D. MDCCCLXXXIV*, Baltimore, MD, Joannis Murphy, 1884, i. *Attentent* in the draft became *attentare ausi fuerint* in the final text, similar to the edit to (what became) canon 124 (ibid., liii), emphasising *daring* to attempt civil-divorce-and-remarriage and separation-without-consultation-of-ecclesiastical-authority in canons 124 and 126 respectively.

[112] See THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis Tertii (public edition)*, 63–68.

[113] See FOGARTY, "The Historical Origin of the Excommunication of Divorced and Remarried Catholics," 427–431.

certainly served to ensure the validity, at least presumed, of many marriages of Catholics, especially where the Church did not yet have a stable presence, in return generations of bishops were required to accept, even if begrudgingly, a certain loss of control over the contracting of marriages by Catholics, being forced to recognize the presumed validity of these marriages even as they condemned them due to their potentially dangerous influence on the faith of the Catholic parties. The ability of Catholics to contract marriage before the civil authorities created something of a difficulty, at least implicitly, regarding the adjudication of marital disputes; it was perhaps difficult to claim exclusive ecclesiastical jurisdiction over matrimonial causes, while repeatedly eschewing the opportunity to claim exclusive jurisdiction over the contracting of marriage. All of this needs to be considered when reading the canons of councils including the Third Plenary Council of Baltimore, the purpose of which may otherwise be opaque.

Canon 123 begins the chapter with the assertion that "it belongs only to the Church […] to decide on the validity of the marriage, and on the rights and obligations deriving from it."[114] It is unstated, but presumably understood, that among the "rights and obligations deriving from" marriage, beyond the mere fact of its validity, must be those of mutual assistance and property rights usually determined by separation, since there is no other relevant meaning of "the rights and obligations deriving from" the marriage bond, distinct from the bond itself.

[114] "Cum Matrimonii contractus sit unum ex septem legis evangelicae sacramentis, ad solam Ecclesiam, cui tota de sacramentis cura a Christo concredita fuit, pertinet de validitate matrimonii, et de juribus ac de obligationibus ex eodem derivantibus judicium ferre. Quam ob rem Concilium Tridentinum, (Sess. XXIV, can. 12) definivit: 'Si quis dixerit causas matrimoniales non spectare ad judices ecclesiasticos, anathema sit'" (THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis Tertii [public edition]*, 63, c. 123).

Canon 124 states that "it is clearly apparent that they are guilty of the gravest guilt (*manifeste apparet gravissimae culpae illos esse reos)*, who request a dissolution from a civil magistrate, or, what is worse, dare to attempt a new marriage after obtaining a civil divorce."[115] Therefore, "to curb these crimes, we establish the penalty of excommunication, reserved to the Ordinary, to be incurred *ipso facto* by those who, after obtaining a civil divorce, dare to attempt marriage."[116] Excommunication was incurred by those who obtained a civil divorce, and then attempted marriage again. Context provided by the use of the word *dissolvi*, and mention of the "the legitimate bond that still remains before God and the Church" but not before the state, mean that *divortium* here must be understood as a civil *divortium plenum* or absolute divorce, not *divortium* including separation with the bond remaining; this canon does not address the issue of civil bigamy after receiving a civil separation only. Since canonical form was not required for validity, any civil marriage would carry with it the presumption of validity in the Church, and therefore it was considered necessary to impose severe penalties for the attempt at a marriage which could not have taken place if presented to the ministers of the Church but which nevertheless could carry a certain putative legitimacy, especially where the fact of the prior marriage was not known.

Canon 125 similarly promotes and encourages the observance of the canonical form of marriage without actually requiring it, denigrating but not prohibiting abuses such as

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[115] "Quoniam constat per matrimonium duos 'unam veluti carnem fieri; et nuptiale vinculum sic esse, Dei voluntate, intime vehementerque nexum, ut a quopiam inter homines dissolvi aut distrahi nequeat' (Leonis XIII. Lit. Ap. Arcanum, 10 Febr. 1880); manifeste apparet gravissimae culpae illos esse reos, qui a magistratu civili matrimonium dissolvi postulant, vel, quod gravius est, divortio civili obtento, novum matrimonium inire attentant legitimo vinculo posthabito, quod coram Deo et Ecclesia adhuc manet. Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, ipso facto incurrendam ab eis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare" (ibid., c. 124).

[116] Ibid., 64, c. 124.

evening weddings[117] (which would exclude the possibility of the nuptial blessing given at Mass, due to the Eucharistic fast at that time beginning at midnight the night before). Canon 127 goes further, and states that those "who have contracted or attempted to contract marriage before a minister of any non-Catholic sect, outside their own diocese, in any state or territory under the jurisdiction of the bishops who are or ought to be present at this Council, incur excommunication reserved to the Bishop," with a similar excommunication reserved to their own Ordinary for those who "committed such an offense in their own diocese."[118] The excommunication is only for those who married (or attempted marriage) before a non-Catholic minister, not for those who used a purely civil official.

1.2.3.4. Canon 126 of the Third Plenary Council of Baltimore

Canon 126, then, occurs among a number of other measures which in various ways encouraged Catholics to eschew civil or non-Catholic means for contracting marriage and resolving its disputes. The canon states:

> Furthermore, in order to better and better provide for the dignity of marriage, which is a great sacrament in the Church, from which countless goods flow for the salvation of souls, for the peace of families, and for the safety and prosperity of the civil republic itself; we command all those who are joined in marriage, not to approach civil

[117] "Rectores animarum saepe moneant fideles ne profanorum hominum errore abripiantur qui pro negotio terreno tantum et saeculari matrimonium habent; iisque in memoriam revocent juxta doctrinam Ecclesiae rem esse sanctissimam utpote sacramentum, et signum quo Christus suum erga sponsam Ecclesiam amorem quodammodo adumbrare dignatus est. Frequenter et gravibus verbis inculcent pium illum et laudabilem Ecclesiae ritum, quo fideles non noctu sed missae tempore cum benedictione nuptiali contrahunt. Qua ratione fidem suam Catholicam tacite profitentur et coram omnibus ostendunt quam alte, ut decet, ac splendide de matrimonii dignitate ac sanctitate sentiant. Et hoc quidem non solum laude dignum sed fere necessarium videtur nostris hisce temporibus quando nihil intentatum relinquunt religionis hostes, ut matrimonio omnis sanctitatis, omnis sacramenti species, si fieri potest, adimatur et quasi merus civilis contractus aestimetur. Fidelium matrimoniis praemitti etiam deberet opportunum examen, quo contrahentes de religione examinentur et instruantur" (ibid., 64, c. 125).

[118] "Item decernimus Catholicos, qui coram ministro cujuscumque sectae acatholicae matrimonium contraxerint vel attentaverint, extra propriam dioecesim, in quolibet statu vel territorio sub ditione praesulum qui huic concilio adsunt vel adesse debent, excommunicationem incurrere Episcopo reservatam, a qua tamen quilibet dictorum Ordinariorum sive per se, sive per sacerdotem ad hoc delegatum absolvere poterit. Quod si in propria dioecesi ita deliquerint, statuimus eos ipso facto innodatos esse excommunicatione, quae, nisi absque fraude legis alium Episcopum adeant, eorum Ordinario reservatur" (ibid., 65, c. 127).

> courts to obtain a separation from bed and board without the consultation of ecclesiastical authority [*ne inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa*]. If anyone should attempt this, let him know that he incurs grave guilt [*se gravem reatum incurrere*] and is to be punished according to the judgment of the Bishop.[119]

The canon is clearly similar to the corresponding paragraph of title IV of the decrees of the Fourth Provincial Council of Cincinnati, having in common the mention of separation of bed and board without consultation of ecclesiastical authority. However, canon 126 lacks the demand of the provincial council that the case be proven at the ecclesiastical judge; and instead of denial of absolution, the penalty is at the discretion of the bishop. Many of the points previously made regarding textual interpretation of Fourth Provincial Council of Cincinnati remain similarly applicable.

The grave guilt incurred (*gravem reatum incurrere*) by one who approached the civil courts for separation according to canon 126 echoes and contrasts with the most grave guilt (*gravissimae culpae illos esse reos*) of those who attempt remarriage after divorce according to canon 124. *Reos* is a form of *reus*: the one accused of a delict; "[w]ith a statement of the crime or the punishment, *one guilty* of any crime, *one condemned* to any punishment."[120] *Reatus* is derived from *reus* and means "the condition of an accused person, a state of impeachment" or "[a]n offence of which one stands accused, a charge," or simply "guilt" in later Latin.[121]

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[119] "Praeterea, quo magis magisque dignitati matrimonii consulatur, quod magnum in Ecclesia Sacramentum est, a quo innumera bona profluunt pro animarum salute, pro pace familiarum, pro ipsius civilis reipublicae incolumitate ac prosperitate; iis omnibus, qui matrimonio conjuncti sunt, praecipimus, ne inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi judicio puniendum esse" (ibid., 64–65, c. 126).

[120] LEWIS and SHORT, *A Latin Dictionary*, s.v. *reus*. Emphasis in original.

[121] Ibid., s.v. *reatum*.

"Guilt" seems to be the best translation without changing the grammatical structure of the sentences, although—or perhaps because—"guilt" can apply in both moral and legal senses. "Commits a grave crime" (c. 126) and "commit the gravest of crimes" (c. 124) might better capture the legal meaning, if at the expense of changing the grammar of the sentence. Translating *reatum* (c. 126) as "charge" is not inaccurate, but risks losing the connection with *reos* of canon 124, unless one changes the whole of the latter clause to something like "through their gravest fault they are charged." Translations of *reatum* and *reos* as "sin" seem to lose the context of the canon which is specifically penal. Only by derivation can it be said that the act is sinful, because it is the commission of a delict established by ecclesiastical law; the canon does not declare the intrinsic sinfulness of the action.

In addition to the common requirements for the commission of, and punishment for, a delict, four things are necessary for the punishment established in canon 126 to be incurred:

First, there is approach of civil courts; not penalized here is whatever marital dispute-resolution mechanism may have been operated by a non-Catholic religion.

Second, the approach must be to obtain separation of bed and board (*separatio a thoro et mensa*). Canon 124 uses the terms "dissolution of marriage from a civil magistrate" (*magistrate civili matrimonium dissolvi postulant*) and "having obtained a civil divorce" (*divortio civili obtento*),[122] so clearly the Fathers were able to refer to divorce of the civil bond in specific terms; they did not consider themselves obliged to refer to civil divorce

[122] Which, as noted in the discussion regarding canon 124, must be a reference to absolute *divortium* ending the civil bond of marriage, not partial *divortium* with the civil bond remaining.

by a euphemism as a way of denying its effect on the canonical bond of marriage. Instead, the term *separatio a thoro et mensa* is an entirely conventional term (albeit one among many) for separation with the bond remaining, as used contemporaneously by Lega ("*separatio mensae et tori*"[123]). Therefore, canon 126 does not mention, much less penalize, approach to the civil courts for divorce ending the civil bond.

The third requirement for the incurrence of the penalty is that the approach to the civil authority be done without consultation of ecclesiastical authority (*ne inconsulta auctoritate ecclesiastica*). The nature of the ecclesiastical authority to be consulted is unspecified; certainly it would have included the diocesan bishop and those to whom he specifically delegated the authority; but perhaps also those who customarily enjoyed such authority in the United States at that time.[124] What is not mentioned is any required specific reaction from the ecclesiastical authority. Consultation alone fulfills the requirement of the canon. While the Fathers may well have expected that a lay person who consulted ecclesiastical authority regarding this matter would generally have observed whatever admonishment was given, non-observance of this expectation would not violate the norm of the canon. Later interpretations—and even "translations"—of this canon which seek to impose a requirement to receive *permission* or any other specific reaction from the ecclesiastical authority have no basis in the text itself.

There is a logic of graduality to the fact that the penalty imposed for civil separation is less severe (or at least, more variable according to circumstances) than that for civil

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[123] LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis*, 214, fn. 2.

[124] "Down to the year 1884, marriage disputes, even those involving the validity of marriages already contracted, were, as a rule, decided, with us, by the bishop, or also by rectors of parishes, and sometimes even by assistant priests, without any judicial formalities whatever" (S.B. SMITH, *The Marriage Process in the United States*, New York, Benziger Brothers, 1893, 5).

divorce followed by remarriage (c. 124), or even than the penalty for attempting marriage before a non-Catholic minister (c. 127), since separation does not create a bigamous marriage invalid due to the impediment of prior bond, nor involve the danger of heresy or schism by participation in the rite of a non-Catholic sect. Nevertheless, there appears to be something of a lacuna inasmuch as there is no canon addressing civil divorce without remarriage, which would appear to be a more grave problem than mere separation since divorce claims to sever the bond itself. It is possible, of course, that this was an oversight on the part of the council fathers, or perhaps an indication that they intended to address the issue in another way. It could also be explained as a result of the way in which the entire schema was derived from the Fourth Provincial Council of Cincinnati, which also did not directly address divorce.

Perhaps it is also understandable, in a roundabout way, by the context of the rightfully exclusive ecclesiastical jurisdiction over "the rights and obligations deriving from" marriage (c. 123) together with the non-promulgation of *Tametsi* as reflected in canons 125 and 127. A marriage without canonical form was discouraged (c. 125) and penalized (c. 127) but enjoyed the presumption of validity. The texts of the *Corpus iuris canonici* were written in a milieu when ecclesiastical decisions regarding marriage were expected to be enforced by the civil power, and generally there was no competing civil authority giving contrary decisions. Later texts in the era when the *Corpus iuris canonici* was in force are based on the same legal foundation, even when—after the Reformation and French Revolution—the original legal landscape was no longer present in all places where canon law was to be applied. As a result, a moral theology and canon law addressing these situations of divergence was not yet fully developed. In the United States, without

the promulgation of *Tametsi*, this lacuna was arguably even more keenly felt than in places where *Tametsi* had been promulgated, since in the United States marriages outside of canonical form were discouraged or penalized yet still presumed to be valid. In this context, then, there was the possibility that a civil decision regarding "the rights and obligations deriving from" marriage, such as in a separation case, could be both unlawfully usurped from ecclesiastical jurisdiction, yet also be seen to retain (even in its ecclesiastical effects) some ill-gotten authority over the parties, in the same way that civil marriage was begrudgingly recognized.

Recognition of the *de facto* effect of a civil separation, irrespective of its *de iure* canonical effect, seems pragmatic. On the other hand, a civil decision of divorce would be manifestly outside of the capacity of any civil power as it might pertain to the marriage bond, and would therefore be more easily rejected and ignored. Although the Fathers of Baltimore would have agreed with those of Cincinnati that "both Church and State may, for good and sufficient reasons, grant divorce from 'bed and board,' as it is called,"[125] they did not engage in a detailed parsing of the respective responsibilities of Church and state. For while "it belongs only to the Church […] to decide on the validity of the marriage, and on the rights and obligations deriving from it,"[126] the particular law of the Church in the United States did not address which are the rights and obligations dependent on marriage

[125] FOURTH PROVINCIAL COUNCIL OF CINCINNATI, Pastoral Letter of the Fourth Provincial Council of Cincinnati, 254.

[126] THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis Tertii (public edition)*, 63, c. 123.

as a "sacrament,"[127] and which rights and obligations may be decided by the civil authority, even in marriages of Catholics. Perhaps this was intended to be addressed in the individual consultation which was mandated before approaching the civil court. It is ultimately unclear to what extent the Fathers believed a Catholic to be bound in conscience by a civil separation decision; the possibility that they would be bound in some way despite its illiceity (as with civil contracting of marriage) may have made it all the more necessary to penalize civil separation more harshly than a civil divorce which was more easily dismissed as manifestly invalid and ineffective.

The fourth requirement to incur a punishment under the terms of canon 126 was that it be imposed by the bishop; it had no *ipso facto* penalty, as was provided by canon 124. This writer has not encountered any reference to a penalty actually being applied by a diocesan bishop citing canon 126 (nor any other among cc. 123-133 comprising the chapter "On the Sacrament of Matrimony"). It is true that records of individual cases may well not have survived, and the matters would not necessarily have been made public. Still, there is no record of any recourse to or response from the Apostolic See regarding such a penalty, which might well have been expected to appear in published records of the activities of the Apostolic See, such as the *Collectanea* of the Sacred Congregation for the

[127]See ibid., c. 123. Reference to ecclesiastical jurisdiction over the "sacrament" of marriage seems to be another example of loose legal draftsmanship. In fact the exclusive jurisdiction of the Church was claimed over all marriages including at least one Catholic, not only those which were sacramental by virtue of both parties being baptized: "If one party is a non-believer and the other is a believer […] [w]e think that the ecclesiastical judge should be considered competent, whoever the plaintiff or defendant may be. For the marriage in question, even if one denies it to be a true and properly so-called sacrament, will nevertheless be by its own force, of its own accord, by its nature, a sacred matter; which by reason of the believing party pertains to the Church" (GASPARRI, *Tractatus canonicus de matrimonio [1904]*, 382, no. 1456).

Propagation of the Faith (through 1906)[128] which included responses of various dicasteries, not only of the Sacred Congregation for the Propagation of the Faith; or in the volumes of the decisions of the Roman Rota, systematically published for 1909 onwards,[129] if the penalty (or at least the recourse against it) had been made in the judicial forum; or in *Canon Law Digest*, which published responses of particular interest in the United States beginning from around 1910, with a few responses dated earlier.[130] Furthermore, it seems significant that literature does not refer to the penal application of this canon, either as anecdotes of individual cases or as instructions for the prosecution of such a case.[131] It seems, then, that this canon functioned more for its didactic value (even when misquoted) than as a penal norm actually to be applied in specific cases.

The circumscribed applicability of canon 126, limited strictly by its text, was understood at that time (in notable contrast to the later authors discussed in Chapter Three):

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[128] See SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, *Collectanea S. Congregationis de Propaganda Fide, seu, Decreta, instructiones, rescripta pro apostolicis missionibus*, vol. 2, Rome, Typographia Polyglotta, 1907.

[129] See *Sacræ Romanæ Rotæ Decisiones seu sententiæ*, published from 1912.

[130] See Chronological Index, in *CLD*, eighth printing, vol. 1, Milwaukee, WI, Bruce, 1958, 879.

[131] Smith's contemporary commentary on canon 126 made no mention of the application of a penalty by the bishop. See SMITH, *The Marriage Process in the United States*, 35, no. 48. Later, for example, King's otherwise-comprehensive work mentions the "special problem of Catholics seeking a civil separation without ecclesiastical permission" addressed by canon 126 of the Third Plenary Council of Baltimore, noting that "such people were warned of the gravity of this offense and reminded of the penalty which the bishop might inflict at his own discretion," but gives no further suggestions on how this might be accomplished, in contrast to his detailed procedural instructions for most other marriage-related processes, including separation with the bond remaining. See J.P. KING, *The Canonical Procedure in Separation Cases: A Historical Synopsis and a Commentary*, Canon Law Studies, no. 325, Washington, DC, The Catholic University of America Press, 1952, 45, fn. 11.

> [T]he Third Plenary Council of Baltimore, n. 126, wisely enacts that where circumstances make it necessary to have recourse to the secular courts, even though for a separation *a thoro et mensa* only, the advice of the ecclesiastical authority should be first sought.[132]

Smith accurately paraphrases canon 126, noting that it applies only "for a separation *a thoro et mensa*,"[133] and that "advice" alone is required. Given that canon 126 was able to be accurately understood according to its text at the time that it was written, the precise origin of its later mistranslation, misunderstanding and misapplication remains obscure.

Conclusion

The terms of canonical discussion and particular legislation regarding marriage in the late nineteenth century were influenced by the social contexts in which they took place. Motivated by distinguishing Catholic teaching from that of the Protestants, Italian-based commentators took up the themes of the Council of Trent, emphasizing the Church's authority to create laws regarding separation of spouses with the bond remaining and to judge individual cases, while—especially toward the end of the nineteenth century—in the United States the predominant emphasis was the undesirability and immorality of marital breakdown, with the authority of the Church to judge these cases being recognized but secondary to the primary goal.

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[132] SMITH, *The Marriage Process in the United States*, 35, no. 48. Italics in original. The Third Plenary Council of Baltimore took place in November and December 1884, and its decrees were approved by the Roman Pontiff in September 1885. See I. SIMEONI, "Decretum recognitionis," in *Acta et decreta Concilii Plenarii Baltimorensis Tertii,* xiv. The decrees were then promulgated in January 1886. See J. GIBBONS, Decretum promulgationis, in *Acta et decreta Concilii Plenarii Baltimorensis Tertii*, xiv.

[133] Regarding divorce, Smith did assert that "especially where the marriage is valid before God and the Church, the parties cannot apply to the secular courts for an absolute divorce, except for very grave reasons, to be approved beforehand by the ordinary" (SMITH, *The Marriage Process in the United States*, 35, no. 48), but supports this with a citation from another commentator, not a legislative text. Smith cites H.J. FEIJE, *De impedimentis et dispensationibus matrimonialibus*, no. 583; various editions are consistent with this information, e.g. 2nd ed., Louvain, Peeters, 1874, 456-458.

The law regarding separation was rooted in both positive ecclesiastical law and divine law, though acknowledgment of this distinction was rarely made. The primordial reason for separation is adultery, acknowledged as deriving at least from divine positive law, and perhaps because of this pre-eminence, separation for other reasons is sometimes analogously compared with adultery. One such analogy is the possibility of leaving an idolatrous or heretical spouse, not because of a threat to the salvation of the departing spouse, but in order to punish the guilty spouse and lead him back to the Faith. Similarly, a spouse guilty of physical or moral cruelty may be punished by the separation of his spouse, and not only when he poses a threat. These provisions and their legal origins illustrate a wider point about the law regarding legal separation; it is fundamentally rooted in property law, not the theology of marriage or of the human person.

Classical commentators are closely tied to the *Corpus iuris canonici*, and Gasparri in particular was reluctant to synthesize legal application beyond the very particular circumstances of the decretal letters. Legal separation, rooted in property law, relies on ecclesiastical authority to establish it for reasons other than adultery, and to declare its effects in all cases. Departure from common living without ecclesiastical intervention can be licit, but is distinct from legal separation and appears in the commentaries as something of an afterthought, since it receives much less attention in the decretal letters. The origins of this right are not discussed: is it to be understood as *described in* the decretal letters as a fundamental right, or *established by* the decretal letters and their subsequent promulgation as law? In contrast, there are distinct views of an *obligation* to cease conjugal living, rooted in natural law or by positive provision of the ecclesiastical authorities.

The principal problem which classical late-nineteenth century commentators outside of the United States are addressing is not separation, divorce, or marital breakdown; it is the attribution of more rights to the civil authority than it truly has over the rights of Christians. Wernz disapproves of those who, *contemptuous of ecclesiastical authority*, are content with separation from bed and board obtained in the civil forum; but does not condemn approaching the civil forum *per se* if not done out of contempt for ecclesiastical authority. In this way he implicitly recognizes that civil separation in individual circumstances may be immoral or not, depending on whether the authentic limits of the authority of the civil government over the rights and obligations of Christian marriage are observed.

Separation, whether legal or practical, was not of much conciliar interest for most of the nineteenth century in the United States. Archbishop Francis Kenrick, the towering figure of moral theology in the US in the mid-nineteenth century and president of the First Plenary Council of Baltimore, stated that the obligation to approach the ecclesiastical judge for separation applied only "where the authority of the Church is exercised," a caveat which effectively exempted US Catholics from such an obligation—but this nuance was sometimes lost when later commentators asserted the exclusive jurisdiction of the Church, irrespective of the practical situation. Kenrick otherwise seems unconcerned with competition with the civil authorities regarding marriage. Following the Second Plenary Council of Baltimore, the possibility of approaching the civil authorities for separation was acknowledged, without any mention of prior ecclesiastical involvement. Comparison of the instructions provided for Austria and for the United States both entitled *Causae matrimoniales*, the US version of which was issued in anticipation of the Third Plenary

Council of Baltimore, suggests that the "authority" of the Church over separation causes may have been considered rather theoretical, since the Apostolic See did not provide for the US the kind of detailed norms found in the "Austrian Instruction" which would have been necessary in practice to adjudicate legal separation.

In 1882, the Fourth Provincial Council of Cincinnati legislated regarding civil separations, prohibiting the faithful to approach civil tribunals without a prior ecclesiastical decision. Perhaps by coincidence, the bishops of the Province of Cincinnati were entrusted with drafting the schema regarding marriage for the Third Plenary Council of Baltimore in 1884, which led to the canons of the plenary council bearing a marked similarity to the provincial council's provisions. Like other canonical texts of the era, the canons of the Third Plenary Council of Baltimore regarding marriage may suffer from a lack of legal precision. Nevertheless, the text of canon 126 is clear enough: a married person who approaches the civil courts to obtain separation of bed and board without consulting ecclesiastical authority is liable for punishment. The canon does not apply to civil divorce, and requires consultation, not permission, and there is evidence that these distinctions were understood at the time. Canon 126 does not seem to have functioned as a penal canon to be *used*; it was a statement of position attempting to prevent the intervention of the civil authorities in the fulfillment of the matrimonial obligations of the faithful.

For both the universal law and for the particular law in the United States in the twentieth century, the situation in law and in practice relied on the textual and legal-cultural foundations present at the end of the nineteenth century. The decretal law provided a foundation largely unchanged for the 1917 Code and even, in its essential elements of the institute of legal separation, for the 1983 Code; but issues such as the relationship between

divine and ecclesiastical law in the right to depart the common life without ecclesiastical intervention were to remain unresolved throughout the twentieth century. Similarly, the Third Plenary Council of Baltimore provided the inescapable backdrop to practice and debate regarding separation in the United States well into the twentieth century, even as the application became increasingly distinct from the texts of the council.

2. SEPARATION WITH THE BOND REMAINING IN THE CODIFIED LAW

The foundational legal texts regarding separation of spouses with the bond remaining had been produced in the Middle Ages, especially in the thirteenth century, and often with even deeper roots added retrospectively as legal context. Notwithstanding the compilation and promulgation of the various editions of the *Corpus iuris canonici*, the original texts were—like all decretal letters—largely written in response to single specific cases, and only haphazardly and later coming to carry universal legislative weight. Interpretation of the law—particularly evident in Gasparri, as noted in Chapter One—remained bound to these specific situations, often hesitating to interpret it to different or new situations. Codification provided for separation of spouses, as with any other area of the law, the opportunity to create a systematic exposition of the law, bound not by historical accident but by divine law and by the state of contemporary Church and society.

Largely, however, both Latin codification projects—that of the early twentieth century, ultimately fulfilling the request of many fathers of the First Vatican Council;[1] and that of the late twentieth century, founded upon the same initiative as, and drawing necessarily upon the work of, the Second Vatican Council—made textual changes to the legislation addressing the institute of separation of spouses with the bond remaining while drawing on the language inherited from, and not clearly repudiating the legal foundations of, the decretal law.

[1] See P. GASPARRI, Praefatio, in *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papæ XV auctoritate promulgatus*, Typis polyglottis Vaticanis, 1917, xxviii-xxxi, English translation in PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, 10–12.

2.1. The 1917 Code of Canon Law

The 1917 Code of Canon Law fundamentally reformulated the law of the Latin Church. One historian alleged that the Code can be treated as the completion of the work of the U.S. bishops evident in the legislation of the Third Plenary Council of Baltimore;[2] whatever truth this claim may have had regarding other matters, the canons of the Code regarding separation with the bond remaining are largely shaped by the decretal law (or more precisely, shaped by how the decretal law was interpreted by Gasparri). In common with the commentaries of the late precodified era, the nature and effects of separation, whether decided by the local ordinary or *propria auctoritate*, are not explicitly defined.

2.1.1. Principles of Codification for the 1917 Code of Canon Law

The consultors and collaborators were instructed that "[…] only those laws should be included in the Code that concern discipline. Nothing prohibits, however, that certain principles can and ought to be worked into the Code that refer to natural justice or to the Faith itself."[3] The proposals, then—and even more so, the codified law—should be recognized as being understood by the consultors as primarily disciplinary (and not merely moral or exhortatory), either of positive ecclesiastical law or as matters of natural justice.

Consultors were first of all to "[…] search out laws for the discipline of the Church, omitting those obsolete or abrogated […]. These should be distilled into canons and contain only the dispositive part of the law […]."[4] "But if the consultor or other supervisor of operations thinks it opportune or necessary to change something from the current law, he

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[2] See GUILDAY, *A History of the Councils of Baltimore (1791–1884)*, 249.

[3] GASPARRI, Praefatio, xxxv, I, PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, 16.

[4] GASPARRI, Praefatio, xxxv, II, PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, 17.

shall recast the canon, advising about the subject of the change and briefly giving reasons for it. He could do the same if he thought something new ought to be interjected."[5] So the proposals were generally to follow the existing law; but reasoned proposals for modifications were also acceptable for consideration. While the records of the redaction process may make clear into which category each proposal was believed to fall, the codified law itself does not explain whether, or to what extent, it was, or was considered to be, a variation from the law existing prior to codification.

In general, the 1917 Code did not introduce any significant innovation regarding the definition of canonical separation, whether legal separation established by ecclesiastical authority or, in danger of delay, as merely temporary departure. While there were changes, some of which will be addressed below, the nature of the institute of separation of the spouses with the bond remaining was not fundamentally changed (or even explicitly addressed) in the 1917 Code, and the circumstances mentioned in the codified law are largely drawn from the decretal law. Nevertheless, some rejected proposals, and the order imposed by codification, are instructive as they shed light on some *lacunae* present in the decretal law.

2.1.2. Unadopted Proposals Regarding the Civil Authority

Consultor Joseph Hollweck was one of two (or perhaps three) consultors who provided vota prior to the formulation of *Schema A*, the first draft of this chapter.[6] Among other contributions, he proposed two canons addressing the role of the civil authority.

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[5] GASPARRI, Praefatio, xxxv, V, PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law*, 17.

[6] See L.A. PRADOS RIVERA, *La separación de los cónyuges en el iter redaccional de la codificación de 1917*, Series canonica, no. 9, Rome, Pontificia Università della Santa Croce, 2003, 114–5.

While neither of these canons became law, even in modified form, their proposal and the discussions surrounding them give insight into what the law was held to be, both before 1917 and even after.

Hollweck proposed one canon requiring that a spouse must receive the *licentia* of the Ordinary before approaching the secular authorities for a civil *divortium* whether temporary or perpetual (*divortium civile sive temporaneum sive perpetuum*), based on the responses of the Sacred Penitentiary[7] of January 5, 1887, January 14, 1891, and June 3, 1891.[8] The context of Hollweck's proposal seems to be his acknowledgment, in a proposal for another canon, that in practice "[…] it will be the civil judge who will decide about the maintenance of the spouse and of the offspring,"[9] therefore proposing a canon providing that

> [i]t shall be the responsibility of the secular judge, in accordance with civil laws, to judge what is to be decided concerning the mutual support of spouses, the care of offspring, always safeguarding their education and instruction in the Catholic faith, and the distribution of the dowry. Where civil law, whether written or unwritten, on this matter either states nothing or is contrary to natural justice and the rights of the Church over its

[7] Responses of the Sacred Penitentiary were not textual basis for law as strictly understood; and in any event, the decision against the proposal not to codify the substance of these responses could indicate their abrogation even if they had been law.

[8] "Sine speciali Ordinarii sui licentia nemini liceat apud iudicem saecularem ad divortium civile sive temporaneum sive perpetuum agere et licentia obtenta serio promittat, se omni tempore mandatis ecclesiae hac de re latis obtemperaturum esse" (ASV, Fondo Commissione Riforma Cod. Diritto Canonico, folder 8§20). As cited in H. FRANCESCHI, "'Bonum prolis' in the Married State of Life and the Canonical Consequences in Case of Separation or Nullity of Marriage," in *Forum*, 17 (2006), 422, fn. 63. The concept of a civil temporary *divortium* demonstrates that *divortium* here is inclusive of separation, not merely meaning "civil divorce" in the modern sense (i.e. of the bond); and therefore, also that civil perpetual *divortium* might also include those separations merely as to cohabitation, not the bond. At that time the title of the chapter mentioned not *separatio* but *divortio*, and even *divortium perpetuum* could be *semiplenum seu quoad thorum et cohabitationis tantum*, not *quoad vinculum*.

Licentia is left untranslated. "Permission" would be the common translation of the word; but "authorization" is another and implies a different juridic result. See commentary on *CIC/83*, c. 1692, §2, *infra*, and V. GARDINER, "The Separation of the Spouses: Old Law, New Questions," in *Proceedings of the Canon Law Society of America*, 81 (2019), 176. Choosing either word in translation cannot but beg the question regarding the meaning of the text.

[9] FRANCESCHI, "'Bonum prolis' in the Married State of Life and the Canonical Consequences in Case of Separation or Nullity of Marriage," 422.

> own, the ecclesiastical judge shall resolve the matter with fair and just discretion, and above all shall diligently provide for the Christian education of the offspring.[10]

Hollweck's proposal, then, was to provide explicitly in the universal law of the Latin Church that the secular judge would decide not only the financial arrangements but even the care of the offspring, save that their Catholic education was to be safeguarded. This would not have given the civil authorities legitimate power to decide whether or not the Catholic spouses were obliged to continue in conjugal cohabitation, but if they were not so obliged (or perhaps even if they were, but the question of obligations regarding the children still required adjudication), then the civil authority would make certain practical decisions, unless the civil law were absent on this matter, or was contrary to natural justice or the rights of the Church. The result would have been that the question of the fulfillment of strictly conjugal responsibilities remained within the purview of the Church (whether actively in each case, or according to one of the provisions permitting separation without active intervention), but the civil decisions regarding related matters would be recognized as binding even within canon law.

Hollweck's proposal concedes nothing as to the principle of the Church's authority over the bond of marriage and the fulfillment of truly conjugal responsibilities by her members. Nevertheless, the proposal is striking for its attempt to recognize explicitly the civil power regarding temporal matters adjacent to spiritual matters. If the history of the Church's political and theological relationship with the civil power regarding marriage is

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[10] "Iudicis secularis erit iuxta leges civiles iudicare, quid de mutua sustentatione coniugum, da alendis liberis, salva semper eorum educatione et instructione in fide catholica, atque de bonorum dotalium distributione sit statuendum. Ubi ius civile sive scriptum sive non scriptum hac de re aut nihil aut contraria iustititae naturali et iuribus ecclesiae in suos statuit, iudex ecclesiasticus aequo et iusto arbitrio rem dirimat et imprimis prolis educationi christianae sedulo providea" (ASV, Fondo Commissione Riforma Cod. Diritto Canonico, folder 8§19, cited in ibid., fn. 62).

a story of rivalry and mutual distrust, each often claiming extensive rights to the exclusion of the other especially since the Reformation and the French Revolution, Hollweck's proposal represents a practical concession even while maintaining the Church's theoretical authority over that which is essential to marriage. While it would have been a novel development in a legislative text, especially as coming from the supreme authority of the Church, it would at the same time merely have recognized a situation which had already existed *de facto* in the modern era in many places, and indeed with some precedent of ecclesiastical cooperation in the medieval era.[11]

Hollweck's proposal became canon 37 of *Schema A* (with minor modifications, and divided into two paragraphs).[12] "Wernz expressed his radical disagreement with canon 37, since he did not see the need to introduce into the Code of Canon Law this declaration in favor of the civil authority, especially since it is clear that civil effects fall within the competence of the latter,"[13] i.e. that this was already understood to be the law as a matter of general principles, and therefore did not require codification.

> Faced with the strong opposition of Wernz, Gasparri proposed to replace this canon with § 19 of Sebastianelli's votum: "After a divorce has been pronounced by a judge, the offspring must be raised and supported by the innocent spouse at the expense of the guilty party; unless the judge has decreed otherwise for their welfare. But if one of the spouses is an unbeliever or a heretic, the offspring, for the sake of favoring the faith, must always be raised by the faithful spouse." And this they unanimously agreed. In the wording of Schema B, Sebastianelli's suggestion was divided into two paragraphs and Gasparri

[11] See e.g. M. VLEESCHOUWERS–VAN MELKEBEEK, "Marital Breakdown before the Consistory Courts of Brussels, Cambrai and Tournai: Judicial Separation *a mensa et thoro*," in *Tijdschrift voor Rechtsgeschiedenis/Legal History Review*, 72 (2004), 88, and G. MARCHETTO, *Il divorzio imperfetto: i giuristi medievali e la separazione dei coniugi*, Annali dell'Istituto Storico Italo Germanico, Bologna, Il Mulino, 2008, 374.

[12] See PRADOS RIVERA, *La separación de los cónyuges en el iter redaccional de la codificación de 1917*, 133.

[13] Ibid.

> specified that the judge was the ecclesiastical one and that it was valid both for the sentence of full and partial divorce.[14]

Hollweck's proposed concession, however, was tempered by the simultaneous proposal, already mentioned, that the ordinary's *licentia* was required before asking the civil judge for separation. While that proposal has a certain similarity to the provision of canon 126 of the Third Plenary Council of Baltimore, the significant difference is that canon 126 required *consultation* by the spouse, while Hollweck's proposed canon obliged the receipt of *licentia*. Since Hollweck already proposed blanket recognition of the civil authority's decisions regarding certain obligations derived from the marriage, it would make little sense for a spouse to request ecclesiastical *licentia* to do something already provided for in the law, viz., for civil decisions regarding temporal matters. The *licentia* must be understood as having been intended to accomplish something else.

The most plausible explanation seems to be that receipt of *licentia* according to Hollweck's proposal was not merely compliance with a disciplinary norm, but that it would have granted to the civil decision an enforceability in the ecclesiastical forum which the civil provision would not otherwise have had. Wernz had observed (and all the other consultors appeared to agree) that the civil authority already had power over the temporal matters even of marriages among Catholics; but (according to e.g. the reservation of matrimonial causes to the ecclesiastical judge per the Council of Trent's *Decree on the Sacrament of Marriage*, Session 24, Canon 12) the civil authority could not have authority over spiritual matters unless that capacity was granted to it by the Church. This proposed canon, then, was an attempt to allow the ecclesiastical authority, to grant that power to the

[14] Ibid., 113–4. The reference to full divorce (*divorcio pleno*) must mean the dissolution or invalidity of the marriage according to canon law, not divorce of the bond as practiced by civil authorities.

civil authority in a given case, such that the civil authority would decide not merely the temporal matters (which power it already held, according to either Hollweck's other proposed canon or Wernz's argument that this power was already acknowledged), but also the spiritual matter of the spouses' conjugal cohabitation and their obligation of mutual support, and the care of the offspring between parties who were both capable of providing a Catholic upbringing. Absent such a concession, a civil decision regarding temporal provisions would be only dubiously effective ecclesiastically (though temporal provisions were, in principle, within the remit of the civil authority) if the separation itself were not demonstrably licit according to canon law.

The situation of discordant civil and canonical statuses of spouses regarding their obligations toward each other is obviously undesirable, yet had been growing as an issue throughout the nineteenth century as more countries created civil divorce and separation laws, and as more Catholics used these laws. One goal or theme in response to this issue was to integrate the two insofar as possible, such that Catholics would not have had to face discordant statuses as spouses, even at the cost of granting ecclesiastical recognition to decisions and to the civil power, which the Church had previously and vehemently opposed. Hollweck's proposal was an attempt to address this issue; its rejection ensured that the 1917 Code made no such provision, and implicitly incorporated the decretal-era law (formed in an epoch when the Church did have exclusive competence over matrimonial matters) into the codified ecclesiastical law of the twentieth century.

2.1.3. The Obligation of Conjugal Cohabitation

The canons of the 1917 Code on separation of bed, table and dwelling begin with the provision that "spouses must preserve the communion of conjugal life, unless a just

cause excuses them."[15] However, this is not taken from any text of the *Corpus iuris canonici*, in which the obligation of matrimonial cohabitation is arguably implicit but is not explicit. The first drafts of the chapter *De divortio semipleno*, which became *De separatione tori, mensae et habitationis*, did not include a canon stating the principle of conjugal cohabitation. Mention of the principle was first introduced in the drafts of two consultors of the chapter *De matrimonii effectibus*.[16] At a meeting of 18 January 1906, however, when *De matrimonii effectibus* was first discussed, it was agreed to transfer this canon to the chapter *De divortio semipleno*, as it was titled at that time.[17] After a variety of changes, the text had become canon 1131 of *Schema H* in 1914 and had taken its final form: "Spouses must preserve the communion of conjugal life, unless a just cause excuses them."[18]

The canon is not descended from any one specific text. Gasparri's sources[19] for this canon begin with the constitution *Exultate Deo* of Eugene IV at the Council of Florence, which (at paragraph 16) describes the goods of marriage and provides that due to fornication (*fornicatio*; in modern vocabulary, adultery) there may be a separation of bed

[15] "Coniuges servare debent vitae coniugalis communionem, nisi iusta causa eos excuset" (*CIC/17*, c. 1128). English translations of the canons of the 1917 Code, unless otherwise stated, are taken from E. PETERS (ed.), *The 1917 Pio-Benedictine Code of Canon Law: In English Translation with Extensive Scholarly Apparatus*, San Francisco, CA, Ignatius Press, 2001.

[16] See PRADOS RIVERA, *La separación de los cónyuges en el iter redaccional de la codificación de 1917*, 114.

[17] See ibid., 115.

[18] "Coniuges servare debent vitae coniugalis communionem, nisi iusta causa eos excuset" (ibid., 197); c. 1128, *CIC/17*.

[19] See *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papæ XV auctoritate promulgatus*, 322, fn. 4.

and board.[20] Similarly, the Council of Trent, cited at Session 24, Canons on the Sacrament of Marriage, canon 8,[21] defends the authority of the Church to define the causes of separation; again, without defining the obligation or *status quo* from which separation derogates. The profession of faith prescribed for the Maronites contained in the letter of Benedict XIV *Nuper ad Nos* describes the indissolubility of the marital bond even as separation from bed and cohabitation may be given for various causes.[22] A response of the Holy Office to Siam addresses almost entirely various complex situations regarding the conversion of nonbaptized persons with multiple marriages, with one tangential reference to the distinction between indissolubility of the bond compared to the "dissolution of the bed," which may take place if there are reasons recognized by the ecclesiastical judge.[23] All of these sources, in one way or another, defend the indissolubility of marriage (which is expressed separately at canon 1013, §2)[24] while also noting the possibility of separation with the bond remaining. In particular, Gasparri's sources defend the authority of the Church regarding separation, whether to define the reasons for it in the abstract, or to evaluate particular cases. The cited *fontes* generally provide context for the clause *nisi iusta*

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[20] "Quamvis autem ex causa fornicationis liceat tori separationem facere; non tamen aliud matrimonium contrahere fas est, cum Matrimonii vinculum legitime contracti perpetuum sit" (EUGENE IV, constitution *Exultate Deo*, 22 November 1439, in P. GASPARRI [ed.], *Codicis iuris canonici fontes*, vol. 1, Typis polyglottis Vaticanis, 1923, 76, §16).

[21] See TANNER, *Decrees of the Ecumenical Councils*, vol. 2, 755.

[22] "Item Sacramenti Matrimonii vinculum indissolubile esse, et quamvis propter adulterium, haeresim, aut alias causas possit inter Coniuges Thori, et Cohabitationis separatio fieri, non tamen illis aliud-Matrimonium contrahere fas esse" (BENEDICT XIV, Profession of Faith Prescribed for the Maronites in the Letter *Nuper ad nos*, 16 March 1743, in GASPARRI [ed.], *Codicis iuris canonici fontes*, vol. 1, 786).

[23] "Praeterea vetitum omnino est christianam nubere pagano; quod si, praevia dispensatione disparitatis cultus a S. Sede obtenta, quandoque eiusmodi matrimonium fieri contingat, notum est illud indissolubile futurum quoad vinculum, et solum aliquando quoad torum posse dissolvi, si motiva canonica adsint a iudice ecclesiastico agnoscenda" (SACRED CONGREGATION OF THE HOLY OFFICE, instruction, Siam, 4 July 1855, in GASPARRI [ed.], *Codicis iuris canonici fontes*, vol. 4, Typis polyglottis Vaticanis, 1951, 205).

[24] "Essentiales matrimonii proprietates sunt unitas ac indissolubilitas, quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti."

causa eos excuset; yet none of them provides positive basis for the codified obligation of preserving conjugal living as expressed in the first clause of the canon: the Pio-Benedictine legislator (following the initiative of the consultors) has, for the first time, provided by the means of legislation for the obligation of conjugal cohabitation.

2.1.4. Deeper Roots in Property Law: X 3, 32, 20 *Dudum*

We considered previously X 4, 19, 6 *De illa vero*, a source frequently cited by Wernz and Gasparri (among others) in their explanation of the universal law prior to 1917, and the sole cited *fons* in the 1913 *Schema Liber tertius: de rebus*[25] for what later became canon 1132, §1 of the 1917 Code. The 1917 Code adds a second *fons*, X 3, 32, 20 *Dudum,* a decretal letter of Gregory IX to the monastery of nuns at Plauda.[26] The letter addresses a dispute raised by a husband, C., against his wife who had entered the same monastery. The wife's defense was that C. had voluntarily renounced all of his rights over the wife and had promised to observe chastity and serve the poor in a certain hospital; C. responded in turn that although this was attested by a document and witnesses, the document was not the original one, changes having been made such that it did not reflect his original agreement; and furthermore that he made this decision while angry with his wife and was deceived by people at the hospital, who offered him food and promised to extinguish his lustful desires. Pope Gregory dismissed these arguments, observing that the changes in the documents were not significant, and that C. had made the commitment voluntarily for the love of God

[25] P. GASPARRI (ed.), *Schema Codicis iuris canonici (Liber tertius: de rebus)*, Typis polyglottis Vaticanis, 1913, 169, c. 410, §2.

[26] *FRIEDBERG2*, coll. 586–7. It is one of the 195 new texts attributed to Gregory IX himself and added to the *Decretales* by Raymond, though not one of the "general statements of law that seem to have been produced specially for the *Liber extra*" (A. WINROTH, "Canon Law in a Time of Renewal, 1130–1234," in A. WINROTH and J.C. WEI [eds.], *The Cambridge History of Medieval Canon Law*, Cambridge, Cambridge University Press, 2022, 106).

and the salvation of his soul; therefore, the wife was to be absolved of the charge against her. It is most curious that X 3, 32, 20 *Dudum* was added as a *fons* to the paragraph promulgated in 1917, addressing directly the possibility of a spouse entering religious life, simultaneously with the mention of that possibility being removed from the paragraph itself in the redaction between 1913 and 1917.[27] Indeed, with this coda having been removed from the promulgated paragraph, it is not clear how *Dudum* is directly relevant to the canon to which it is cited as a source, especially in view of its unique circumstances.

Setting aside the possibility of a drafting error in the composition of the *fontes*, the relevance of X 3, 32, 20 *Dudum* may be in the milieu it illustrates. The *allegationes* from *Dudum* in the *Editio Romana* largely relate to contract law. There are six citations to the Digest of Justinian, all related to property and procedure, three of which (all regarding *dolus*) are to the edict of Ulpian, book 11, *et eleganter* (*Dig*. 4, 3, 7pr).[28] Ulpian cites "Julian […] in his fourth book,"[29] explaining that where someone is defrauded by a slave to sell the same slave and the buyer frees the slave, the seller's recourse is against the freed slave, not against the buyer;[30] or applied to *Dudum*, the husband's first recourse must be against the one who allegedly fraudulently persuaded him to renounce his marital rights, not against his wife or the monastery which received her. Furthermore, though "there is no sale

[27] "[…] *coniux fidelis potest etiam ad religionem transire aut ordines suscipere*" was present in canon 410, §2 of the *1913 Schema Liber tertius: de rebus* but had been removed by the time canon 1131, §2 was promulgated as part of the 1917 Code.

[28] See *The Digest of Justinian*, 120.

[29] I.e. the fourth of ninety books in the *Digesta* of Salvius Julianus, a jurist of the early first century, "richly excerpted by the compilers of Justinian's Digest" (A. BERGER, *Encyclopedic Dictionary of Roman Law*, 1991 reprint, Transactions of the American Philosophical Society, 43,2, Philadelphia, PA, American Philosophical Society, 1953, s.v. *Iulianus, Salvius*).

[30] See *The Digest of Justinian*, 120.

if he was deceived with respect to the very fact that he was selling,"[31] in the present case there does not appear to be dispute regarding the husband being "deceived with respect to the very fact that he was" renouncing his marital rights, but merely that he was in some way improperly influenced by other factors.

In the same gloss on *Dudum* there are four *allegationes* to the Codex of Justinian, again illustrating various points of contract law. Regarding Gregory's decision on the substantial truth of the documents, Bernardus summarizes *Cod*. 6, 23, 15[32] which he cites, wherein it is stated that "a designation shall be valid by whatever wording it is accomplished and in whatever mode of speech it is formed, provided only that the intended disposition is comprehensible through it."[33] Similarly, when the gloss on *Dudum* refers to other chapters in the title *De conversione coniugatorum*,[34] it relies on arguments which may not appear, to the modern reader, to be particular to marriage or even to the sacraments or to spiritual matters in general.

The *allegationes*, and even more so the *fontes* to the glossator's *fontes*, are not directly connected to the obligation of marital reunification, except in the broadest sense that both matters are governed by the rule of law. "One should not […] assume that a citation that seems inapt is a mistake. The glossators' and commentators' sense of

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[31] Ibid.

[32] "Probably issued in fact by Constantius II" (BLUME et al., *The Codex of Justinian*, 1509, fn. 144). But if it is attributable to Constantine as claimed, then it is "part of a long edict reforming the law of succession issued by Constantine at Serdica on January 31, 310, and posted at Rome on April 1" (ibid., 1459, fn. 75). If *Cod*.6.23.15 was issued by Constantine, then prior to the *Codex Justinianus*, this text or versions or predecessors of it appeared in the *Codex Theodosianus*, at 3.2.1, 4.12.3, 8.16.1 and 11.7.3, generally addressing inheritance but not marriage (ibid., fn. 75).

[33] BLUME et al., *The Codex of Justinian*, 1509.

[34] From *renunciavit omnino*: X 3, 32, 3 *Quidam intravit monasterium* and X 3, 32, 12 *Placet nobis*. From *obsequio se devovit*: X 3, 32, 9 *Ex parte abbatis*. From *spes*: X 3, 3, 14 *Ex parte tua* and X 3, 32, 16 *Veniens ad praesentiam*.

relevance was not the same as ours."[35] While it would be reductionist to claim that the medieval authors saw marriage as *no more than* a contract, it is quite clear that marriage and its rights and obligations, both essential and not, were able to be adjudicated like any other contract. The 1917 Code's lack of a definition of separation, together with its general adherence to contemporary summaries of the decretal law and the citation of many of the same medieval and Roman sources as *fontes* to the 1917 Code, suggest that the 1917 Code did not sever the legal roots in property law of the institute of separation of spouses with the bond remaining.

2.1.5. Reasons for Separation

Canons 1129 and 1130 provide for separation due to adultery. The canons do not define adultery, nor explicitly address sodomy and bestiality which, both before and after codification, have been considered as granting an equivalent right to dissolve the common life. Unlike commentators on the decretal law, "spiritual adultery" is not treated together with adultery,[36] but in the subsequent canon 1131 alongside other reasons for separation.

Canon 1131, §1, enumerates various reasons for separation:

> If one spouse gives his name to a non-Catholic sect; if he raises the [offspring] non-Catholic; if he leads a criminal or disgraceful life; if one creates grave danger to the soul or body of the other; if by cruelty, one renders common life too difficult; these reasons and others of their sort are for the other spouse completely legitimate reasons for leaving,

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[35] C. DONAHUE, *Corpus iuris civilis* Citation Form, *The Ames Foundation*, https://amesfoundation.law.harvard.edu/digital/CJCiv/CitationForm.shtml (April 19, 2023).

[36] "It is a commonplace of ecclesiastical writers to compare infidelity, idolatry, heresy to fornication or spiritual adultery and on this ground to admit separation" writes Augustine Bachofen, citing three canons of the *Decretum* (BACHOFEN, *A Commentary on the New Code of Canon Law*, 376 and fn. 14). The declassification of "spiritual adultery" as equivalent to adultery for the purposes of separation was noted by at least one commentator after codification. See A.F. KAISER, "A Last Resort: Separation," in *American Ecclesiastical Review*, 84 (1931), 56.

> with the authority of the local Ordinary, or even on [the spouse's] own authority if these things appear certain and there is danger in delay.[37]

It can clearly be seen that the list of reasons for separation follows very closely to the reasons listed by Gasparri and others in the late era of the decretal law,[38] with each of the reasons linked to a source in the *Corpus iuris canonici*.

The Code provides that a spouse who endangers the soul of the other spouse provides the other with a cause for leaving, even on the spouse's own authority where there is danger in delay; and this would presumably apply to the situation of a heretical spouse who may tempt the faithful spouse into joining him in his error. So it might seem somewhat superfluous, then, that the same paragraph of canon 1131 also explicitly lists the spouse joining a non-Catholic sect, or raising the offspring non-Catholic, or living a criminal or disgraceful life, as providing reasons to leave—unless one understands from X 4, 19, 6 *De illa vero* (a *fons* to *CIC/17* c. 1131, §2) and from X 2, 6, 5, 6 *In aliis* (an allegation from the same *fons*) that a person could leave a heretical spouse not because she feared the danger that his heresy would provide to her own soul, but in order that her absence would weary him and cause him to rethink his error. One U.S. commentator was explicit that the purpose of separation in the situation of the non-Catholic education of the children was "to relieve the innocent and punish the guilty."[39] Therefore, as with adultery, the faithful spouse could use separation not merely to protect himself or herself, but as a tool to promote

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[37] "Si alter coniunx sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora." I have changed Peters's translation's "children" to "offspring," since the *proles* do not need to be minors.

[38] See e.g. GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 331–332, no. 1371; WERNZ, *Ius decretalium*, 661–663, no. 713.

[39] KAISER, "A Last Resort: Separation," 57.

reform of the offending spouse, even when that behavior does not threaten the body or soul of the innocent spouse.

Danger to the soul or body of the spouse or offspring was an autonomous, codified, ground for leaving the common life. Cruelty (*saevitia*) defines the kind of undue difficulty in the common life which can justify separation. Commentary of the decretal era regarding the nature of cruelty remains essential to interpreting the ground. A sentence *coram* Florczak, of June 30, 1928, addresses a related question; the husband alleged "deadly hatred" by the wife, yet this phrase does not appear in the codified law, but only in the decretal law (see X 2, 13, 8). Nevertheless, pursuit "with deadly hatred" (*capitale odium*) appears in Gasparri's commentary both before and after codification.[40] The decision *coram* Florczak affirmed that *haec aliaque id genus* of canon 1131, §1 allowed "that other reasons of equal weight may also be given, as the *Code* itself clearly indicates, excluding a taxative enumeration."[41] This point of jurisprudence interpreting the Code was brought to the attention of U.S. scholars and practitioners of the law via *Canon Law Digest*, albeit two decades later, as part of the renaissance of interest in separation and divorce in the 1940s and 1950s.[42] In support of "deadly hatred" being among the other reasons (and indeed, apparently not being considered directly under the codified titles of "grave danger to the body" or of cruelty rendering the common life too difficult, despite moral cruelty being

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[40] GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 331, no. 1371, 3º; ID., *Tractatus canonicus de matrimonio (1932)*, 247, no. 1177, 3º.

[41] "Non omnes, sed praecipuae tantum a Codice enumerantur causae, adeo ut aliae quoque causae aequi ponderis dari possint, quod manifeste indicat ipse Codex, taxativam enumerationem excludens per verba: 'Haec aliaque id genus sunt pro altero coniuge totidem legitimae causae discedendi'" (TRIBUNAL OF THE ROMAN ROTA, *coram* FLORCZAK, 30 June 1928, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 20 [1928], 268, no. 2).

[42] "[…] the cause for temporary separation as enumerated in canon 1131 is not exclusive" (TRIBUNAL OF THE ROMAN ROTA, Separation Refused, 30 June, 1928, in *CLD*, vol. 2, Milwaukee, WI, Bruce, 1949, 344).

classified as a grave danger to the body, *supra*), Florczak cites Alexander III directly,[43] affirming that the precodified law regarding separation was still believed to be relevant, at least where it was necessary to fill a *lacuna* in the codified text which is at least fundamentally in continuity with the prior law.

The same decision *coram* Florczak also addresses another *lacuna* in the codified law. While *CIC/17* c. 1129, §2 provides for condonation of adultery through marital relations, and thereby the renunciation of the right to separate for the same cause, the *Code* did not explicitly indicate whether or how a cause for separation other than adultery might eventually be remitted. As the wife in that case put it, "If I was repulsive to the petitioner, how is it that he also had intercourse with me seven months ago?" The court reasoned,

> Therefore, even if hatred existed, it cannot be deemed implacable, and it is clear that it was remitted. For with the reconciliation having taken place after disagreements or quarrels, it is evident that these were already forgiven and can no longer be brought forward as reasons to demand a temporary divorce [*divortium temporaneum*]. For when dealing with the right to obtain perpetual separation, this right is no longer granted to a spouse who has at least tacitly condoned the adultery of the other spouse (c. 1129); all the more separation is not given in the case mentioned above.[44]

The judges therefore reason, at least implicitly, according to something akin to the maxim *plus semper in se continet quod est minus*:[45] since only adultery can cause a perpetual separation, separation for other factors is referred to as mere temporary separation and is judged as a lesser form of separation (even if, weighed according to other

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[43] "[c]fr. verba Alexandri Pp. III in cap. 8, *De restitut. spoliat*" (TRIBUNAL OF THE ROMAN ROTA, *coram* FLORCZAK, 30 June 1928, 269, no. 2); Alexander III to the Archbishop of Canterbury, X 2, 13, 8 *Ex transmissa nobis*, in *FRIEDBERG2*, col. 283.

[44] "Ait enim uxor: «Se io era ributtante all'accusatore, come avviene che egli abbia pure 7 mesi fa avuto coito con me? […]» Inde odium, etiamsi exstitisset, haud implacabile dicendum est, atque remissum esse constat. Posita enim reconciliatione post discordias vel rixas, patet, easdem iam condonatas fuisse neque amplius deduci posse uti causas ad divortium temporaneum flagitandum. Si enim ubi agitur de iure separationis perpetuae obtinendae, hoc ius coniugi, qui adulterium alterius coniugis saltem tacite condonaverit, non amplius conceditur (can. 1129), eo magis separatio non datur in casu de quo supra" (ibid., 271, no. 7).

[45] See *RJ* 35 *in VI°*, in *FRIEDBERG2*, col. 1123.

criteria, deadly hatred or grave physical or moral dangers might otherwise be judged as no less serious evils than repented adultery); and therefore, the act which condones or reconciles adultery must also condone or reconcile other misdeeds.[46]

Major commentaries on the 1917 *Code* generally adhere to the understanding of the role of fault from the precodified law:[47] that fault is not necessary in order to depart conjugal living but is necessary for legal separation; "the punishment of *divortium* presupposes preceding fault,"[48] as Capello put it. Canon 1131, §1 addressed primarily and directly departure from conjugal living, while indirectly also enumerating reasons for legal separation. However, this interpretation was not universally held. Peter Huizing, professor at the Pontifical Gregorian University, taught that

> [t]he causes enumerated [in canon 1131 §1, *CIC/17*] […] are all culpable on the part of one spouse, who thereby loses the right to communion. There are also other non-culpable causes, which this canon does not address, for which it is nevertheless permissible to break communion, such as a contagious disease of one spouse which creates a danger to the body. In such a case, the spouse does not lose the right to communion, but because of a greater harm, the obligation corresponding to the right is suspended.[49]

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[46] A novel inversion of this principle is given in the argument that "[i]t does not seem that sexual intercourse is a requisite condition for tacit condonation [of adultery], for marital affection is also displayed by kissing, embracing, etc" (M.J. MATHIS and N.W. MEYER, *The Pastoral Companion: A Handbook of Canon Law*, 12th ed., Chicago, IL, Franciscan Herald Press, 1961, 288-289).

[47] Not least because some of the most prominent commentaries on the codified law are but revised editions of commentaries on the law prior to codification. For example, the various editions of Gasparri's *Tratcatus canonicus de matrimonio*, and Vidal's revision of Wernz: WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*; WERNZ and VIDAL, *Ius canonicum*.

[48] "Ut sit *formale*, non materiale tantum sine interno consensu, ex *errore* aut *vi* procedens: poena enim divortii supponit praecedentem culpam" (F. CAPELLO, *Tractatus canonico-moralis de sacramentis*, 4th ed., vol. 5, *De matrimonio*, Rome, Marietti, 1947, 821, no. 826.1, 3º). Emphasis in original.

[49] "Causae enumeratae non sunt taxative, sed exemplative, ut ex ipso tenore canonis liquet. Sunt omnes culposae ex parte alterius coniugis, qui inde ius ad communionem perdit. Sunt et aliae causae non culposae, quas hic canon non respicit, ob quas tamen licet abrumpere communionem, ut morbus contagiosus compartis qui corporis periculum creat. Tunc compars non amittit ius ad communionem, sed propter damnum gravius obligatio iuri respondens suspenditur" (P. HUIZING, *Schema structurae iuris canonici latini de matrimonio cum notis bibliographicis*, Rome, Pontificia Universitas Gregoriana, 1963, 681).

For Huizing, the enumerated reasons must result from fault or else they do not apply at all; but outside of the terms of this canon, non-culpable causes permit a spouse to break communion (*communio abrumpere*), i.e. to depart the conjugal life. Huizing seems to believe that the "danger to the body" mentioned in the canon applies only in case of fault, and that danger to the body due to disease is therefore not among the dangers to the body mentioned by the canon. Nevertheless, the concrete application of Huizing's understanding—that a spouse may suspend conjugal living for reasons not morally imputable to the other spouse—is consistent with that of other canonists, even as he roots it outside of the canon. Huizing's distinction between the loss of the right which can only occur via fault, and suspension of the obligation corresponding to the right which can occur without fault, is broadly consistent with a conventional application and more dexterously expressed.

Gasparri's commentary in 1932[50] on the question of separation for reasons of danger is almost identical to that given in 1904;[51] the only changes concern updating the citations from the *Corpus iuris canonici* to the corresponding canons of the 1917 Code, and the removal of a sentence which rejected the idea that punishment for various crimes could be legitimate reasons for separation (*divortium*), "contrary to what the recent civil laws establish."[52] This text was presumably removed because the line "si vitam criminosam et ignominiosam ducat" was introduced among the reasons for separation in canon 1131, §1; to Gasparri this must have been a new provision, making up for a *lacuna* in—or

[50] See GASPARRI, *Tractatus canonicus de matrimonio (1932)*, 247-248, no. 1177.

[51] See GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 331–332, no. 1371.

[52] "Alia delicta aut poenae, e. g., furtum, homicidium, damnatio ad triremes, ad carcerem, etc., per se non sunt sufficiens causa divortii […], contra id quod statuunt recentiores civiles leges" (ibid., 332).

even contradicting—the prior law. In the codified law, then, a criminal or ignominious life, even without danger to the innocent spouse, is a new reason for separation, of positive ecclesiastical law. Commentators on separation in the *Corpus iuris canonici* do not question whether the decretal letters established law by *fiat*, or described the rights and obligations of spouses intrinsic to the nature of marriage. The *Liber extra* contains decretal letters concerning culturally specific reasons for separation, cheek-by-jowl with letters addressing matters of sacramental theology now held to be immutable. Therefore, the first codification process provides important, and arguably overdue, insight into which reasons for separation are held to be intrinsic to marriage, and which are created by the positive ecclesiastical law.

"Condemnation to the galleys" was no less archaic a concept in 1932 than it was when Gasparri rejected it as a reason for separation in 1904; the removal of the whole sentence must have been due to a perceived change in the law, not merely an updating. This change, in addition to its own significance, demonstrates that other elements of Gasparri's commentary which did remain unchanged from 1904 to 1932 may not have been merely convenient reprints of the prior text, but indicate his opinion that in most respects the law regarding separation did not substantially change at the time of codification, and nor, therefore, from the Middle Ages.

A recurring phenomenon in the modern history of canonical separation is the repetition of the text of the law without consideration of the social and legal context in which it was written, knowledge of which is necessary to understand the legal text in all its aspects and implications. This ignorance of, or lack of engagement with, the "world of the context" of the law precludes in turn any meaningful consideration of whether and to what

extent the presuppositions buttressing specific formulations of positive ecclesiastical law continue to exist, even when the text of the law is relatively unchanged. In 1904, Gasparri considered condemnation to the galleys as though it were a current occurrence afflicting marriages, removing the reference only when explicitly provided by codification. In a similar manner, later commentators recite and attempt to apply the law regarding separation even after significant changes which undermined the foundations of canonical provision for the obligations of separating spouses, even as many of the words forming the superstructure of the text of the law remained untouched. This seems to apply especially to the loss of civil effectiveness of ecclesiastical marriage law, and the personalist revolution in the understanding of marriage itself.

2.1.6. Procedure for Separation

Whatever the cause, if the matter is certain and there is danger in delay then the spouse can leave on his own authority; otherwise, the decision is to be made by authority of the local ordinary. The authority competent regarding separation is largely the same in the codified law as in the decretal era, albeit with a similar lack of specificity. Temporary separation by a spouse's own authority (for reasons other than adultery) is licit but does not have public or perpetual effect.

However, a close reading of canon 1131, §1, which provides what are universally understood as the reasons for separation, including by action of the ecclesiastical authority, only mentions explicitly the legitimate cause for departure, not legal separation. It is not clear from the text of the canon, then, what is the legal nature of the decision made by the local ordinary according to the provision of the same canon; whether it is a decision of

legal separation in all its effects, or merely of licit departure. The official interpretation of canon 1131, §1 further complicates the issue:

> Question. Whether the separation of spouses for the causes mentioned in c. 1131, § 1, are to be decided by the administrative form.
>
> Reply. In the affirmative, unless the Ordinary determine otherwise either *ex officio* or at the insistence of the parties.[53]

Taken at face value, the interpretation appears to say that separation for the "causes" (*causae*) mentioned in canon 1131, §1, are generally to be decided by an administrative process. Yet what, precisely, does *causae* mean here? Does it mean "for the reasons" mentioned in canon 1131, §1, i.e. excluding the reason of adultery (cc. 1129-1130) and entry into religious life (not mentioned in any canon), but including all of the reasons mentioned in the paragraph? Or does it mean "in the *causae* according to the process" mentioned in canon 1131, §1, therefore excluding those which are not procedural causes according to the provisions of the same paragraph? Those which are not procedural causes, but which still fall under the substantive provisions of the same paragraph, would include the decision to depart the conjugal life *propria auctoritate* in danger of delay. Indeed, could the interpretation be read as a demand that the *forma administrativa* be used instead of a more informal procedure?

The *dubium* does not specify what is the deprecated alternative to the administrative form. The most likely explanation is the judicial process; indeed, a sentence of the Roman Rota of February 4, 1925 affirms—against an objection—that the reference in canon 1131,

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[53] "D[ubium]. An separatio coniugum ob causas, de quibus in canone 1131 § 1, forma administrativa decernenda sit. R[esponsum]. Affirmative, nisi ab Ordinario aliter statuatur ex officio vel ad instantiam partium" (COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CANONS OF THE CODE, Responses on the Separation of Spouses, in *AAS*, 24 [1932], 284). See also ID., Administrative Decree of Separation, 25 June, 1932, in *CLD*, vol. 1, Milwaukee, WI, Bruce, 1934, 554. I have used my own translation, not that in *CLD*.

§1 to the *auctorit[as] Ordinarii loci* must include judicial power, since the Ordinary has judicial power.[54]

There is something of a *lacuna* in the different forms of temporary separation; *viz*., the legal separation, and mere departure. Canon 1131, §1 provides the list of reasons used in practice for legal separation, but the text of the canon lists them as reasons for departure which are sufficient *propria auctoritate* if there is danger in delay. This being the case, the law does not distinguish the reasons sufficient for mere departure alone (i.e. suspending, at least for a time, the obligation of cohabitation) from the reasons for legal separation which suspends the obligation of mutual support except as established by ecclesiastical authority. It would be hasty to assume that the distinction is essentially defined by the form, with full separated status being established by ecclesiastical authority while mere departure being established only *propria auctoritate*, for the law does not make this differentiation.

2.2. The Revision of the Codified Law: *De matrimonio*

A complete recounting of the coalescence of the substantive and procedural canons regarding separation in the 1983 Code of Canon Law is outside the scope of this work; the reader is directed to J. Kamas[55] generally, to A.R. St. Louis-Sanchez[56] especially regarding canon 1152, and to E. Peters[57] regarding the *itinera* of the texts from the *Schema de*

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[54] TRIBUNAL OF THE ROMAN ROTA, *coram* FLORCZAK, 4 February 1925, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 17 (1925), no. 2. Summarized in "Temporary Separation by Judicial Decree, 4 Feb., 1925," in *CLD*, 5th ed., vol. 2, Milwaukee, WI, Bruce, 1949, 344.

[55] See J. KAMAS, *The Separation of the Spouses with the Bond Remaining: Historical and Canonical Study with Pastoral Applications*, Tesi Gregoriana, Serie diritto canonico, no. 20, Rome, Pontificia Università Gregoriana, 1997.

[56] See A.R. ST. LOUIS-SANCHEZ, "Separation of Spouses *propria auctoritate* and the Nature of Ecclesiastical Intervention," in *Studia canonica*, 48 (2014), 493–530.

[57] See E. PETERS, *Incrementa in progressu: 1983 Codicis iuris canonici: With a Multilingual Introduction*, Collection Gratianus, Montreal, Wilson & Lafleur, 2005.

matrimonio and *Schema de processibus* onwards. Nevertheless, the opportunity is taken here to make observations on certain records of the Pontifical Commission for the Revision of the Code of Canon Law, some of which have been made public only since the completion of Kamas's thesis.[58] These additional minutes and drafts provide insight into the formation of the text prior to the *Schema de matrimonio* and the *Schema de processibus*, and it was in this period that the texts underwent the greatest modifications and the most fundamental questioning from the consultors. This chapter addresses the revision of canons 1128-1132, *CIC/17* into canons 1151–1155, *CIC/83*, via the *Coetus* working on the *Schema de matrimonio* and on the *Schema de sacramentis*. The creation of canons 1692-1696, *CIC/83*, will be addressed in Chapter Three.

The current law of the Latin Church is found primarily in the canons of the 1983 Code of Canon Law; the text of which is promulgated under the authority of the supreme legislator, and also authentically interpreted by him; formally, it is not the product of those who assisted with the drafting of its various parts. However, examination of various elements of the drafting process for the canons regarding separation of the spouses illustrates the various attitudes present among the consultors, revealing the diversity of perspectives not only regarding how the law should be revised but also regarding how the law of the 1917 Code was to be understood. Many of the comments of the consultors, and the drafts proposed by them, provide insight into their understanding of the law regarding separation of the spouses with the bond remaining under the 1917 Code and of the fundamental question of the *role of law* regarding this institute, especially in the context of

[58] See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De matrimonio* (Sessio XVI), in *Communicationes*, 34 (2002), 230–260; ID., Coetus studiorum *De processibus* (Sessio XI), in *Communicationes*, 40 (2008), 143–165.

the formulation of the 1983 Code of Canon Law in the aftermath of the Second Vatican Council.

2.2.1. The Right and Obligation Regarding the Conjugal Life

Canon 1128 of the 1917 Code provided that "spouses must preserve the communion of conjugal life, unless a just cause excuses them." The first proposed revision expressed a similar idea as the existing canon, but added a "right" to the existing obligation, with the words "spouses have the right and duty to preserve the communion of conjugal life, unless a legitimate cause excuses them."[59]

Huizing, as relator, proposed a further modification: "Spouses have the right from one another to the communion of conjugal life, unless they have been legitimately deprived of it."[60] Essential to understanding this proposal is the note that "the Most Reverend Relator considers c. 1128, as it is in the [1917] Code, to have a moral character, which more pertains to the private life of spouses. However, the purpose of this article of the Code is to establish legal obligations and rights, which also have a social dimension."[61] This is consistent with his view of canon 1131 having a strictly legal character regarding the right to conjugal living, with the moral nature of the suspension of the obligation. Huizing emphasized a

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[59] "Coniuges habent ius et officium servandi communionem vitae coniugalis, nisi legitima causa eos excuset" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De matrimonio* [Sessio XVI], canones, in *Communicationes*, 34 [2002], 260).

[60] "Coniuges erga invicem ius habent ad vitae coniugalis communionem, nisi eo legitime privati fuerint" (ibid., 235).

[61] "Rev.mus Relator censet can. 1128, prout est in Codice, habere indolem moralem, quae potius ad vitam privatam coniugum spectat. Finis autem huius articuli Codicis est statuere obligationes iuridicas et iura, quae habent etiam dimensionem socialem" (ibid.). The explanation is worded slightly differently in the agenda held in the archives of the DLT: "hic articulus non agit de obligatione morali, quae potius ad vitam privatam coniugum spectat; sed de obligatione iuridica et de jure, quod habet etiam dimensionem socialem" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Acta et documenta coetus studi «de matrimonio»*, in DLTA, vol. 4, 8).

distinction and tension between law and morality (not often clear prior to codification and often conflated by many commentators even after codification), and favored its resolution with a canon which was more explicitly legal than the existing canon which he considered to be merely moral and private. It seems significant that a member of the Commission held this opinion; certainly the tone of commentaries on the 1917 Code (other than that of Huizing himself) does not indicate that the obligation is *merely* moral and private, and not legal. The question of the distinction between the legal and the moral, and the attempt to remove the latter from a code of laws, seems to have been a recurring theme of Huizing's. His comments regarding the penal law of the Church seem worth considering even at some length since they succinctly summarize, *mutatis mutandis*, a recurring (if often unspoken) question regarding the nature and application of the law regarding separation of the spouses in the modern era and the idea of enforcement of matrimonial rights and obligations:

> To prove that the Church needs a penal code it has been argued that coercive power (*potestas coactiva*) is just as necessary to the Church as law at large. It is said that the Church is a perfect society (*societas perfecta*) and that this requires an external juridical ordering of the life of the community. Coercion is an essential element of law, or at least a necessary aspect of it. […]
>
> This point of view applies to Church order a concept of law which is valid for law and order in secular States but not for the Church. It is true that in earlier days excommunication and other punitive measures of the Church had a pronounced coercive character. This was, first of all, because in the religiously homogeneous society of those days these measures were backed by public opinion, and because if the transgressor resisted such ecclesiastical measures he would ultimately have to face the "secular arm." But even in those days, certainly in current teaching, the emphasis fell on the essentially religious and ecclesiastical meaning of such measures. They meant to bring the transgressor to conversion and penance, and to protect the religious community against attacks on their faith or the order of their communal life.
>
> The principle of religious freedom, accepted by the Council, now forces us to abandon every form of social coercion, also within the Church. Membership of this community, participation in the liturgical celebrations and the Church's apostolic mission, the acceptance and execution of ecclesiastical offices and services—all this the Church can only wish to have on an exclusively voluntary basis. Any measures by which the Church excludes somebody from this community […] can only be meant today as measures to maintain the community of worship and proclamation, first in actual fact, then also verbally, as an authentic and credible sign in this world. The Church will obviously hope

> that her judgment will bring possible transgressors to a change of heart, but this, too, must be wholly voluntary and not as the result of coercive discipline. […]
>
> It would appear to be more logical to drop the whole idea of "penal law" in the Church, and to talk rather of a disciplinary Church order. Such an order is not so much concerned with judging or condemning the individual as with judging what kind of conduct would be incompatible with the nature and mission of the ecclesiastical community.[62]

If we summarize Huizing's argument regarding penal law to attempt to explain his proposal to the *Coetus de matrimonio* regarding the right-duty to the communion of conjugal life, we might phrase it something like this: "When compliance with the Church's matrimonial law, at least regarding marital cohabitation and separation, is merely voluntary and can no longer be enforced by coercion (or *should* no longer be enforced with coercion), then to what extent is it *law* any longer? Has it not become disciplinary or moral?"

Huizing did not favor the complete removal of the canons regarding separation, but merely their modification and replacement according to a different canonical—even, ecclesiological—order. Still writing regarding penal law, but yet again with obvious application to marital separation, he continued:

> A public procedure in the sense that everyone knows about it will not be desirable in many cases, but it is desirable in the sense that those who do the judging genuinely represent the community and that their judgment should reflect the judgment of the community not only in a formally juridical way but also in terms of social reality. […] The denial of participation in the Eucharist as pronounced, for instance, by the pastoral council of a deanery or a diocese, would be felt far more deeply as conveying the witness of the community than if only the bishop or the episcopal Bench pronounced this sentence.[63]

Huizing is arguing, then, that the application of the law—and of the moral and disciplinary measures which he distinguishes from true law—must be supported by the community, and indeed may be all the more efficacious if imposed by a body formed from or representative of the community. If the decisions of the ecclesiastical authority, howsoever constituted,

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[62] P. HUIZING, "Crime and Punishment in the Church," in *Concilium*, 8 (1967), 57–58.

[63] Ibid., 63–64.

"reflect the judgment of the community […] in a social way," then judgments regarding the non-fulfillment of marital rights (and even a consequent "denial of participation in the Eucharist") may be useful or even necessary for the maintenance of the public order regarding marriage. However, if the "social reality" includes a fundamental rejection of the idea of external (even community-based) judgment regarding conjugal communion, then there is no meaningful role for a disciplinary measure, let alone law, since it would not be "backed by public opinion."[64]

Other consultors disagreed with Huizing's suggested modification, stating that "that obligation [i.e. the one contained in the existing Code of Canon Law] has a legal character and not only a moral one."[65] Furthermore, a challenge was raised to Huizing's concept of a right to communion of life, "because the communion of life is not a right, but an obligation that follows from the marriage itself,"[66] and therefore—implicitly—not subject to modification by positive ecclesiastical law. Again, this dispute harks back to the distinction between the right and the obligation taught by Huizing, and also to his idiosyncratic interpretation that the suspension of the obligation of conjugal living for non-culpable causes was not addressed in the Code. If the relevant consultors could not agree on whether the primary canon of the Code regarding the obligation to preserve the communion of conjugal life had any legal significance, and whether or not it was proper to

[64] In this light, it is interesting to consider what a community-based procedure could have looked like for the enforcement of matrimonial rights and obligations; though since Huizing was a member of the *Coetus de matrimonio*, not the *Coetus de processibus*, he did not make such a suggestion directly.

[65] "Alii Consultores praeferunt formulam Codicis, […] quia illa obligatio habet indolem iuridicam et non tantum moralem" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De matrimonio* [Sessio XVI], 236).

[66] "[…] quia communio vitae non est ius, sed obligatio quae consequitur ad ipsum matrimonium" (ibid.). As recorded, the proposed new canon referred to the *communio vitae conjugalis* (communion of conjugal life) while this comment referred to the *communio vitae* (communion of life), but in context it appears that the consultors understood these to be essentially equivalent terms.

speak of a right in this regard, perhaps this ought to temper our surprise at the great variety of interpretations held outside of the Code Commission.

Huizing's proposal was not accepted in its entirety. By votes of 6-3 in each case, the consultors approved changes to the effect that "spouses have a right and a duty to maintain the communion of conjugal life"[67] (rather than simply the right), "unless a legitimate cause excuses them"[68] (rather than "unless legitimately deprived of the right"). The published *Schema* therefore maintained the "obligation" of the 1917 Code and adds the "right" of Huizing's initial proposed revision, while also (without comment) changing the object of the right and obligation from the communion of conjugal life *sensu strictu* to its maintenance; an effort more within the ability of the other spouse to deliver.

The commission also entertained the suggestion of some (*nonnulli*) that the entire matter not be retained in the Code, but rather be entrusted to episcopal conferences, which could, where needed, issue particular laws on the matter according to the customs of the peoples.[69] This was rejected, however, by the consultors following a small discussion, after Onclin observed that at least the primary reason for separation (that is, adultery) has its

[67] "[…] dicatur 'Coniuges habent ius et officium servandi communionem vitae coniugalis'" (ibid.).

[68] "[…] dicatur '[...] nisi legitima causa eos excuset'" (ibid.).

[69] "Nonnulli suggesserunt ut tota materia de separatione coniugum manente vinculo (cann. 347-351) non retineatur in Codice, sed potius committatur Episcoporum Conferentiis quae, ubi opus fuerit, leges particulares de re ferre poterunt secundum mores populorum" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum de iure matrimoniali [Series Altera, Sessio V], in *Communicationes*, 10 [1978], 118).

foundation in sacred scripture,[70] implying that the matter was not to be treated as a *tabula rasa* for local regulation according to the customs of the peoples.

As secretary to the Commission, Onclin had both access to and time to consider all of the written observations regarding the draft texts, not merely the circulated summaries, giving him greater insight into the thinking of the world's episcopal conferences—and therefore, some indication of the content of particular legislation which might have been created by the same episcopal conferences, if given the opportunity. It might have been clear to him (as it is clear to us) that some of the comments submitted by episcopal conferences regarding separation, even if they reflected "the customs of the peoples," were difficult to reconcile with the canonical tradition even regarding matters held to be of divine law. For example, it was "the unanimous opinion of the Zambia Episcopal Conference that the duty of mutual forgiveness is not sufficiently emphasized in the Church's marriage laws. It is also the opinion of the Zambia Episcopal Conference that the innocent party's exercise of the right to separation from a partner who has committed one single act of adultery is questionable and that the exercise of the right to separation usually produces undesirable moral effects."[71] Although the discrepancy is addressed specifically neither by the Zambia Episcopal Conference nor by the Commission, this opinion amounts to a rejection of the traditional interpretation of the "Matthean exception" of Matt. 5:32 and

[70] "De sententia alicuius Consultoris adest ratio peculiaris retinendi hos canones in Codice, quia causa praecipua (adulterium) ius dans ad instituendam separationem, habet fundamentum in S. Scriptura. Post parvam discussionem, Consultoribus placet retinere hos canones in Codice" (ibid.). The fact that it was Onclin who made this observation is revealed in PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum de iure matrimoniali (Series Altera, Sessio V (recognitio animadversionum ab organis consultationis prolatarum): Relatio recognitio schematis) (1975), in DLTA 152.07.02.01, 129.

[71] ZAMBIA EPISCOPAL CONFERENCE, Letter "Schema documenti pontificia quo disciplina canonica de sacramentis recognoscitur: De matrimonio," 21 July 1975, in DLTA 150.02.1.26, 27.

19:9, accepted as divine positive law,[72] that even one act of adultery gives the other party the right to separate.

The Episcopal Conference of Malawi, while not mentioning adultery specifically, had strikingly similar concerns to their counterparts in Zambia. Specifically, in response to the same draft canon, "[t]he Episcopal Conference unanimously thought that the duty of mutual forgiveness is not sufficiently emphasised in the Church's marriage Laws. To emphasise so much on separation will, in our local circumstances, create misunderstandings in the minds of many people. Separation could easily be interpreted as dissolution and the consequences will be more harmful than good."[73] Examples of the "undesirable moral effects" hinted by the Zambia Episcopal Conference are then listed by the Episcopal Conference of Malawi:

> 1) Physical separation will be understood as dissolution of marriage.
>
> 2) After separation children suffer.
>
> 3) Christians who are not honest will use this law for their selfish motives.
>
> 4) It would create occasions for incontinence, promiscuity, concubinage, and unlawful quasi-conjugal unions.[74]

What these African responses have in common, in contrast to counterparts from the western world and even from the developing world outside of Africa, is preeminent consideration of the effects of marital separation upon society, rather than a focus on the rights of the spouses alone (a phenomenon repeated in comments regarding the *Schema de processibus*, discussed in Chapter Three).

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[72] See e.g. GASPARRI, *Tractatus canonicus de matrimonio (1932)*, 242-243, no. 1171.

[73] EPISCOPAL CONFERENCE OF MALAWI, Letter regarding the *Schema de sacramentis*, September 3, 1975, in DLTA 150.02.1.122.

[74] Ibid.

No bishop of the United States commented via the episcopal conference on the canons regarding separation; a lack of interest which is notable, perhaps, given their collated comments on almost every other canon of the *Schema de sacramentis*.[75] The Canon Law Society of America[76] and the School of Canon Law at the Catholic University of America also did not comment regarding separation.[77] The only comments regarding the substantive canons on separation of spouses with the bond remaining from an institution intimately familiar with the reality of the Church in the United States came from the Faculty of Canon Law of Saint Paul University. Regarding canon 350 of the *Schema de sacramentis*,[78] Saint Paul University Faculty of Canon Law suggested that "[r]eference to the local Ordinary should be omitted in this canon. If, in some countries, it is necessary to retain the Ordinary's intervention, then the entire matter should be left to particular law."[79] Canon 350 §1 of the *Schema de sacramentis* at that time already stated the right to depart "etiam propria auctoritate, si periculum sit in mora,"[80] providing for the immediate safety of a spouse or offspring in danger or enduring harshness, and therefore it is not clear what benefit the complete removal of reference to the local Ordinary would have provided,

[75] See NCCB, Letter "U.S. Episcopate Sacramental Law," 1975, in DLTA 150.02.1.110. The few US bishops who commented on the *Schema de sacramentis* directly to the Commission, not via the NCCB, also did not comment on the canons regarding separation with the bond remaining. See in DLTA 150.02.01: 30 [Wichita]; 139 [St. Louis]; 159 [New Orleans]; 185 [Pueblo].

[76] See CLSA, Letter regarding the *Schema de sacramentis*, July 2, 1975, in DLTA 151.01.32.

[77] See CATHOLIC UNIVERSITY OF AMERICA SCHOOL OF CANON LAW, Letter regarding the *Schema de sacramentis*, n.d. 1975, in DLTA 150.02.143.

[78] That is, the draft canon replacing *CIC/17*, c. 1132, and which would later become c. 1153 in 1983, listing reasons for departure and separation.

[79] SAINT PAUL UNIVERSITY FACULTY OF CANON LAW, Letter regarding the *Schema de sacramentis*, July 1975, in DLTA 151.01.81.

[80] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema documenti pontificii quo disciplina canonica de sacramentis recognoscitur*, Typis polyglottis Vaticanis, 1975.

except as a statement against the very idea of the intervention of the hierarchical authority of the Church in matrimonial disputes.[81]

2.2.2. Reasons for Separation

The first draft of *De matrimonio* significantly modified the reasons for separation provided in the 1917 Code, and this revision remained substantially in place through to the promulgated text of the 1983 Code. The initial proposed text of the revised canon 1131 stated:

> § 1. - If one spouse makes the common life dangerous or too difficult either for the spouse or for the offspring, this provides a legitimate reason for leaving, with the authority of the local Ordinary, and even on one's own authority, if this is certain and there is danger in delay.
>
> § 2. - It is for the Conferences of Bishops to establish the reasons for separation, according to the customs of the people and the circumstances of the places.

[81] A lesser version of this attitude is found in the response of the Antilles Episcopal Conference, which relayed the opinion of six bishops in response to cc. 348, §3 and 350, §1 of the *Schema de sacramentis*. Canon 348 of the *Schema* addressed adultery, as an evolutionary stage from *CIC/17,* c. 1129, to c. 1152 of 1983. The conference related: "It should be made clear that permission of the Bishop is not required for separation when the separation is mutually agreed on. The Bishop's permission is required in order to protect the rights of that party who wishes to resume common habitation. But it would be unjust of the Bishop to impose common habitation on a couple both of whom do not want to live together" (ANTILLES EPISCOPAL CONFERENCE, Letter regarding the *Schema de sacramentis*, September 19, 1975, 20–21). While this was contrary to the law then in force regarding separation by mutual consent *in every circumstance*, and certainly in tension with elements of the canonical tradition which at times have not hesitated to attempt "to impose common habitation on a couple both of whom do not want to live together," and even if contrary to possible interpretations of the teachings of the Second Vatican Council (cf. *infra*), it was not evidently outside the scope of the revision project—arguably in contrast to the aforementioned Zambian intervention. The Antilles comment appears to endorse the usage of ecclesiastical permission as a tool "to protect the rights of that party who wishes to resume common habitation."

Although of course the particular churches of the Antilles Episcopal Conference were not located in the United States (except for the Territorial Prelature of the Virgin Islands), several bishop members of the conference were American and may have brought US perspectives to their work. For example, the bishop of Nassau, Paul Hagerty, was American (*Annuario Pontificio per l'anno 1976*, Tipografia poliglotta Vaticana, 1975, 364), as were Edward Harper, apostolic prefect of the Territorial Prelature of the Virgin Islands (ibid., 687, 854–855), Robert Hodapp, bishop of Belize (ibid., 73), and Brian Hennessey, bishop of Hamilton in Bermuda (ibid., 214). For member particular churches of the Antilles Episcopal Conference in 1975, see ibid., 942.

> § 3. - In all cases, once the reason for separation ceases, the common way of life must be restored (unless it has been decided otherwise in the decree of separation).[82]

Gone are the specific reasons from the 1917 Code: "If one spouse gives his name to a non-Catholic sect; if he raises the offspring non-Catholic; if he leads a criminal or disgraceful life." As noted above, these clauses were not glosses on the "grave danger to the soul or body of the other," but were titles of separation in their own right, for the purpose of medicinal punishment of the errant spouse and with legal roots in Roman and medieval contract law. The explanation given for the removal, however, is not an affirmation of a personalist view of marriage as the donation and acceptance of each other,[83] nor reaction against a model of marriage which allowed a spouse to punish the other by withdrawing from conjugal living, but "because they are scarcely in accordance with the teaching of the Declaration *Dignitatis humanae* of the Second Vatican Council."[84] This explanation is difficult to understand in its entirety; for *Dignitatis humanae* did not create a right for Catholics to commit schism according to the dictates of conscience, even if it could be used

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[82] "§ 1. – Si alter coniux vitam communem sive coniugi sive filiis periculosam vel nimis duram reddat, huic legitimam praebet causam discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de ea certo constet et periculum sit in mora.

§ 2. – Conferentiarum Episcoporum est causas separationis, pro moribus populorum et locorum circumstantiis, statuere.

§ 3. – In omnibus casibus, causa separationis cessante, vitae consuetudo restauranda est (nisi in decreto separationis aliter statutum sit)" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De matrimonio* [Sessio XVI], canones," 261).

[83] See SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, December 7, 1965 [=*GS*], no. 48, in *AAS*, 58 (1966), 1067; in *FLANNERY1*, 950.

[84] "Rev.mus Relator censet quod primae duae causae recensitae in can. 1131, § 1, scilicet «si alter coniux sectae acatholicae nomen dederit» et «si prolem acatholice educaverit», supprimi debent, quia parum conveniunt cum doctrina Declarationis *Dignitatis humanae*, Conc. Vat. II" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De matrimonio* [Sessio XVI], 246). No specific passage of *Dignitatis humanae* is cited, but it would appear to be supported by a line from number 5: "[P]arents […] have the right to decide in accordance with their own religious beliefs the form of religious upbringing which is to be given to their children" (SECOND VATICAN COUNCIL, Declaration on Religious Liberty *Dignitatis humanae*, 7 December 1965, no. 5, in *AAS*, 58 [1966], 933, English translation in *FLANNERY1*, 803).

to argue in favor of the right of a parent (albeit only a non-Catholic one[85]) to attempt to raise a child in the non-Catholic religion. Also gone are the named dangers "to the soul or body of the other," and the "cruelty" which specified how the common life was rendered too difficult. The former reappears in the 1980 Schema;[86] the latter is gone permanently.[87] A new addition however, is that the danger or difficulty justifying separation may be not only to the other spouse but also to the offspring, which remains present in the revised Code.

In general, the modifications proposed at this stage, and the discussions thereupon, do not have a single driving theme. There is the removal of some named reasons for separation, but the addition of others. There is some simplification, reducing the distinct reasons for separation to an absolute minimum while preserving the rights of the parties and the integrity of marital cohabitation. Regarding the manner of intervention of the ecclesiastical authority (more a matter for the *Coetus de processibus*, discussed in Chapter Three), in the *Coetus de matrimonio* there was some disagreement about whether a particular phrase would oblige active intervention of the ecclesiastical authority prior to *de facto* separation, but there was unspoken unanimity that the revised law should not oblige such active intervention.

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[85] "[W]hile the religious freedom which men demand in fulfilling their obligation to worship God has to do with freedom from coercion in civil society, it leaves intact the traditional Catholic teaching on the moral duty of individuals and societies towards the true religion and the one Church of Christ" (SECOND VATICAN COUNCIL, Declaration on Religious Liberty *Dignitatis humanae*, no. 1, in *AAS*, 58 [1966], 930, English translation in *FLANNERY1*, 800).

[86] See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema Codicis iuris canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum*, Typis polyglottis Vaticanis, 1980, canon 1107 §1.

[87] Removed by vote on November 8, 1972: "(3) dicatur «... *ex sevitiis nimis* duram reddat» (Rev.mus primus Consultor): Placet 2; non placet 8" [emphasis in original] (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De matrimonio* [Sessio XVI], 247).

The discussion does not address explicitly the distinction between legal separation, with the suspension of the parties' obligation of mutual support toward each other, versus the mere departure made licit—in cases of necessity, on the spouse's own authority—in certain dangerous situations. However, the discussions on one point are relevant to the distinction between departure (or *de facto* separation) and complete separated status. Huizing as relator persistently argued in favor of the inclusion of *gravis culpa* in the draft of the revised text of canon 1131, §1, though not explaining (at least as recorded in the minutes) why this was important to him.[88] The first consultor argued for its removal, since "there is a case of intolerable common life even without serious fault by the one causing it."[89] Implicit in this rejoinder is a rejection of Huizing's interpretation of *CIC/17* c. 1131, noted *supra*, that non-culpable departure is permissible but not addressed by the canon; the first consultor expects that it should (continue to be) addressed by the canon. The majoritarian interpretation of this canon—both in the 1917 Code and in its revision-in-progress state at that time—did not refer solely (or arguably, even primarily) to *divortium* as a legal separation; it explained the reasons for licit departure from the conjugal life, but neither the departure nor the cause for it (necessarily) would create a state of legal separation *seu divortium*. For mere departure, no fault was required on the part of either spouse. Therefore Huizing's proposal was an attempt to bring the revised codified law into conformity with his interpretation of what the 1917 Code already said; from Huizing's perspective this would not have been a change in the law at all, since he argued that *CIC/17*

[88] See ibid., 246–247.

[89] "Rev.mus primus Consultor vult supprimere verba «gravi culpa», quia datur casus intolerabilis vitae communis etiam sine gravi culpa dantis causam" (ibid., 246).

c. 1131 §1 referred to legal separation and not to departure, which for him was either a non-legal matter, or else was to be understood as law outside of the 1917 Code.

The expression *gravis culpa* was deleted as a result of a vote, 7-3, among the consultors,[90] and the *Schema de sacramentis*, canon 350, did not mention fault. Nevertheless, there was a later suggestion discussed by the members of the *coetus* to add *culpabiliter* (culpably) as part of a wider reorganization of the draft canon. The broader reorganization was accepted with the exception of the word *culpabiliter*;[91] and therefore, the canon remained, as *CIC/17* c. 1131 §1 had been, indifferent to the issue of fault, while still being applicable to both simple departure and legal separation, the latter (still unstated in the canon) only with fault.

Through these proposals and comments are revealed again the fundamental disagreements and widely differing interpretations of the nature and purpose of the canons regarding the separation of the spouses with the bond remaining. Noting the many and varied understandings of the *ius vigens* implicit in the responses of the various universities and episcopal conferences as well as displayed among the consultors and members of the Commission, it appears that even if there was arguably a "conventional" understanding of separation to be found in the works of the classic commentators, it should not be assumed that this was widely held or even known.

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[90] See ibid., 247.

[91] "Suggestum est ut initio ita dicatur: «Si alteruter coniugum culpabiliter grave seu animi seu corporis periculum alteri aut proli facessat, vel aliter vitam communem nimis duram reddat, alteri legitimam etc.». Propositio omnibus placet, dempto tamen verbo «culpabiliter». Proponente aliquo Consultore, ultima verba § 1 ita mutantur: «... auctoritate Ordinarii loci et, si periculum sit in mora, etiam propria auctoritate»" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum de iure matrimoniali [Series Altera, Sessio V], 120).

2.2.3. Procedure for Separation

While the discussion on the procedure to be observed for separation is, for the most part, naturally the purview of the *Coetus de processibus*, and will be addressed in Chapter Three of this work, nevertheless a discussion did arise involving this question at least implicitly in the *Coetus de matrimonio*.

One consultor did not like the initially suggested formulation "unless they have been legitimately deprived of [the right to conjugal cohabitation]," "because the new formula of the Most Reverend Relator is ambiguous […] as if always requiring the intervention of legitimate authority to have a separation,"[92] but this objection was rejected by all the other consultors. Although the discussion on this point is not recorded, we might observe that the formulation was *not* ambiguous, since legitimate deprivation of the right would not need to occur by ecclesiastical intervention, as provided for in both canon 1131, §1 of the 1917 Code and in the revision proposed at that time.[93] Nevertheless, from an historical perspective it is not insignificant that one consultor believed that the phrase "unless legitimately deprived of it" bespoke an exclusive reference to ecclesiastical intervention, as though "legitimate deprivation" could not occur *ipso iure* or indeed *propria auctoritate* as provided for by the existing law. Similarly regarding the *Schema de sacramentis*, which stated at canon 350 §1: "If either of the spouses makes the common life dangerous or excessively difficult for either the other spouse or the offspring, this

[92] "[…] quia nova formula Rev.mi Relatoris est aequivoca […] quasi requiratur semper interventus legitimae auctoritatis ad habendam separationem" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, "Coetus studiorum 'De matrimonio' [Sessio XVI], 236).

[93] "Si alter coniux vitam communem sive coniugi sive filiis periculosam vel nimis duram reddat, huic legitimam praebet causam discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de ea certo constet et periculum sit in mora" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, "Coetus studiorum 'De matrimonio' [Sessio XVI], canones," 261).

provides the other with legitimate cause for leaving, with the authority of the local Ordinary, and even by one's own authority if there is danger in delay,"[94] "[s]ome have proposed the removal of the words 'with the authority of the local Ordinary,' so that particular law can address the involvement of the Ordinary wherever deemed necessary. However, the consultors consider it very suitable that such a grave matter of separation not be unknown to the legitimate ecclesiastical authority, hence they do not agree to delete those words."[95] There was, therefore, a desire from the *coetus* to maintain the involvement of ecclesiastical authority as a matter of principle, even though—as in the 1917 *Code*—departure was authorized by the spouse alone if there was danger in delay. From those proposing removal of the words "with the authority of the local Ordinary," it is not clear whether or how the remainder of the draft was intended to read; whether the ability of the spouse to depart *propria auctoritate* would apply only if there was danger in delay, or whether removal of the role of the local Ordinary except as provided by particular law was part of a proposal or understanding to allow a spouse to depart *propria auctoritate* even without danger in delay.

Across the whole time from the formulation of the initial drafts through the tweaking of the final schemas, regarding both the substance and the procedure for the separation of spouses with the bond remaining, there were consistent proposals to remove some words, paragraphs or canons and to refer the matter to particular law. Taking all of

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[94] "Si alteruter coniugum vitam communem sive coniugi sive filiis periculosam vel nimis duram reddat, alteri legitimam praebet causam discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si periculum sit in mora" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum de iure matrimoniali [Series Altera, Sessio V], 120).

[95] "Nonnulli proposuerunt suppressionem verborum «auctoritate Ordinarii loci», ita ut de interventu Ordinarii, si alicubi necessarius censeatur, videat ius particulare. Consultores vero censent valde opportunum esse ut factum tam grave separationis non ignoretur a legitima auctoritate ecclesiastica, proinde non placet delere illa verba" (ibid.).

these together, they do not appear, in general, to be the result of strongly held positive principles to have the matters regulated by particular law, but instead to be the result of the preference to have the matter not regulated at all by the law of the Church. Few seem to hope or intend that their own particular churches would have such proper law. Therefore the suggestion to allow for particular law seems, in that context, to be a kind of concession or excuse used to remove a matter from the law.

Throughout the revision process for the substantive canons on separation of spouses with the bond remaining, there is evidence of varied opinions among the experts not merely on what the law ought to become, but regarding even basic elements of what the law already was. Similar discrepancies occur among the *Coetus de processibus*; but since these overlap more significantly with the question of civil divorce and the relationship between the civil and ecclesiastical authorities, this question will be examined in Chapter Three.

2.3. The 1983 Code of Canon Law

In this work on separation of spouses in the United States and from the late nineteenth century onwards, space precludes a comprehensive canon-by-canon commentary on the canons of the 1983 Code of Canon Law regarding separation of the spouses with the bond remaining.[96] Nevertheless, some of the canons in their current form are discussed here, especially regarding the extent to which they reflect certain themes which have recurred in discussion of this issue in the United States.

[96] For a general exposition of these canons, see my observations in the forthcoming third CLSA commentary on the 1983 *Code of Canon Law*: V. GARDINER, "Separation with the Bond Remaining," in R. JENKINS (ed.), *CLSA Commentary on the Code of Canon Law[=CLSA Comm3]*, Washington, DC, Canon Law Society of America, forthcoming.

2.3.1. Understanding and Interpretation: Continuity and Reform

"As so often is the case with technical terminology […] the code offers no definitions, leaving the matter of definition to canonical jurisprudence."[97] If the legislation regarding a canonical institute has not been completely reordered, the fundamental nature and definition of the institute remains unchanged,[98] and therefore must be assessed in continuity with the prior law.[99] If, however, the legislation regarding an institute has been completely reordered—even by changes to canons other than those explicitly discussing the institute—then we are left to uncover a new definition of the institute. Do changes, in *Gaudium et spes* and the 1983 Code of Canon Law, to the fundamental description of marriage, force us to consider the legislation regarding separation of spouses as fundamentally reordered, even while the textual changes to the *canons* concerning the latter appear relatively minor?

For separation with the bond remaining as for any other canonical institute, the revised law inherits much of the accumulated baggage of its predecessor. For all the discussion regarding the personalist understanding of marriage given in *Gaudium et spes*; for all of Huizing's attempts to reform or reframe the substantive law on separation; and for all of the comments from the world's bishops and ecclesiastical faculties advancing perspectives contrary to the canonical tradition, the canons on separation of the 1983 Code are remarkably similar to their 1917 counterparts: the text of the revised law is an evolution, not a revolution. The canons themselves do not reveal a change in the fundamental nature

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[97] R.T. KENNEDY, "Juridic Persons (cc. 113-123)," in *CLSA Comm2*, 154. A comment made regarding the institute of juridic personality, but applicable to many other canonical institutes including separation of spouses with the bond remaining.

[98] Canon 20.

[99] Canon 6, §2.

of the institute of the separation of the spouses from the 1917 Code, nor even from the legislation prior to 1917.

Nevertheless,

> this new Code can be viewed as a great effort to translate the conciliar ecclesiological teaching into canonical terms. If it is impossible perfectly to transpose the image of the Church described by conciliar doctrine into canonical language, nevertheless, the Code must always be related to that image as to its primary pattern, whose outlines, given its nature, the Code must express as far as is possible.[100]

Therefore even where the text of the canons on separation is not entirely new, nevertheless "[t]hat process of translation is itself the interpretation, if one understands translation – in the line of the Greek tradition – as the mediation between two different worlds: in this particular case, between the world (and language) of theology and the world (and language) of canon law."[101] A comprehensive process of interpretation of the law on separation must, as far as possible, take into account not only the canons on separation themselves, but also the revision of other canons—most notably regarding the essential definition of marriage[102]—and the ecclesiological, sacramental and anthropological teachings of the Church, especially those expressed in new ways since the prior codification. This is not a call to understand the canons "in the spirit, direction and attitude of the [Second Vatican] council," [103] since "spirit, direction and attitude" are not recognized canonical means of interpretation; but it would certainly be necessary to take into account

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[100] JOHN PAUL II, Apostolic Constitution for the Promulgation of the New Code of Canon Law *Sacrae disciplinae leges*, in *AAS*, vol. 75, no. 2 (1983), xi, English translation in G. SHEEHY (ed.), *The Canon Law: Letter & Spirit; A Practical Guide to the Code of Canon Law*, London, Chapman, 1999 [=*CLSGBI Comm*], xv.

[101] W. KOWAL, *Understanding Canon 17 of the 1983 Code of Canon Law in Light of Contemporary Hermeneutics*, Lewiston, NY, The Edwin Mellen Press, 2000, 22.

[102] C.f. C.J. SCICLUNA, *The Essential Definition of Marriage according to the 1917 and 1983 Codes of Canon Law: An Exegetical and Comparative Study*, Lanham, MD, University Press of America, 1995.

[103] J.A. CORIDEN, "Highlights of the Revised Code," in *The Jurist*, 44 (1984), 31.

the teaching documents of the Second Vatican Council, along with other documents. The law expressed in the canons on separation of spouses with the bond remaining remains dependent on the Church's laws and teachings on marriage and the nature of the Church, as expressed principally in the canons of the revised Code and in the *documents* of the ecumenical councils.

The relationship between the Second Vatican Council and the Church's marriage law as old but new, reflecting perennial principles in new expression, is well summarized in the introduction to the instruction *Dignitas connubii*:

> The Second Vatican Council not only presented the doctrine on the dignity of marriage and the family using new concepts and renewed terminology […] but also prepared a correct path for further doctrinal perspectives and laid renewed foundations upon which the revision of the Code of Canon Law could be based.
>
> These new perspectives, which are commonly called "personalist," offered much for the progressive development of certain values in a doctrine which was commonly accepted and quite often proposed by the Magisterium in a variety of ways, values which by their nature offer much to assist the institution of marriage and the family in attaining those highest ends which were destined for it by God the Creator by a marvellous plan and given to it by Christ the Redeemer with a spousal love.
>
> It is evident that marriage and the family is not a private matter that each person can construct at will. The Council itself, which so extols whatever pertains to the dignity of the human person, aware that the social dimension of man belongs to this dignity, does not fail to point out that marriage by its nature is an institution founded by the Creator and endowed by his laws […].
>
> From all this it follows that the juridic dimension of marriage is not and cannot be conceived as something "juxtaposed as something foreign to the interpersonal reality of marriage, but constitutes a truly intrinsic dimension of it", as is affirmed explicitly in the doctrine of the Church beginning with Saint Paul, as Saint Augustine observes: "The Apostle attributes so much of a right to this fidelity [of the covenant of marriage] that he calls it a power, saying "a wife does not have power over her own body but rather her husband does, likewise a husband does not have power over his body, but rather his wife does" (*1 Cor* 7:4)."[104]

[104] PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Instruction to Be Observed by Diocesan and Interdiocesan Tribunals in Handling Causes of the Nullity of Marriage* Dignitas connubii, *Official Latin Text with English Translation*, Libreria editrice Vaticana, 2005, Introduction, 7-9.

The nature of marriage is not changed, but is presented using "new concepts and renewed terminology," and the personalist philosophy of marriage reflected in *GS*, no. 48 is also present in postconciliar magisterial teaching. Marriage must not be understood as personal or personalist to the exclusion of its social and juridic dimensions, nor ignoring its nature as an institution founded by God and governed first of all by his laws; but the positive ecclesiastical laws, even when unchanged in text, must be interpreted as reflecting the whole teaching of the Church.

Even when applying those canons on separation which are largely of positive ecclesiastical law, a positivist mindset must be avoided since there remains a dependence on the Church's understanding (incorporated, inevitably and sometimes not promulgated as law) of marriage itself:

> The judge must then abide by canonical laws, correctly interpreted. Hence, he must never lose sight of the intrinsic connection of juridical norms with Church doctrine. Indeed, people sometimes presume to separate Church law from the Church's magisterial teaching as though they belonged to two separate spheres; they suppose the former alone to have juridically binding force, whereas they value the latter merely as a directive or an exhortation.
>
> Such an approach basically reveals a positivist mindset which is in contradiction with the best of the classical and Christian juridical tradition concerning the law. In fact, the authentic interpretation of God's Word, exercised by the Magisterium of the Church (cf. *DV*, no. 10), has juridical value to the extent that it concerns the context of law, without requiring any further formal procedure in order to become juridically and morally binding.[105]

A positivist mindset is revealed often in hasty adoption of an excessive hermeneutic of change in response to updated wording of legal texts, when the underlying reality is not changed. In the context of separation of spouses with the bond remaining, this positivist attitude is particularly revealed in continued adherence to an understanding of the law of

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[105] JOHN PAUL II, allocution to the Roman Rota, January 29, 2005, in *AAS* 97 (2005), 164-166, no. 6, English translation in W.H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-2011*, Ottawa, Faculty of Canon Law, Saint Paul University, 2011, 283.

separation inherited from the prior law and relying on the fact that the *text* of the canons on separation underwent only minor changes, as though all of the relevant law had all along been supported only by the text of the canons regarding separation, not dependent on the Church's teaching regarding marriage. For the authentic interpretation of God's Word, exercised by the Magisterium of the Church, has juridical value when it concerns the context of the law, and is juridically and morally binding without requiring any further formal procedure such as the modification of the canons on separation or their authentic interpretation (according to the norm of can. 16).

2.3.2. Substantive Law regarding Separation

The 1983 Code modifies somewhat the law regarding the common life and the reasons which legitimately excuse from it. The relevant canons of the 1983 Code are considered here largely in contrast to the corresponding canons of the 1917 Code.

2.3.2.1. The Right and Obligation to Conjugal Living

The substantive canons on the separation of spouses with the bond remaining begin with canon 1151, clearly derived from and a development of *CIC/17* c. 1128, a predecessor canon having the same role in the 1917 Code.[106] Canon 1151 states,

> Spouses have the obligation and the right to maintain their common conjugal life, unless a lawful reason excuses them.[107]

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[106] Which was itself a new canon, without explicit precedent in the *Corpus iuris canonici*.

[107] "Coniuges habent officium et ius servandi convictum coniugalem, nisi legitima causa eos excuset" (*Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989). All English translations of the canons of the 1983 Code will be taken from G. SHEEHY (ed.), *The Canon Law: Letter & Spirit; A Practical Guide to the Code of Canon Law*, London, Chapman, 1999, unless indicated otherwise.

The canon provides the basic context for the canons which follow, and which must be interpreted according to what has been established in canon 1151. The canon states a right-duty correlative, and therefore at first glance might be interpreted—according to Örsy's classification of literary forms[108]—as a canon "which create[s] rights and impose[s] duties in the realm of law" and is therefore among "the true legislative pieces in the Code."[109] However, this should not obscure the extent to which this canon does not *create* rights nor *impose* duties, but largely reflects or describes the rights and obligations stemming from marriage itself. The canon appears more to be a "statement of Catholic belief" or at least a "theological opinion"[110] than a creation of positive ecclesiastical law alone. So as the 1983 Code adds reference to the "right" where the 1917 Code had only an obligation,[111] it does not create a new right by positive law, but states what was always inherent in the nature of marriage as a union of persons to be upheld in society.[112]

2.3.2.2. Distinction Between Departure and Legal Separation

Like canon 1131, §1 of the prior code, canon 1153, §1 literally describes the circumstances of licit departure from the common conjugal life, which is a species of separation in the broad sense but is not identical with legal separation, even when the

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[108] See L. ÖRSY, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, Wilmington, DE, Glazier, 1986, 39–41.

[109] Ibid., 39.

[110] Ibid., 40.

[111] See *CIC/17*, c. 1128: "Coniuges servare debent vitae coniugalis communionem, nisi iusta causa eos excuset."

[112] It could be argued that by its explicit mention of the right and not merely the obligation, the text of the revised law better provides for the legal assertion of the right to the common life against threats than did the prior law. However, this newly enumerated right does not seem to have taken root in the life of the Church, since it can certainly be observed that the right to preserve the common life of marriage was, in practice, much better protected by legal action in the era of the 1917 Code and earlier than in the era of the 1983 Code.

departure is provided for by decree of the local ordinary. Nevertheless, the paragraph is universally understood to describe reasons for legal separation also. Huizing's private commentary on *CIC/17* c. 1131, §1[113] suggests one possible way of resolving this ambiguity: that with fault, all of the enumerated reasons are reasons for legal separation, while without fault the same reasons can be reasons for the suspension of the obligation of conjugal living; but the suspension occurs not *because* the reasons are enumerated in codified law, but because of the nature of marriage and the rights of the human person. The present writer resolves the ambiguity in a similar way: legal separation is largely a matter of positive ecclesiastical law, while suspension of the conjugal life *seu* departure is largely a matter of morality with limits on the law's ability to restrict the rights of the spouses; and therefore the reasons enumerated in canon 1153, §1 are positive provision for the institute of legal separation, while also describing reasons for departure deducible from the nature of marriage and human dignity. Nevertheless, it must be acknowledged that a weakness of my interpretation (and of Huizing's) and of the draftsmanship of the canons is that canon 1153, §1, *CIC/83* and canon 1131, §1, *CIC/17* mention *departure* and not legal separation.

As in the prior law, the danger to body or soul must be caused by the other spouse in a general sense but does not need to be attributable to the moral fault of that spouse for

[113] See HUIZING, *Schema structurae iuris canonici latini de matrimonio cum notis bibliographicis*, 681.

departure. The revised law, by its similarity to the prior law, inherits the jurisprudential tradition that fault is required for a legal separation.[114]

2.3.2.3. Reasons for Separation

The reasons for departure (aside from adultery) are addressed in canon 1153, §1:

> A spouse who occasions grave danger of soul or body to the other or to the [offspring], or otherwise makes the common life unduly difficult, provides the other spouse with a reason to leave, either by a decree of the local Ordinary or, if there is danger in delay, even on his or her own authority.[115]

The principal difference from the 1917 Code is the removal of punitive or didactic reasons for departure, a feature of both the decretal law and the 1917 Code. Although not mentioned or explained in the revision process, this change is consistent with a move away from marriage as a collation of distinct legal rights and obligations, and toward a "personalist" law of marriage in which the parties give their whole selves to each other. In this way, at least, the revised law is more favorable to the maintenance of the conjugal life than was the prior law, by removing certain listed reasons for departure such as giving his name to a non-Catholic sect or giving the offspring a non-Catholic education, even while retaining the right to depart if those same actions give grave danger to the souls of the other

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[114] "It has been widely discussed in recent years whether it is sufficient that the reasons for separation constitute a danger, or whether it is necessary that this danger should be of culpable origin, as prescribed in common doctrine. […] In order for the separation to be juridically effective and thus suspend conjugal rights and obligations as well as the objective of mutual assistance, the situations opposed to conjugal life must be culpable, because only guilt breaks the obligation of the other party and one's own right. Of course, the spouse who is the cause of the problem refuses without good reason to cease cohabiting, his or her conduct is in itself a form of culpability" (J. HERVADA, "Separation While the Bond Remains," in J.I. ARRIETA [ed.], *Code of Canon Law Annotated*, 4th ed., Collection Gratianus, Chambly, Wilson & Lafleur, 2022, 896–897).

[115] "Si alteruter coniugum grave seu animi seu corporis periculum alteri aut proli facessat, vel aliter vitam communem nimis duram reddat, alteri legitimam praebet causam discedendi, decreto Ordinarii loci et, si periculum sit in mora, etiam propria auctoritate." As previously noted, English translation of the canons of the 1983 Code of Canon Law are generally from SHEEHY (ed.), *The Canon Law: Letter & Spirit*; nevertheless I have replaced "children" in that translation with "offspring" here, since the latter more clearly reflects the fact that the *proles* is not limited to minors. For discussion of the incorrect translation of this canon in the CLSA version, see GARDINER, "The Separation of the Spouses," 161–162.

spouse or to the offspring. The fact that this change can be made emphasizes that much of the law regarding separation of spouses is of positive ecclesiastical law, and not the natural law determinative of the fundamental nature of marriage.

To the grave danger to the body or to the soul of the spouse mentioned in the prior law, is now added the same danger to the bodies or souls of the offspring, somewhat mitigating the effect of the removal of the enumerated actions, and addressing something of a lacuna arguably present in the prior law, which—if taken literally—could have left a spouse without legitimate recourse against behavior which threatened the bodies or souls of the offspring but not the spouse, and which did not fall into the listed categories of behavior.

While the prior law demanded that the "undue difficulty" be caused by "cruelty" to justify a departure, the revised law makes no such specification. The roots of cruelty as a legal concept related to separation are deep, initially as a defense in law against a suit for restitution of marital rights[116] and only later evolving into part of the definition of an autonomous ground of separation.[117] But in the revised law, the undue difficulty can be from any cause, and removal of cruelty means that the legal focus is entirely on the effects upon the suffering (and potentially departing) spouse, and not dependent on proving the motives or actions of the other spouse.

A spouse's own ability to decide the departure where there is "danger in delay" is retained from the prior law, but with a slightly widened applicability. The spouse no longer

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[116] See Decretal letter of Alexander III [reigned 1159-81] to the Archbishop of Canterbury, X 2, 13, 8 *Ex transmissa nobis*, in *FRIEDBERG2*, col. 283.

[117] The course by which the exception of *saevitia* evolved into the autonomous ground of separation of *odium capitale* is described in MARCHETTO, *Il divorzio imperfetto*, 361–375.

may do this only "if these things appear certain"[118]; the degree of knowledge or belief regarding the cause is not specified in the revised law. The favor of the law which marriage enjoys,[119] and the gravity of the marital obligations, suggest that in many circumstances certainty remains required. Yet the removal of the enumerated requirement for certainty of the danger or undue difficulty seems to open the possibility that something less than certainty could suffice when faced with a grave threat to another obligation such as the protection of the children or even of the spouse's own physical or moral integrity.[120]

Despite all of the changes noted above, the fundamental nature of the institute of separation of the spouses with the bond remaining—and within it, departure—remains superficially unchanged from 1917 and earlier. A personalist interpretation of marriage does not claim that marriage is solely a private matter between the spouses,[121] and for a Catholic the ecclesiastical authorities have a role in regulating the exercise of its rights and obligations, both by passing legislation and the application of laws in individual cases. Some of the reasons for separation established by prior positive law have been removed, while others have been broadened. When a spouse wishes to leave the conjugal life—and

[118] "[…] si de eis certo constet [...];" *CIC/17* c. 1131, §1.

[119] See c. 1060.

[120] "Sometimes acting on the safe side in respect to one responsibility necessarily entails acting on the risky side in respect to another, more compelling responsibility. Then it is necessary to take the risk of not fulfilling the responsibility which is less compelling" (G.G. GRISEZ, *The Way of the Lord Jesus*, *vol. 2: Living a Christian Life*, Chicago, IL, Franciscan Herald Press, 1983, 288). Regarding marital separation in particular Grisez acknowledges the need to consider other responsibilities but not the degree of certainty required for any particular action. See ibid., 725–727. The obligation to protect oneself or the children from some grave threats, especially those resulting in permanent damage, could arguably be a "more compelling responsibility" than the obligation of conjugal living—and therefore certainty may not be required in all cases.

[121] "Marriage is never a purely personal affair; it is also social. Married couples have rights and duties towards the rest of society, and the rest of society has duties and rights towards each married couple" (C. BURKE, *The Theology of Marriage: Personalism, Doctrine, and Canon Law*, Washington, DC, Catholic University of America Press, 2015, 114–115).

even more so, to establish a state of legal separation—the law takes the starting position that the decision will be made by the ecclesiastical authorities. Nevertheless, the 1983 Code expands somewhat upon the prior law's allowance for the spouse to make the decision to depart[122] by his own authority. The result is a law which much more closely reflects—that is, adds less to—Church teaching regarding the nature of marriage.

2.3.3. Rights and Obligations: Property and Personalism

The "personalist" understanding of marriage, expressed in *Gaudium et spes* as a relationship "in which the spouses mutually give and accept each other,"[123] is reflected in canon 1055 which describes "the marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life," supplanting canon 1012, *CIC/17*, which introduced marriage *only* as a contract.

Even prior to 1983, however, the juridical import of *GS* was evaluated and applied by jurists; and some of this may be applicable not only regarding nullity of marriage (in which context the judgment was given) but also regarding separation with the bond remaining. Anné wrote in a judgment in 1969, "this proposition of the Second Vatican Council [that the act by which marriage is entered into is the spouses' mutual giving and acceptance of each other; *GS* no. 48, §1] has a juridical meaning. For it does not regard the mere fact of the establishment of the community of life, but *the right and obligation* to enter into this intimate community of life, which has as its most specifically characteristic

[122] And where there is adultery, truly to establish separated status. See ST. LOUIS-SANCHEZ, "Separation of Spouses *propria auctoritate* and the Nature of Ecclesiastical Intervention," 530.

[123] "[…] quo coniuges sese mutuo tradunt atque accipiunt […]" (*GS*, no. 48, in *AAS*, 58 (1966), 1067). See *FLANNERY1*, 950.

element the most intimate conjunction of persons." [124] The object of matrimonial consent "also comprises the right to that partnership of life or community of life which is properly called matrimonial, along with the correlative obligations — that is, the right to the *intimate conjunction of persons and of works*."[125] This juridic interpretation of matrimonial personalism comprises at least two novel elements: an extension of the object of matrimonial consent beyond simply the *ius in corpus* to a partnership or community of life; and a recognition of a *right* and obligation to such a life. Each of these has juridic implications regarding legal separation which have yet to be fully explored.

As an aside—as he moves toward establishing the nullity of the marriage—Anné addresses separation of spouses with the bond remaining by way of example as a kind of exception which proves the rule.[126] He observes that even when the exercise of the *ius in corpus* is suspended due to adultery the marriage bond remains intact, and therefore[127] the

[124] "Propositio haec Concilii Vaticani II sensum iuridicum habet. Non respicit, enim, merum factum instaurationis communitatis vitae sed *ius et obligationem* in hanc intimam communitatem vitae, quae uti elementum maxime specificum habet intimissimam personarum coniunctionem qua vir et mulier fiunt una caro, ad quam uti culmen tendit illa vitae communitas" (TRIBUNAL OF THE ROMAN ROTA, *coram* ANNÉ, February 25, 1969, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 61 [1969], 182, no. 13). Emphasis in original.

[125] "*Obiectum*, exinde, *formale substantiale* istius consensus est non tantum ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem, excluso omni alio elemento formali essentiali, sed complectitur etiam ius ad vitae consortium seu communitatem vitae quae proprie dicitur matrimonialis, necnon correlativas obligationes, seu ius ad *intimam personarum atque operum coniunctionem*, qua « se invicem perficiunt ut ad novorum viventium procreationem et educationem cum Deo operam sociant » (Enc. *Humanae vitae*)" (ibid., 183-184, no. 16). Emphasis in original.

[126] "Nec obiiciantur canones 1128 et ss., de separatione coniugum, cum obiectio ex hisce desumpta aeque valet quod attinet ad « ius in corpus, perpetuum ... », de quo can. 1081, § 2. Nec dicatur in casu separationis definitivae ob adulterium tantum remanere vinculum matrimoniale. Vinculum istud, enim, unice constituitur summa relationum iuridicarum, ethicarum et socialium talium quales matrimonii propriae sunt et ab eisdem re non distinguitur" (ibid., 183, no. 14).

[127] The argument is implicit: if even the exercise of the *ius in corpus* can be suspended, then the possibility of separation for other reasons does not disprove the juridic reality of the obligation of the communion of life. "Plus semper in se continet quod est minus" (*RJ* 35 *in VI°,* in *FRIEDBERG2*, col. 1123).

possibility of legal separation with the bond remaining does not undermine the principle of the juridic reality of the communion of life.

Conciliar teaching on marriage was mentioned in decisions of the Roman Rota specifically deciding separation even prior to the promulgation of the revised Code,[128] but a complete exposition of the law regarding separation in light of the conciliar teaching and the revised Code seems to have been delayed by both the delayed promulgation of the Code itself and then by the relative paucity of separation cases heard.[129]

This leaves us with something of a lacuna: although "Rotal jurisprudence is not constituted by a single Rotal decision or by a few decisions but by a manner of judging which is consistent in many decisions during a given period of time,"[130] we do not have "many decisions" since 1983, nor since the Second Vatican Council, to demonstrate "a manner of judging which is consistent." Even observing the warning that "the scientific merit of a single decision standing alone may in fact be reducible to that of a scholarly opinion,"[131] (and not having the force of law according to c. 19), surely that is a "scholarly opinion" worth considering, especially given the dearth of canonical examinations of a personalist application of the law of separation of spouses.

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[128] See e.g. TRIBUNAL OF THE ROMAN ROTA, *coram* MASALA, February 19, 1975, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 67 (1975), 65–66, no. 3.

[129] "A glance at the jurisprudence of the Tribunal of the Roman Rota shows us that the cases of separation of spouses in the judicial forum have practically disappeared from the ecclesiastical courts. In the volumes of Sentences of the Rota in the first years of the twentieth century we find many cases dealing with separation. Instead, in recent jurisprudence, the matter has been very rarely treated, and usually as an incidental case" (FRANCESCHI, "'Bonum prolis' in the Married State of Life and the Canonical Consequences in Case of Separation or Nullity of Marriage," 428).

[130] R.L. BURKE, *Lack of Discretion of Judgment Because of Schizophrenia: Doctrine and Recent Rotal Jurisprudence*, Analecta Gregoriana, Rome, Pontificia Università Gregoriana, 1986, 21.

[131] W.L. DANIEL, "The Notion of Canonical Jurisprudence and Its Application to the Tribunal of the Roman Rota and Causes of Nullity of Marriage," in *The Jurist*, 76 (2016), 204.

With this warning having been noted, three published decisions of the Roman Rota (one judgment and two decrees) provide notable matter for consideration. One concerns children; one addresses directly the issue of separation of spouses in the context of the concept of "property"; and one addresses a judicial petition to enforce reconciliation. Two of the three are—as it happens—from the same ponens.

The 1917 Code stated that "the raising of the children is incumbent upon the innocent spouse or, if one of the spouses is non-Catholic, it is incumbent upon the Catholic spouse," while making allowance that the Ordinary could decide otherwise "for the good of the children, always with due regard for their Catholic education."[132] The revised law, however, states simply that "appropriate provision is always to be made for the due maintenance and upbringing of the children,"[133] without asserting a preference for the "innocent spouse" or for a Catholic parent over a non-Catholic parent. Certainly, the moral example given by the parents' habits of life and the parents' abilities to provide Catholic religious formation could be factors considered by the proper authority when making provision for the "due maintenance and upbringing of the children"; but these two factors no longer receive special legislative mention.

As explained in a recent judgment *coram* Jaeger at the Roman Rota,

> A minor daughter is not an inanimate object but a human person, and disputes about the custody of minors are not at all similar to disputes about the ownership or administration of things. […] There is one purpose of assigning custody: to provide for the care of the minor in the best possible way. Therefore, the universal rule by which custody

[132] *CIC/17* c. 1132.

[133] C. 1154.

> is assigned to one parent or another must be this alone: that by which the best interests and care of the minor are best provided.[134]

To support this, however, Jaeger relies not on the usual array of canonical sources, but on less conventional citations, including the final *Relatio* of the 2015 Synod of Bishops[135] and a 2016 statement of the president of the Italian Episcopal Conference.[136] Jaeger also cites the United Nations Convention on the Rights of the Child,[137] observing that the Holy See ratified the same treaty.

That Jaeger needed to rely on unconventional sources in order to emphasize the paramount importance of the best interests of the child is unsurprising. While Jaeger is certainly not the first canonical author to have emphasized this principle,[138] it must be acknowledged that this perspective, and even more so its vehemence, is a departure from the previous preeminent emphasis on canonical "innocence" and on the religion of the

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[134] "Filiafamilias minor non est res inanimis sed persona humana et controversiae de minorum custodia haud similes sunt controversiis de rerum dominio vel administratione. ... Finis custodiae adsignandae unus est: minoris curae quam optime providendum. Eapropter regula universalis, qua custodia uni alterive adsignetur parenti, nonnisi haec sit: qua electione minoris bono et curae melius provideatur" (TRIBUNAL OF THE ROMAN ROTA, *coram* JAEGER, 19 February 2016, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 108 [2016], 64, no. 32). The passage including the above quotation and the reference to the United Nations Convention on the Rights of the Child (64-65) is itself a quotation from Jaeger's unpublished sentence of 22 July 2015, 173/2015, no. 18.

[135] See XIV ORDINARY GENERAL ASSEMBLY OF THE SYNOD OF BISHOPS, Final Report of the Synod of Bishops to the Holy Father, Pope Francis, on the Vocation and Mission of the Family in the Church and in the Contemporary World, in *AAS*, 107 (2015), 1211, no. 79.

[136] See A. BAGNASCO, Conferenza Episcopale Italiana consiglio permanente, Roma, 25 - 27 gennaio 2016: Prolusione del Cardinale Presidente, (2016), https://www.chiesacattolica.it/wp-content/uploads/sites/31/2017/05/11/Prolusione-25.01.16.pdf (March 15, 2025).

[137] See United Nations Convention on the Rights of the Child, November 20, 1989, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (March 15, 2025). If the ecclesiastical authorities making decisions regarding the care of the children are understood as "public or private social welfare institutions, courts of law [or] administrative authorities," then the Church authorities—or more precisely, the Holy See—would be obliged to ensure that "the best interests of the child shall be a primary consideration" "in all actions concerning children" (ibid., art. 3, §1).

[138] Franceschi stated that "the decision [regarding the care of the children in matrimonial causes] should always have as its first aim the welfare of the children" while rejecting the idea "that entrusting the children to the [innocent] spouse was a sort of punishment [to the other spouse] for having been 'guilty' of the separation" (FRANCESCHI, "'Bonum prolis' in the Married State of Life and the Canonical Consequences in Case of Separation or Nullity of Marriage," 429).

parties (even as the possibility of making an alternate decision was not entirely excluded in the prior law). Indeed, even after the coming into effect of the 1983 Code, a decision *coram* Stankiewicz relied on the factor of canonical innocence regarding the separation in order to decide custody of the children.[139]

Jaeger states, clearly and unequivocally, that disputes about human persons are not at all similar to disputes about the ownership or administration of things.[140] However, it has already been observed numerous times *supra* that the institute of separation of the spouses with the bond remaining borrows heavily from law regarding property rights: for example, that a spouse could deprive the other spouse of conjugal living, for reasons not directly related to the essential rights and obligations of marriage, in order to weary him by its absence; a legal strategy drawn explicitly from property law. Even as these specific reasons for separation were removed from the law in 1983, the underlying structure of the institute of separation of the spouses with the bond remaining remains difficult to disentangle from its history of being fundamentally a question of property rights, both literally (regarding division of the property of the spouses) and by fiction of law (as the rights and obligations of marriage have been divided up and decided like property). Indeed, we might observe that the very notion of legal separation of spouses with the bond

[139] "Concessa autem separatione ob culpam mariti, filiorum custodia ac educatio ad normam iuris parti innocenti seu uxori concredi debet, servato iure patris eos invisendi […]" (TRIBUNAL OF THE ROMAN ROTA, *coram* STANKIEWICZ, 26 February 1987, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 79 [1987], 82, no. 15). Admittedly, this example is complicated by the fact that the first instance decision under appeal was decided according to the *CIC/17*, and it was perhaps for this reason that the Rotal court cited the *ius vetus* in *CIC/17* c. 1131, §1 (ibid., 79, no. 8). However, it remains notable that the court did not consider that the formulation in the revised Code, perhaps reflecting Conciliar principles, might have obliged a complete rethinking of this principle to be applied even at appeal.

[140] See TRIBUNAL OF THE ROMAN ROTA, *coram* JAEGER, 19 February 2016, 64, no. 32.

remaining necessarily *requires* the division and apportionment of the rights and obligations of marriage which are ideally undivided.

Even more striking, in a later decree *coram* Jaeger addressing a case where a husband had requested the ecclesiastical authority to oblige the wife to resume conjugal living against her will, Jaeger rejects the idea that

> […] the giving of oneself and the acceptance of the other spouse effected by matrimonial consent (cf. c. 1057 §2) could be likened to the purchase of a slave, by which a person acquires the right to have another person with him as if the latter were nothing but some inanimate object. This could not accord with the nature and dignity of the human person, and the current Church teaching on marriage, thoroughly marked by personalism (cf. *Gaudium et spes*, no. 48), would not appear to allow it.[141]

Jaeger's argument for a personalist interpretation of the law regarding separation relies on the rejection of an interpretation which he characterizes as treating "another person […] as if […] nothing but some inanimate object," or even like "the purchase of a slave." However palatable or self-evident this argument may be to a modern audience, the fact remains that ecclesiastical marriage law regarding separation of spouses is built on legal foundations which include treating personal rights and obligations (if not always, in a precise sense, persons themselves) as inanimate legal objects, even using *allegationes* based on ownership of a slave[142] to illustrate these property rights.

Jaeger's conclusions do not contradict the text of the 1983 Code, but they are difficult to reconcile with mainstream canonical interpretation of the 1917 Code and of the

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[141] "Secus '*sui traditio* alteriusque coniugis acceptatio', quae matrimoniali efficiatur consensu (cf. c. 1057 §2), *servitutis* adsimilaretur negotio, quo persona alteram personam apud se habere ius adquireret ac si haec nonnisi inanimis aliqua esset res; quod cum personae humanae natura et dignitate componi nequiret quodque Ecclesiae de matrimonio huius aetatis doctrina, 'personalismo', quem aiunt, radicitus signata (cf. GS §48) sinere non videretur" (TRIBUNAL OF THE ROMAN ROTA, *coram* JAEGER, decree of July 18, 2019, B. Bis 91/2019, in *Studia canonica*, 57 [2023], 301–302, 6, emphasis in original).

[142] See *supra*, *fons* to c. 1131, §2, *CIC.17*, X 3, 32, 20 *Dudum*, *allegatione* in the *Editio Romana* to the edict of Ulpian, book 11, *et elegenter* (Dig. 4, 3, 7pr).

uncodified law prior to it.[143] To the extent that these conclusions address the nature of marriage itself, not merely positive ecclesiastical law, the logical conclusion of Jaeger's argument may be that enforcement suits are not merely contrary to the 1983 Code or to any specific law promulgated by the Second Vatican Council, but have been contrary to the nature of marriage at every point in the history of the Church (even if positive ecclesiastical law did not previously recognize this).

Jaeger, in the two decrees just cited, is notably detailed in his exploration of the nature of ecclesiastical separation and the limit of the reach of ecclesiastical authority especially regarding cohabitation (or departure), but these two texts are not unique among recent decisions of the Roman Rota in rejecting the idea of using the judicial process for legal separation as a mechanism to order reconciliation after the departure of one spouse. Addressing a case where the petitioner had attempted to use ecclesiastical judicial means

[143] As a matter of law, "[i]t is not the place of the judiciary in the Church to be innovative with respect to the general legislation; rather, it is bound to apply it. The ecclesiastical judicial function […], rather than develop the law, […] yields to its prescripts" (DANIEL, "The Notion of Canonical Jurisprudence and Its Application to the Tribunal of the Roman Rota and Causes of Nullity of Marriage," 204). The distinction between a forbidden judicial development of the law and a permitted (indeed, even obligatory) yielding to the as-yet imperfectly codified legislative prescripts of an ecumenical council may, at times, be a fine one.

As a matter of historical fact, there are numerous and notable examples of judicial interpretation of moral norms preceding the legislative texts regarding marriage law. For example, regarding the development of cruelty as a cause for separation, "it first appeared in the writing of Bulgarus, a teacher of civil law, was then adopted and developed by later twelfth- and thirteenth-century canonists and theologians, and was widely accepted by church courts as a legitimate basis for granting separations long before it was formally approved and incorporated into the official texts of canon law" (BRUNDAGE, "Review: *Il divorzio imperfetto: i giuristi medievali e la separazione dei coniugi*," 600). Or by the sixteenth century, even going beyond "adultery and cruelty" to "more extensive grounds, i.e. incompatibility (*discrepantia morum, incompatibilitas morum, displicentia*), spendthrift (*dissipatio bonorum*), old age (*senium*) with its corollary of dwindling sexual vigour (*lascivia carnis cessat, carnalis vigor cessat propter senectutem*), grievous querulous discord between spouses, and a suspicion of leprosy" (VLEESCHOUWERS–VAN MELKEBEEK, "Marital Breakdown before the Consistory Courts of Brussels, Cambrai and Tournai," 83). And of course regarding the nullity of marriage, the development of the "psychological grounds" in the decisions of the Roman Rota from the 1940s onwards and leading to canon 1095 in the 1983 Code. See e.g. E. XUEREB, "A Historical Approach to the Question of Psychic Incapacity," in *Melita theologica*, 57 (2006), 61–67.

to intervene regarding the other spouse's decision to suspend conjugal living,[144] a decree *coram* Monier states,

> [I]n the present case … the *petitum* does not fall within the competence of the court and certainly lacks a legal and probative foundation. The Prelate Auditors of the Turnus fully accept the conclusions of the Promoter of Justice: "In other words, the cause—which does not pertain to an ecclesiastical court, as is the case here concerning the reconciliation of the woman petitioner with the respondent husband—cannot be handled judicially […]. This being established, the petition of the woman Petitioner lacks any foundation whatsoever."[145]

This decree provides further support for the idea that enforcement petitions *per se* (distinct from the temporal consequences of culpably failing to maintain conjugal living, as is decided by the ecclesiastical authorities in certain places) are not a matter for the ecclesiastical courts. Monier does not address whether this is the result of some *substantive legal* development in e.g. the Second Vatican Council, movements in the jurisprudence of the Roman Rota or the 1983 *Code of Canon Law*; whether it is based on a more fundamental *theological* or *anthropological* reassessment; or whether it is merely a *procedural* distinction of the judicial process from the administrative process. Even regarding the latter possibility, it must be observed that enforcement of marriage had at least nominally[146] been considered a judicial matter in the past.

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[144] The Roman Rota had previously addressed a related issue regarding the same parties, namely, the woman's recourse against the rejection at first and second instances of her *libellus* seeking judicial relief against the man's decision to leave the home. See TRIBUNAL OF THE ROMAN ROTA, decree *coram* CABERLETTI, November 14, 2007, in *Sacræ Romanæ Rotæ decreta*, 25 (2007), 71–77.

[145] "Utcumque nostro in casu minime sermo fieri potest de re iudicata in casu reiectionis libelli, cuius petitum non est competentiae tribunalis et pro certo caret iuridico probatorioque fundamento. Praelati Auditores de Turno Promotoris iustitiae conclusiones plene recipiunt: «Commutatis verbis, causa – non pertinens ad tribunal ecclesiasticum, sicut est illa de conciliatione mulieris actricis cum viro convento – iudicialiter pertractari non potest, ideoque ne quidem de eius re iudicata loqui potest». His positis mulieris actricis instantia quovis fundamento caret" (TRIBUNAL OF THE ROMAN ROTA, decree *coram* MONIER, April 20, 2012, in *Sacræ Romanæ Rotæ decreta*, 30 [2012], 43, no. 5).

[146] I say "at least nominally" because historians' analysis of surviving court records often reveals that the material motive for the petition was financial, even when the formal object of the case was sometimes an order to resume conjugal cohabitation.

Has the underlying law regarding the nature of marriage changed such that the canons' meaning and application are no longer the same as their predecessors', even when the text of the legislation is similar or identical? If the removal of less personalist reasons for separation indicates that the text of the law which has *not* changed is already sufficiently personalist, then it can therefore be applied consistently with the former law in regard to elements which have not been changed.

Or did the removal of specific reasons for departure other than those directly dependent on the possibility of moral conjugal living create, unheralded, a new and personalist law of separation of spouses? If some older interpretations and applications, especially those more rooted in property law, must be pruned from canonical understanding as the legislative text has been pruned, perhaps this same method must also be applied when understanding elements of the text which have *not* changed.

Although the canons on separation of spouses with the bond remaining have been revised following the Second Vatican Council, making certain changes which can be seen as "personalist" regarding the spouses and even the children, the principal points of the codified legislation (in the distinction between legal separation and departure, the latter being permissible on the spouse's own authority outside of adultery only when there is danger in delay) remain broadly consistent with the prior law. Nevertheless, we are left with some lack of clarity regarding the law in force. Can the law be understood and applied as it always has been, save for the few textual modifications in the revised law? The relative lack of attention in practice to separation with the bond remaining since 1983 has thus far not allowed the Church the opportunity to work through these questions and arrive at clear answers.

Conclusion

For the most part, the canons of the 1917 Code regarding separation with the bond remaining are a recapitulation of the decretal law as understood by Gasparri. Nevertheless, certain changes were proposed as part of the drafting process, some of which were adopted.

Hollweck proposed a canon providing that the *licentia* of the ordinary must be received before approaching the secular authorities for civil *divortium*, either temporary or perpetual. This was not based on the *Corpus iuris canonici*, but on interventions of the Sacred Penitentiary in the late nineteenth century. Hollweck was motivated by the practical reality that it was the civil judge who would provide for the maintenance of the spouse and of the offspring, indicating that the proposal was intended to address legal separation, not necessarily departure from conjugal living. Wernz opposed the inclusion of such a proposed canon because it was already recognized that the civil authority had competence over temporal matters. While this was true, it seems to ignore what was new about Hollweck's proposal, the result of which would have been to recognize the enforceability of these decisions *within the law of the Church*. Gasparri's compromise was a canon making provision for the care of the offspring (including the expenses for this), in the case of separation as well as dissolution of marriage, but specifying the competence of the ecclesiastical judge. The eventual canon 1132, §1, *CIC/17*, emphasized the Church's theoretical primacy over separation cases, while ignoring the practical reality that in many places, such matters were decided by the state.

An innovation in the 1917 Code compared to the decretal law is the creation of a norm (c. 1128) expressing for the first time a positive obligation to preserve the communion of conjugal life. *Fontes* to this new canon suggest that the primary motivation for the

creation of the canon may not have been to ensure conjugal living, but to emphasize the authority of the Church to provide for exceptions to this obligation.

Gasparri's *fontes* to *CIC/17* c. 1132, §1, while not part of the text of the law itself, are important illustrations of the unspoken legal foundations upon which the law is based. The basis for the law remains very deeply in property law (including the ownership of a slave). Legal separation, therefore, is fundamentally an institute of property law; less clear is whether and how this applies to the right and obligation to maintain conjugal living, and indeed to depart in certain circumstances. Punitive or didactic separation remains permitted under the 1917 Code. Fault was generally held to be unnecessary to depart conjugal living but was necessary for legal separation which, especially in its property settlement, presumes punishment for wrongdoing.

By the 1960s, however, very varied interpretations of the law regarding separation were held, some of which are evident in the drafting process which led to the 1983 Code. Huizing, for example, held a distinctive interpretation of the role of "fault" in the right to depart the common life, and the relationship between disciplinary, legal and moral norms. A proposal to remove the canons on separation of spouses from the Code and defer the matter to a particular law—which may in practice have been an attempt to have the matter not regulated by the Church at all—was rejected, citing the reason that separation of spouses, at least for adultery, is a matter of divine law. Bishops of the United States did not comment regarding separation of spouses.

The 1983 Code removed the enumerated list of reasons for legal separation—and with them, the possibility of punitive or didactic separation. The new, shorter list of reasons arguably reflects a more personalist vision of marriage, prioritizing the common life of the

spouses over other priorities, except that which makes conjugal living impossible. The same list of reasons applies to both legal separation and departure, the latter on the spouse's own authority when there is danger in delay. In this way, the 1983 Code repeats the 1917 Code's lack of textual clarity on the distinction between legal separation and departure, and the role of the local ordinary in deciding these.

The law regarding separation of spouses with the bond remaining has not received significant attention since 1983. This is especially evident in a lack of jurisprudence of the Apostolic See interpreting or applying the revised law.[147] This absence is unfortunate since it leaves unaddressed the issue of whether and to what extent the law regarding separation must be interpreted and applied differently in light of renewed law and theology regarding marriage as a whole.

Within this lacuna, then, two recent published decisions by the same Rotal auditor assume unusual prominence in their attempts to address these questions. The two decisions by Jaeger draw a greater distinction than usually made explicit between legal separation as an institute of positive ecclesiastical law, and the right and obligation to maintain or depart conjugal living. Kinship between the latter and property law is explicitly denied, citing personalism and even fundamental human rights, on which basis suits for the enforcement of matrimonial rights seem to be impossible. It is premature to state that personalism in general, or these more recent decisions in particular, demand a specific new interpretation of the law regarding separation of spouses with the bond remaining. Nevertheless, they

[147] A notable exception, PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Letter regarding Bishop's Permission for Divorce, prot. no. 15181/2015, 4 November, 2015 [=PCLT Letter], in *Roman Replies and CLSA Advisory Opinions 2021*, Washington, DC, CLSA, 2021, 23–24, is examined in detail in Chapter Three.

illustrate that the revised law has certainly not resolved the questions and problems present in its predecessor. This lack of clarity continues to be fueled by the lack of connection between the text of the law and legal practice in the Church, as in the United States and most other countries the law continues to be ignored almost entirely. Many of these same themes recur as we move to consider not the Church's own legislation regarding marital separation, but her relationship with the civil authorities as they have attempted to regulate separation and divorce.

3. THE ECCLESIASTICAL RESPONSE TO CIVIL SEPARATION AND DIVORCE LAWS IN THE UNITED STATES

The Pastoral Companion, a family of canonical handbooks for the parochial clergy from 1929 to the present,[1] adapted for United States readers, stated in its 1961 edition:

> The Third Plenary Council of Baltimore states that those who sue before a civil magistrate for a dissolution of marriage are guilty of grave sin, and it forbids the faithful to sue in civil court for a separation from bed and board unless they first consult the ecclesiastical authorities, otherwise they also are guilty of grave sin. (Balt. III, nos. 124, 126.) Hence, the faithful have a grave obligation to obtain the local Ordinary's permission before suing in civil court for separation (in States permitting this) or divorce (in States not granting legal action for separation, or when it is only divorce that will fully protect the innocent spouse according to the laws of the State in question).[2]

The first statement is correct, inasmuch as canon 124 of the Third Plenary Council of Baltimore states that it is gravely sinful to sue in civil court for divorce, and canon 126 states respectively that it is wrong[3] to sue for separation of bed and board without prior consultation of ecclesiastical authority.

In the very next sentence, however, the authors misread the same law they previously accurately summarized, concluding that "the faithful have a grave obligation to obtain the local Ordinary's permission before suing in civil court for separation […] or divorce." "Permission" is not mentioned in either cited canon of Baltimore III, nor in the immediately preceding sentence, which mentions only "consultation." Furthermore, canon

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[1] See D.W. BONNER, "Foreword," in *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, Chicago, IL, Franciscan Herald Press, 1986, ix. For the current edition, see J.M. HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, 5th updated ed., Collection Gratianus, Montreal, Wilson & Lafleur, 2016.

[2] M.J. MATHIS and N.W. MEYER, *The Pastoral Companion: A Handbook of Canon Law*, 12th ed., Chicago, IL, Franciscan Herald Press, 1961, 290–291. Parenthetical citations as in the original.

The whole section remains the same as late as the fourteenth edition, published in 1976 (see D.W. BONNER, *The Pastoral Companion: A Handbook of Canon Law*, M.J. MATHIS (ed.), 14th ed., Chicago, IL, Franciscan Herald Press, 1976, 296–297).

[3] Though see the discussion in Chapter One of the moral and legal implications of different translations of *reatum* as used in this canon.

126, regarding separation, mentions only "consultation" as the manner of involvement of ecclesiastical authority; canon 124, regarding divorce, simply states the sin without providing any means of toleration. The distinction between a "canonical obligation [and] a moral obligation"[4] is elsewhere observed regarding the question of whether it is necessary to oppose or contest a divorce suit; but this difference between the canon law and morality is not mentioned in the analysis of the potential plaintiff for divorce. Whatever support there may have been for the idea that episcopal approval was necessary before attempting civil divorce, it did not come—as claimed—from the Third Plenary Council of Baltimore.

This immediate juxtaposition of a correct quotation or paraphrase of the law, followed by a summary or conclusion building incorrectly from what had been just cited, is especially stark in this passage from *The Pastoral Companion*, but the phenomenon of manifestly erroneous readings of the texts of the Third Plenary Council of Baltimore, or of responses of the Apostolic See regarding civil divorce and separation, is a pervasive phenomenon in the canonical literature in the United States in the twentieth century. This chapter examines the original historical texts, the US literature, and the current law, ultimately concluding that the current universal law is broadly consistent with US literature prior to the diversion of the Third Plenary Council of Baltimore and the responses of the Apostolic See of the late nineteenth and early twentieth centuries.

Cautions against recourse to the civil authorities, even for separation, are not all identical. At least two distinct strands of reasoning are identifiable. The first is *precautionary or disciplinary*; it finds in the civil decision potential danger—whether

[4] MATHIS and MEYER, *Pastoral Companion (1961)*, 291.

directly to the spouses, or to the Church's proper relationship with the civil authorities—and discourages or prohibits the faithful from making use of it without the matter having been evaluated by the ecclesiastical authorities. The result could be likened to a dispensation from a prohibition. The second is *procedural*, where recourse to the civil authorities is a matter for caution because without ecclesiastical approval, the civil decision will not be effective in the Church.

At least four different eras of literature relevant to this study can be identified. The first is in the United States in the mid-nineteenth century, lasting until the effects of the Third Plenary Council of Baltimore are felt. Prescinding from their discussion of the moral liceity of civil divorce in cases where the marriage is canonically invalid, these authors allow the use of divorce under two criteria. First that there is very grave reason, and second, that its use is not intended by the party to dissolve the real bond of marriage, and especially not to enter into a new marriage. No intervention of ecclesiastical authorities is mentioned. This literature implicitly addresses an unnamed backdrop which would not ever allow the use of civil divorce.

The second era of literature, largely appearing outside of the United States, is heavily influenced by the replies of the Apostolic See of the 1880s and 1890s, which are read to indicate that civil divorce can never be permitted under any circumstances. These replies occur in a specific political context, namely the divorce law of France of 1884, but are later taken outside of that context as though they were universal principles of morality or canon law—which the texts themselves do not support and, in some cases, exclude.

The third era is influenced by both the Third Plenary Council of Baltimore of 1884, and a response of the Holy Office of 1906 (though not coming to widespread public

attention until 1932) which allows that divorce could be permissible in certain circumstances broadly consistent with those of the first era, but adds the requirement of explicit permission of the ecclesiastical authority, often mentioned as the diocesan bishop or the local ordinary. As we shall examine, this position is not supported by the texts upon which it claims to rely. It was sometimes supported by similar diocesan particular law. This position dominates in the United States throughout the twentieth century, and indeed some authors continue to rely on it into the twenty-first century.

The fourth era is something of a return to the first. Not mentioned in the *CIC/83* any more than it was in the *CIC/17*, recourse to civil divorce is not addressed by the universal law of the Church. The morality of divorce is to be evaluated according to its usage in each case, but it is not a canonical matter. The original two criteria—grave cause, and recognition of the enduring bond—still apply, at least implicitly, but there is no legal obligation to seek the intervention of ecclesiastical authority. This position is reflected in the Catechism of the Catholic Church, and in a 2015 letter from the Pontifical Council for Legislative Texts. The *CIC/83* allows for the first time in the universal law that the ecclesiastical authority can grant jurisdiction to the civil authority for separation with the bond remaining, including its ecclesiastical effects. Though new in the codified law, this idea was proposed for inclusion in the *CIC/17* and had long been implemented for all separation cases—not only individual instances—in certain territories via concordat or supplied jurisdiction.

3.1. The Challenge of Divorce in Nineteenth-Century American Catholicism

Divorce purporting to end the bond of marriage, outside of those dissolutions recognized by the Church, was not a new phenomenon for the Church to address (since

divorce was known in the ancient societies of the Mediterranean world in the first centuries of the Church); but for the Church in the United States in the nineteenth century, it was largely treated as a new phenomenon, or at least one requiring entirely new legislation to address.

For hundreds of years for the Latin Church in Europe, the civil authorities' ceding of family law to the ecclesiastical authorities meant that the problem of discordant civil and ecclesiastical marital statuses did not often occur in the core Catholic territories which most influenced the development of canon law. Even the creation of divorce of the bond in certain jurisdictions following the Reformation was limited in its effect, since many of these places had (after the Reformation) relatively few Catholics, and divorce of the bond was often rare in practice.[5] The provisions made for mission lands[6] addressed the situation of previously pagan, divorcing societies and people coming to the Catholic faith; they did not have to contend with the issue of divorce encroaching upon, much less, becoming endemic within, Catholic societies. It was only with the coming into force of "Enlightenment" principles in the aftermath of the French Revolution—roughly simultaneous with the creation of the United States—that the Church found itself needing to contend, as though for the first time, with significant numbers of her members having the opportunity to distinguish the civil marriage from the bond *coram Ecclesiam*, to end the former, and therefore to create discordant civil and ecclesiastical marital statuses.

[5] For example, in England from 1700 to 1857, there were only 314 divorces. See UK PARLIAMENT, Divorce, https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/divorce/ (September 16, 2025).

[6] See NOONAN, *Power to Dissolve*, 347–359.

Authors agree—and therefore, this author prescinds from discussion of—that divorce could be licitly sought in order to obtain civil freedom from a marriage dissolved or declared invalid by the Church, or of a civil marriage not recognized by the Church[7] (in those places where *Tametsi* had been published). Similarly, answering a civil summons to defend against a divorce suit filed against the party's wishes was at least tolerable.[8]

3.2. Civil Separation and Divorce Immediately Prior to Codification

Church-state conflict regarding jurisdiction over marriage received significant attention in the Syllabus of Errors of Pius IX,[9] and in the Encyclical letter *Arcanum Divinae* of Leo XIII.[10] The question of the relationship with the civil authorities regarding separation or divorce was one which vexed both American and non-American jurists in the late nineteenth and early twentieth centuries, as well as various dicasteries of the Apostolic See.

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[7] "Indeed, if the marriage is not a religious one, all admit that civil divorce is *per se* licit, because it implies civil freedom for the parties, who in fact are free" (P. GASPARRI, *Tractatus canonicus de matrimonio*, vol. 2, Paris, Institut Catholique, 1891 [=GASPARRI, *Tractatus canonicus de matrimonio (1891)*], 392, no. 1235).

[8] See e.g. SACRED CONGREGATION OF THE HOLY OFFICE, Responses to the Diocese of Southwark, May 22 and December 19, 1860, in *Collectanea Sancti Congregationis de propaganda fide seu decreta instructiones rescripta pro apostolicis missionibus*, vol. 2, Rome, Typographia Polyglotta, 1907, 483, no. 3.

[9] See PIUS IX, Syllabus complectens praecipuos nostrae aetatis errores qui notantur in Allocutionibus consistorialibus, Allocutionibus Encyclicis aliisque apostolicis litteris sanctissimi domini nostri Pii Papae IX, December 8, 1864, in H. DENZINGER and I. STAHL (eds.), *Enchiridion symbolorum et definitionum*, 8th ed., Würzburg, Stahelian, 1895, 384-385, nos. 65-74.

[10] See LEO XIII, Encyclical Letter on Christian Marriage *Arcanum Divinae*, February 10, 1880, in *ASS*, 12 (1879), 385–402.

3.2.1. Responses of the Apostolic See in the Late Nineteenth and Early Twentieth Centuries

Ecclesiastical legislation and literature in the United States were influenced by responses from Rome; Roman responses, in turn, were influenced by civil legislation in France, and in fact are impossible to understand outside of that context.

3.2.1.1. Essential Context: The Reintroduction of Divorce to France in 1884

"No law affecting the French family was as controversial as that which reestablished divorce in 1884."[11] Divorce was declared to be "a grave attack on Christian civilization" by Charles Freppel, who—indicative of the Church's interest in politics and in opposition to this legislation—was both Bishop of Angers and a deputy in the lower house of the National Assembly of France.[12] These civil developments and the atmosphere in which they took place influenced both the questions posed to the Apostolic See and the answers given. The "revival of divorce in France [in 1884] was done in open defiance of the Catholic Church and over the protests of French Catholics,"[13] and the replies reflect this context. All of the published responses to questions to the Sacred Penitentiary, and both *decrees* (as opposed to other responses) published by the Holy Office, concern France.

> The severity of the Sacred Penitentiary and the Holy Office in all these cases apparently must be understood in the light of the 1884 revival of divorce in that country. The reason the Holy See was severe in forbidding cooperation of consorts, advocates, judges and mayors in that country, seem to be that there it was a matter of cooperation in carrying out legislation which resisted the rights and laws of the Church. The Holy See's attitude was

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[11] T. McBRIDE, "Public Authority and Private Lives: Divorce after the French Revolution," in *French Historical Studies*, 17 (1992), 747.

[12] See ibid., 759.

[13] E.A. FORBES, *The Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128-1132*, Series canonica, no. 15, Ottawa, The University of Ottawa Press, 1948, 305–306.

> that, in France, such cooperation was illicit since these civil enactments harmed the common good of the Church.[14]

It is therefore not coincidental that so many questions came from France, and that of those that were formally published, they appeared soon in a French-language journal. The political context is not mentioned in the questions or the responses, but would have been obvious to readers as the most pressing issue of the day. The issue of civil divorce in France at that time could not be understood only as an issue for the spouses and other direct participants, but as the encroachment of a hostile power, actively usurping the rights of the Church. The Church in France had not given up hope that the state would be persuaded to amend its legislation (indeed, some success was seen inasmuch as the law was modified fairly swiftly, giving the mayor a less direct role in pronouncing a divorce, in 1886,[15] and giving additional effects to separation, mitigating the attraction of divorce, in 1893).[16] In that context, participation in the state matrimonial courts, especially regarding divorce, was not (only) a matter for the spouses themselves, affecting their own marriage and family, but an act of allegiance to an aggressively secularist regime opposed to the Church herself.

The narrow geographical scope of application of these replies was illustrated by the response of the Holy See to political fallout from the publication of one of its decisions. The decree of May 27, 1886 (discussed in more detail below), was published by anticlerical newspapers in Belgium, which sought to use it to cause Catholic judges in Belgium to resign from their offices (the consequence of them being unable in conscience to enforce the civil divorce law, in compliance with the decree). Following a spat which included a

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[14] Ibid., 212–213.

[15] See GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 446.

[16] See FORBES, *The Canonical Separation of Consorts*, 213.

brief severing of diplomatic relations between Belgium and the Holy See, peace was restored by a letter from the Apostolic Nuncio to Belgium to the Belgian government and read in the Belgian Parliament affirming that "the decree does not concern Belgium and that, consequently, nothing has changed in that country with regard to the matter of divorce."[17] This is most notable in light of the fact that the divorce law in Belgium was essentially identical to the law newly in effect in France;[18] what mattered was not a textual evaluation of the legislation itself, on the simplistic basis that it proclaimed the capacity of the state to end the civil marriage, but the complex dynamic of Church-state relations in which the legislation was but one element.

3.2.1.2. Responses of the Sacred Penitentiary

There appear to be five publicly-known substantive responses of the Sacred Penitentiary regarding the use of civil divorce by one of the spouses in this era,[19] and all

[17] "[…] la Congrégation du Saint-Office a déclaré que le décret du 27 Mai ne concerne pas la Belgique et que, par conséquent, rien n'est modifié en ce pays en ce qui touche la matière du divorce" (D. FERRATO, "Déclaration concernant la Belgique, 14 September 1886," in *Nouvelle revue théologique*, 19 [1887], 74). Regarding the background to the situation in Belgium and the effects felt there of developments in France, see also GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 446, no. 1548, and FORBES, *The Canonical Separation of Consorts*, 213.

[18] The French Republican law of September 20, 1792 creating divorce was enacted, with some modifications, into the civil codes of France and Belgium in 1804; but the restoration of the monarchy in France suppressed these laws in France from 1816 to 1884. The uproar in France in 1884 was caused not by an entirely new law, but by the reemergence of the law previously in effect in France prior to 1816, and continuously since 1804 in Belgium. See FORBES, *The Canonical Separation of Consorts*, 205, and MCBRIDE, "Public Authority and Private Lives," 755.

[19] SACRED PENITENTIARY, Response of the Sacred Penitentiary regarding a Particular Case, 5 January 1887, in *Nouvelle revue théologique*, 19 (1887), 74–75. The other four responses are as follows: (2) ID., Response of the Sacred Penitentiary, January 14, 1891, in *Nouvelle revue théologique*, 23 (1891), 671–672; (3) ID., Response of the Sacred Penitentiary, June 3, 1891, in *Nouvelle revue théologique*, 23 (1891), 677–678; (4) ID., Response of the Sacred Penitentiary, January 7, 1892, in *Nouvelle revue théologique*, 24 (1892), 528–529; (5) ID., Response of the Sacred Penitentiary, June 30, 1892, in *Nouvelle revue théologique*, 24 (1892), 529–530.

These are widely known among the authors on this subject; they are also cited by date of issue (though not to a place of formal publication), and paraphrased or quoted in part, by e.g. CAPELLO, *Tractatus canonico-moralis de sacramentis*, 832–833, no. 835 and GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 446–447, nos. 1549-1550.

probably come from France.[20] All concern "apparently very worthy"[21] situations where a spouse needed the civil divorce in order to receive certain temporal benefits, necessary to fulfill the party's other responsibilities, which could only be received with divorce, and for which civil separation would be insufficient by peculiarities of law in effect in France at that time.

To four of the questions, the response was that civil divorce would be sinful, despite it being stated that the party desired only the civil effects and not to be liberated from the bond of the marriage. To the fifth, however, the response was a more ambiguous referral to the "approved authors."[22] This is both the latest response chronologically of the five, and the only one in which it is stated that the petitioner had already received ecclesiastical separation. This last point in particular may have been decisive in giving a different answer to that which had been given to an otherwise-similar question less than six months earlier; but it is impossible to know, since none of the responses explain their reasoning. Indeed, it is not certain that the response was intended to mean anything different from the four previous negative responses.

None of the questions nor the answers were matters of canon law, but requests for moral guidance. One of the requests is explicitly from a confessor, and the others may be also.[23] Canon law is not mentioned. Indeed, an attempt by a bishop to infer from the response of the Sacred Penitentiary regarding the mayor's role in pronouncing divorce in

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[20] See FORBES, *The Canonical Separation of Consorts*, 210, fn. 99. Kelly believes that they come from "the Bishops of France and Belgium;" cf. J.P. KELLY, "Separation and Civil Divorce," in *The Jurist*, 6 (1946), 221.

[21] FORBES, *The Canonical Separation of Consorts*, 210.

[22] "Orator consulat probatos auctores" (ibid., 209).

[23] See ibid., 210, fn. 99.

France into a general rule was met with the response that "the Sacred Penitentiary, in issuing the decree in question, had in mind only to provide for a particular case according to its circumstances and requirements."[24] Nevertheless, these responses, having been published and made their way to English-language canonical literature, came to take on a status almost of holy writ decades later as both carrying canonical weight, and being applicable outside of the specific context—the French divorce law of 1884—in which they were given.

3.2.1.3. Responses of the Holy Office in the Nineteenth Century

In addition to those of the Sacred Penitentiary, several responses of the Holy Office were published. Unlike those of the Sacred Penitentiary, many are less focused on the spouses themselves, and more on the participation of lawyers, judges and mayors in divorce.

The first was submitted in the context of "the lamentable establishment of the English court, by whose decree marriages are accustomed to be dissolved as to the bond, so that spouses may pass over to new marriages";[25] a reference to the Matrimonial Causes Act of 1857, which created divorce through the civil courts, rather than only divorce through private acts of Parliament, or annulment or separation through the Church of England's ecclesiastical courts.[26] Three years later, the Holy Office replied to two *dubia*

[24] "S. Poenitentiariam in rescripto, de quo agitur, edendo id unum in mente habuisse, ut casui particulari pro ejus circumstantiis et exigentiis provideret" (GASPARRI, *Tractatus canonicus de matrimonio [1904]*, 449, no. 1552).

[25] "Post plorandam erectionem tribunalis anglici, per cuius decretum dissolvi solent matrimonia quoad vinculum, adeo ut conjuges possint ad nova matrimonia transire" (SACRED CONGREGATION OF THE HOLY OFFICE, Responses to the Diocese of Southwark, May 22 and December 19, 1860).

[26] See G.L. SAVAGE, "The Operation of the 1857 Divorce Act, 1860-1910: A Research Note," in *Journal of Social History*, vol. 16, no. 4 (1983), 103.

submitted by the Bishop of Southwark. A Catholic was said to be not able licitly to act as lawyer to a party seeking the dissolution of the bond of his marriage, nor to be a judge nor member of the jury.[27] Regarding civil separation, a number of conditions were established before a Catholic could act as lawyer, judge or plaintiff in a separation case, not involving the dissolution of the bond. The conditions were that

> […] the Catholic party has no other court to which it can turn, from which it may obtain a sentence of separation from bed and board, and provided that the sentence of this court produces no other effect than the aforesaid separation, it may be tolerated that Catholics act in that forum in the roles of plaintiff or advocate, provided that just causes of separation are present in the judgment of the Bishop; and if anything further remains doubtful, let recourse be had, with a fuller explanation of all the circumstances and the provisions of the law.[28]

There are three conditions: that no alternative court were available (almost certainly true in England at that time, since Catholic ecclesiastical decisions were unenforceable); that the sentence was for civil separation only; and that sufficient reason for separation was present, in the judgment of the bishop. It is not stated that the bishop must give specific approval to seek civil intervention; only that, in his judgment, reasons for separation be present; this could, presumably, be the episcopal intervention in departure or legal separation discussed in Chapter One. Therefore, this answer concerns morality, not canon law; a process or procedure of requiring ecclesiastical approval to approach the civil authority, separate from the approval for the separation itself, is not mentioned, mandated or established. The question was not asked or answered—at least in the published version—whether a Catholic party could seek the civil dissolution of the bond of his marriage if the

[27] See SACRED CONGREGATION OF THE HOLY OFFICE, Responses to the Diocese of Southwark, May 22 and December 19, 1860, nos. 1–2. Divorces under the Act were contested cases, requiring proof of specific wrongdoing by a spouse and often denied by the other, hence the need for a jury.

[28] Ibid., no. 4.

other conditions mentioned for civil separation were met, but it could be inferred from the answer to the similar question regarding an attorney that it would not be permissible.

This remained the basis of subsequent published responses. The Bishop of St. Gall asked a similar question regarding the participation of lawyers and spouses in civil separation cases, and was referred back to the previous response given to the Bishop of Southwark.[29] However, his question regarding judges was not given the same negative response as to Southwark, but instead the instruction that judges were to have recourse[30] in each case—perhaps a reflection of the particular divorce laws at issue in St. Gall at that time, or Church-state relations in Switzerland.

The Apostolic See's most public and general statement on participation on the new matrimonial legislation of France was given by the Holy Office on June 25, 1885.[31] It was asked whether it could be done (*fas esset*)[32] to participate in the new civil matrimonial processes. The principal conditions for toleration of the participation of public office holders (i.e. judges and mayors) and lawyers in "matrimonial cases in France"[33] were that

> […] they openly profess the Catholic doctrine concerning marriage and concerning matrimonial cases which pertain to ecclesiastical judges alone, and provided that they are so disposed in mind both concerning the validity and nullity of marriage and concerning the separation of bodies, in which causes they are constrained to judge that they never issue a sentence, nor defend for it to be issued, nor appeal nor incite toward a sentence contrary to divine or ecclesiastical law and in doubtful or more difficult cases, each one should

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[29] SACRED CONGREGATION OF THE HOLY OFFICE, Response to the Bishop of St. Gall, April 3, 1877, in J. PLANCHARD, "Les décisions du Saint-Siège et la loi du divorce," in *Nouvelle revue théologique*, 18 (1886), 484-486.

[30] From the context, to the Apostolic See—though which dicastery is not explicitly clear in this response.

[31] See SACRED CONGREGATION OF THE HOLY OFFICE, Resolution of the Holy Office concerning the Separation of Spouses, June 25, 1885, in *Collectanea Sancti Congregationis de propaganda fide*, 208.

[32] From the introduction to the same decree as reprinted in FOURTH PROVINCIAL COUNCIL OF CINCINNATI, *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882 adjectis pluribus decretis, rescriptis aliisque documentis*, Cincinnati, OH, Benziger Brothers, 1886, 301–303.

[33] SACRED CONGREGATION OF THE HOLY OFFICE, Resolution of the Holy Office concerning the Separation of Spouses, June 25, 1885.

> approach his own Ordinary, be guided by his judgment, and, insofar as may be necessary, through him have recourse to the Apostolic Penitentiary.[34]

A few points can be noted: the official must not merely privately believe in the Catholic teaching of the reservation of matrimonial causes [of the baptized] to ecclesiastical judges but must "openly profess" it; a political statement in the context of the situation in France. Furthermore, they must never issue nor pursue a sentence "contrary to divine or ecclesiastical law," which in context seems to be a reference to divorce of the bond of a presumptively valid marriage. The response introduces explicitly for the first time the idea that the Ordinary is to be approached in each case regarding the civil effects. It also continues the idea—mentioned in the 1860 response to the Bishop of Southwark—that recourse could be had, clarifying that it was to be to the Apostolic Penitentiary.

In order to address some public interpretations of the 1885 decree, some French bishops requested clarification from the Holy Office:

> Whether the interpretation spread throughout France and even published in print is correct; namely, according to which a judge satisfies the above-mentioned condition who, although a marriage may be valid before the Church, entirely avoids, in truth and in conscience, that marriage, and applying the civil law, pronounces that the conditions for divorce have been satisfied, provided that he intends in his mind to break only the civil effects and the merely civil contract, and that the terms of the sentence pronounced refer only to those matters? In other words, can a sentence issued in this way be said not to be contrary to divine or ecclesiastical law?[35]

The response to this question was negative, apparently firmly rejecting the idea that voluntary participation by a public official in the divorce laws then in force in France could ever not be contrary to divine law, with mental reservation about the merely civil effects of the act. However, there are two differences between the situations addressed in the 1885

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[34] Ibid. Mention of the *Apostolic* Penitentiary is authentic from the source.

[35] SACRED CONGREGATION OF THE HOLY OFFICE, Decree in Response to Bishops of France, May 27, 1886, in *ASS*, 22 (1889), 635–636.

and 1886 decrees: the earlier addressed civil separation, but demanded public profession of Catholic doctrine by the official; while the later addressed divorce but with a judge who practices a kind of mental reservation "in conscience," intending "in his mind" to break only the civil bond. It is not entirely clear, therefore, which of these two significant differences made the latter response negative when the first had been affirmative.

Nevertheless, the importance of this clarification to those who issued it is suggested by the fact that it is the only response of the Apostolic See we have mentioned which was published in the *Acta Sanctae Sedis*. Furthermore, it was also "sent to Cardinal James Gibbons, ordering that he communicate [it] to the Archbishops and Bishops of the United States" (together with the aforementioned 1885 response to which this 1886 decree was a clarification), and it was in fact published in 1886 as an appendix to the acta of the Fourth Provincial Council of Cincinnati.[36]

The legal restraint of the 1886 decree, limited to the interpretation of the 1885 decree, and both specifically regarding France, was noted—even lamented—by contemporary commentators. "Since the famous responses of 27 May 1886 [which, as it was previously noted, caused considerable confusion and damage to the public position of the Church in Belgium], it seems that in Rome they have resolved not to answer any doctrinal question on this unfortunate law of divorce."[37] With more than a hint of disappointment, one of the Belgian authors concluded, "[…] our readers have seen with what care the Holy See avoids doctrinal decisions on this point, and it is not probable that

[36] See SACRED CONGREGATION OF THE HOLY OFFICE, Resolutions of the Holy Office concerning the Separation of Spouses, Whether regarding the Bond or Only regarding Cohabitation, in *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 301–303.

[37] J. PLANCHARD, "Divorce civil: Opinions et résponses," in *Nouvelle revue théologique*, 23 (1891), 665–666.

it will so rapidly change its practice."[38] What was clear to that European commentator, however, was not always understood by later American authors.

3.2.1.4. The Response of the Holy Office of 1906

Twenty years after these two responses to the situation in France, another response was given, which does not directly contradict the previous replies but which nevertheless breaks new ground. The response of August 6, 1906 is the first from the Holy Office to address the question of civil divorce by one of the spouses, not a lawyer or public official.

This response does not seem to have been published in full anywhere; not in a scholarly journal, such as *Nouvelle revue théologique* which published responses of the Holy Office and Sacred Penitentiary on a similar theme weeks or months after they were issued; not in the *Collectanea S. Congregationis de Propaganda Fide*, the second volume of which had appeared the next year and which included other responses of the Holy Office including those regarding civil divorce and separation; not in the *Acta Sanctae Sedis*, wherein the 1886 response was published, not in the *Fontes* to the *CIC/17*, which repeated the 1885[39] and 1886[40] decrees as sources of *CIC/17* can. 1960 (regarding the reservation of matrimonial causes to the ecclesiastical judge); not in other volumes of ecclesial acts, such as the publication of the 1885 and 1886 responses, only months after the latter was issued, together with the acta of the Fourth Provincial Council of Cincinnati.[41] It even

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[38] Ibid., 679.

[39] See SACRED CONGREGATION OF THE HOLY OFFICE, Decree regarding Matrimonial Cases in France, June 25, 1885, in GASPARRI (ed.), *Codicis iuris canonici fontes*, vol. 4, 423–424, no. 1093.

[40] See SACRED CONGREGATION OF THE HOLY OFFICE, Decree regarding Matrimonial Cases in France, May 27, 1886, in GASPARRI (ed.), *Codicis iuris canonici fontes*, vol. 4, 429, no. 1101.

[41] See SACRED CONGREGATION OF THE HOLY OFFICE, Decrees of the Fourth Provincial Council of Cincinnati.

escaped publication in periodicals such as the Belgian anticlerical newspaper which used the 1886 decree to further its own cause. Instead, it is repeated in part in the 1932 edition of Gasparri's *Tractatus canonicus de matrimonio*.[42] While the authenticity of Gasparri's quotation ought not to be doubted, the manner of—or rather, lack of—publication reflects the fact that this was a response regarding the morality of "a specific question posed in a particular case." Although Kelly stated that he had seen a response in 1945 in the same words,[43] this does not strengthen the response's relevance as a matter of law but weakens it: if it was supposed to provide public guidance in the manner of law for decades after its issue, surely additional means of publication could have been found, other than a partial quotation devoid of context and published a quarter of a century after the event.[44]

Gasparri recounted:

> In response to a specific question posed in a particular case: "Whether it may be permitted that a woman, for most grave causes [*ob gravissimas causas*], seek a divorce from the civil tribunal," the same Sacred Congregation, on the 6th of August, 1906, judged that the response should be: "Considering the particular circumstances concurring in the case, it can be permitted, provided that the woman petitioner declares before the Ordinary or his delegate, in the presence of two witnesses, even under oath, that she in no way intends to break the matrimonial bond, but only wishes to be freed from the burdens of the civil customs [*civilis ritus*]; scandal having been removed in the manner that, in the judgment

[42] See GASPARRI, *Tractatus canonicus de matrimonio (1932)*, 337, no. 1324.

[43] See KELLY, "Separation and Civil Divorce," 222.

[44] The "Roman Conferences" of the era seem to have been occasions when officials of the Roman Curia responded to questions, mentioning decisions which had been made, including those yet to be made public. Notes were taken, and some of these in turn were published as at least preliminary or informal curial responses. See PLANCHARD, "Divorce civil," 668–671. Although I have found no record of this decree prior to 1932 (and numerous other commentators after 1932 citing Gasparri as their source), it is possible that this response may have been made known by such a means. Even if it were, however, this would not detract from the greater point that such a means could not be a manner of publicly giving a rule for general cases—even if it was internally treated as a model for similar situations. "Assurément, l'autorité de la conférence romaine, et celle des censeurs et des éminents personnages qui parlèrent dans le sens du rapporteur, est fort grave; mais ce n'est pas une décision" (ibid., 670–671).

> of the Bishop, can best be effected." This norm was subsequently adopted by the Sacred Penitentiary in its later practice.[45]

The Holy Office gave two provisions in this particular case: that the wife declare in a prescribed manner that she did not intend to break the true bond but end only the civil obligations; and the removal of scandal according to the best judgment of the bishop. In addition to these two, we could add the presupposition of the *dubium* that "most grave causes" exist.

The response, as reported, cannot support the weight of the arguments which were later based on it. At the risk of belaboring the point, this response contains no elements which would suggest that it is an interpretation of law. Moreover, the role of the Ordinary or of the bishop is not the placing of a juridic act, granting or denying a request for a *licentia*. Regarding the first provision or condition, the Ordinary's role is a participation in the formalities of a public oath personally or via delegation; and regarding the second, the diocesan bishop's role is a judgment regarding the best manner of removing scandal. The Ordinary or bishop is not asked to make a judgment about whether or not it is morally or canonically licit to seek civil divorce: he is asked to witness the wife's oath, and he is obliged to find the best means to prevent scandal. In later tellings in the United States, however, the reply is described as establishing a requirement for episcopal approval, which is simply not present in the text.

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[45] "Proposito enim dubio in casu particulari: « Num permitti possit ut mulier ob gravissimas causas petat divortium a tribunali civili », eadem S. Congregatio, die 6 aug. 1906, respondendum censuit: « Attentis peculiaribus circumstantiis in casu concurrentibus, permitti posse, dummodo mulier oratrix coram Ordinario vel eius delegato ac duobus testibus etiam iureiurando declaret se matrimoniale vinculum nullatenus abrumpere, sed tantummodo a civilis ritus oneribus exsolvi velle; remoto scandalo quo meliori modo iudicio Episcopi fieri poterit ». Quam normam S. Poenitentiaria in sua posteriori praxi recepit" (GASPARRI, *Tractatus canonicus de matrimonio [1932]*, 337, no. 1324).

But perhaps we are getting ahead of ourselves. In its own context, the 1906 response—albeit publicized a quarter of a century later—was not important because of quasi-legal conditions or requirements it established before civil divorce could be permitted; it was notable because it allowed for the possibility of divorce at all, following the 1886 decree in particular which seemed not to allow this outcome.

3.2.2. Literature outside of the United States

The question of recourse to civil divorce is treated as an important topic by canonists in the nineteenth century, and not only in the United States. We will consider this phenomenon first through the evolution of Gasparri's *Tractatus canonicus de matrimonio* (recognized already in 1891 as "examining and setting forth very well the question of civil divorce"[46]) and other authors as necessary.

Gasparri addresses the exclusive jurisdiction of the Church regarding marriage cases of her members, in light of the 1860 and 1885 responses of the Holy Office mentioned above. Rather than citing those responses as proof examples of the absolute incompetence of the civil tribunals, as US authors would later do, Gasparri notes that in both replies, the participation of the civil judge in separation cases can be "tolerated," "and therefore jurisdiction is supplied"[47] to the civil judge in England and in France as a result of these decisions of the Holy Office. This is not toleration of a purely *moral* evil, but true supplied jurisdiction. At least insofar as separation with the bond remaining is concerned, Gasparri

[46] R.P. PIAT and J. PLANCHARD (eds.), "Bibliographie: *Tractatus canonicus de matrimonio*," in *Nouvelle revue théologique*, 23 (1891), 663.

[47] "Si autem tolerator fideles divortium semiplenum sub iis conditionibus petere a judice laico, et advocatos hanc petitionem defendere, eo ipso tolerari judicem laicum hoc divortium concedere, ideoque eidem jurisdictionem suppleri palam est" (GASPARRI, *Tractatus canonicus de matrimonio (1891)*, 333–334, no. 1165).

is attempting to reconcile the civil and ecclesiastical jurisdictions, rather than attempting to create or magnify a clash of discordant fora which would only result in confusion and difficulty for the faithful.

Gasparri takes a different approach, however, to civil divorce. He does not address the matter within the main body of his work, but in an appendix "on so-called civil marriage,"[48] suggesting that the matter is something other than a matter of canon law. The appendix begins with an extensive exposition of the civil marriage laws of France;[49] there are footnote references to Italian legislation, but it is very clear that the issue is raised primarily in regard to France. "Let us see, therefore, whether civil divorce is so evil in itself that a party can never request it without sin"[50]—making clear that this is a matter of morality, not law (though, since it treats the relationship between civil marriage law and the Church, of interest to readers of a textbook on ecclesiastical marriage law). Gasparri identifies two principal currents of thought: the strict opinion (*opinio rigida*), which held that civil divorce was intrinsically evil and could therefore never be done under any circumstances; and the lenient opinion (*opinio benigna*)—"omitting more lax opinions"[51]—which allowed that recourse to, or participation in, civil divorce could be done if varying conditions were fulfilled.

The lenient opinion, "held at least as probable, in theory or in practice, by many bishops, educated, pious, prudent and most devoted to the Apostolic See in Germany,

[48] "De matrimonio, ut ajunt, civili" (ibid., 374).

[49] See ibid., 374–379.

[50] "Videamus igitur num divortium civile ita in se malum sit, ut numquam possit sine peccato judex illud pronuntiare, pars petere, procurator et advocatus illi patrocinari" (ibid., 391, no. 1233).

[51] "ut alias laxiores opiniones omittamus" (ibid., 394, no. 1238).

England, America, and France,"[52] is explicable by the argument that since the civil bond of marriage is distinguishable from the religious bond, and the civil bond does not truly exist as a bond, "civil divorce is morally indifferent in itself."[53] While depriving a religious bond of its rightful civil effects is "an effect contrary to divine law,"[54] this happens "indirectly, though necessarily";[55] and since "for a just cause, an act that is indifferent in itself is licit, from which certainly, but only indirectly, arises an effect contrary to divine law,"[56] use of civil divorce can be morally licit. Additionally required would be a serious cause of public benefit, not merely the private benefit of the party, emphasizing social obligations over the individual rights of the spouses.

The stricter opinion, on the other hand, held that "the existing religious bond makes the civil freedom of the parties intrinsically evil,"[57] and therefore no circumstances could allow it.

Gasparri examines in ample detail the various responses of the Apostolic See on the matter, critically evaluating how each of them supports in various ways the two opinions. Gasparri himself concluded in the strict opinion,[58] relying in particular on the 1886 decree. This remained his position in the 1904 edition.[59]

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[52] "[…] et eam sive in theoria sive in praxi retinent, saltem ut probabilem, non pauci Antistites, docti, pii, prudentes et Sedi Apostolicae addictissimi in Germania, Anglia, America, Gallia" (ibid., no. 1238).

[53] "[…] divortium civile est per se moraliter indifferens" (ibid., 395, no. 1238).

[54] "[…] effectus contrarius juri divino" (ibid.).

[55] "[…] indirecte, etsi necessario" (ibid.).

[56] "[…] atqui ex justa causa licitus est actus ex se indifferens, ex quo certe, sed indirecte tantum, sequitur effectus contrarius juri divino" (ibid.).

[57] "[V]inculum religiosum existens reddit intrinsece malam civilem partium libertatem" (ibid., 394, no. 1237).

[58] "Jam vero nos in rigidam opinionem inclinamur" (ibid., 404, no. 1248).

[59] See GASPARRI, *Tractatus canonicus de matrimonio (1904)*, 450, no. 1554.

However, the first edition to be published after 1906, in 1932, is revised to reflect the 1906 response. Of course, the 1932 edition generally reflects the codified law, not the law as it was in 1906. But as has already been established, the codified law of separation was not a fundamental reordering of the institute, but largely a synthesis of the decretal law, and especially of Gasparri's own understanding of the decretal law. Large parts of the 1932 edition are mostly or even entirely identical to the 1904 and 1891 editions, save only for references to canons of the *CIC/17* rather than chapters of the *Corpus iuris canonici*. Therefore, it seems reasonable to use the 1932 edition as an indication of the impact of the 1906 letter on Gasparri's understanding of the pre-codification law, as well as regarding the 1917 Code.

In Gasparri's 1932 work, civil divorce remains in an appendix as a special question,[60] now separated from the question of civil marriage. Much of the text is repeated from the prior editions. He gives largely the same analysis of the same late nineteenth-century responses; apart from the 1906 response, there is no other new source material, nor did the 1906 response lead Gasparri to revise significantly his analysis of the earlier works.

The 1906 response does, however, force Gasparri to modify his conclusion regarding the question of whether civil divorce can ever be morally licit: "whatever may have been the case in the past when we ourselves inclined toward the rigid opinion, which seemed to be favored by the Sacred Congregation of the Holy Office […], today the Holy Office seems to follow a milder opinion."[61] He then recounts the partial text of the response

[60] See GASPARRI, *Tractatus canonicus de matrimonio (1932)*, 323–337.

[61] "At, quidquid sit de anteactis temporibus, quando nos ipsi in rigidam opinionem inclinabamur, cui S. C. S. Officii, quae in his questionibus suprema est, favere videbatur, hodie S. Officium mitiorem sententiam sequi videtur" (ibid., 337, no. 1324).

as given above, and acknowledges that in such circumstances the divorce can be licitly sought by the parties, and also their lawyers, and pronounced by the judges in the case. He concludes: "In practice, however, the Bishop, taking into account the decrees and responses given thus far, should consult either the Holy Office or the Sacred Penitentiary in more difficult particular cases."[62]

Gasparri certainly does not take the position that civil divorce is of no intrinsic moral weight, as Kenrick and Smith did before him, and Woywod did later. Far from it. Indeed, he seems to conclude only reluctantly that the 1906 response supersedes his strict interpretation of the prior responses, in which he stated that divorce can never be licit. But it is important to clarify exactly what Gasparri does and does not say about civil divorce.

First, his conclusion, both in its text and the discussion which had led up to it, remains an opinion regarding morality, not a matter of law. Second, even observing this limitation, he does not say that the diocesan bishop must be involved in every (potential) divorce. The diocesan bishop could have had many reasons to consult with the Apostolic See regarding divorce outside of his deciding individual cases: for assistance in responding to confessors who sought his guidance, whether regarding the matter in general or in response to specific cases; in order to publish guidance for confessors regarding the divorce laws operative in a place; even regarding a "reservation of the sin of divorce" he may have been considering. None of these possible reasons for the bishops consulting the Apostolic See presume that the bishop would himself need to be consulted *ipso iure* or *ex natura rei* regarding every possible divorce in his diocese. Furthermore, it is only "in more difficult

[62] "In praxi autem, Episcopus, prae oculis habens decreta et responsa huc usque data, in difficilioribus casibus particularibus consulat aut S. Officium aut S. Penitentiariam" (ibid., no. 1326).

particular cases" that he "should consult" with the named dicasteries; there is no mention of an obligation on his part, nor of the Holy See granting permission, and certainly not for all cases.

Yet Gasparri's opinions were not universal. Writing prior to most of the responses of the Apostolic See, Feye held that civil divorce generally "cannot be theologically justified,"[63] but could be allowed under very limited circumstances; specifically, lack of civil provision for separation alone, or wholly exceptional harms to the party above and beyond those usually experienced by others, leaving the Catholic party with no means to provide for himself or herself.[64] His reasoning for general opposition is distinct from Gasparri; he is concerned that civil divorce would be an occasion of sin *especially for the other spouse*, who would have the opportunity to enter into a new marriage. Writing from Belgium and citing in places the Belgian Civil Code regarding divorce, he seems to have more-or-less come to terms with the fact of civil intervention in marriage, seventy years after its coming into effect, even while firmly rejecting divorce's effect on the bond of marriage. While Feye required "the prior intervention of ecclesiastical authority"[65] before recourse to the civil authority to obtain civil freedom from a canonically inexistent bond, this seems to be in terms of the proper ecclesiastical declaration of the bond's nonbinding nature, not for the civil aspects *per se*. If the "theological" conditions are met for civil divorce—which would, according to Feye's criteria, be rather rare—then no intervention of ecclesiastical authority is mentioned.

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[63] "[…] theologice excusari nequit" (H.J. FEIJE [FEYE], *De impedimentis et dispensationibus matrimonialibus in usum auditorum suorum*, 2nd ed., Leuven, Peeters, 1874, 456, no. 583).

[64] See ibid., 456–457.

[65] "[…] praeviam auctoritatis ecclesiasticae interventionem" (ibid., 456, no. 583).

Similar to Gasparri, Wernz addresses civil divorce in a *scholion*, as a kind of gloss included perhaps for the convenience of readers interested in the intersection of marriage, law, and the Church, but clearly distinct from his commentary on the marriage law of the Church. Writing after the Holy Office's 1906 response, but not mentioning it or any similar response, Wernz summarizes the strict opinion and the more benign opinion in terms generally similar to Gasparri's, including reference to the same nineteenth-century responses already discussed. However, Wernz's own conclusion is revealed to be the more benign opinion, "since the Church has not yet given a general decision in favor of the strict view,"[66] noting the fact that all of the responses of the Apostolic See were related to specific countries' divorce laws, or even to specific marriages, and therefore were not universally binding. Continuing to emphasize the importance of local circumstances, Wernz states that "Catholic judges and lawyers cannot arbitrarily follow their own thoughts in these matters, but must be taught by theologians and canonists, indeed they will seek the declarations of their ordinaries and, as necessary, of the Apostolic See."[67] Wernz thus concludes more clearly than any other commentator of the era that there is at least a general expectation of following the directives of local ecclesiastical authority. However, in the context of Wernz's emphasis on the restricted applicability of the Holy See's responses, this could be fulfilled

[66] "Quare cum ipsa Ecclesia generalem decisionem nondum dederit in favorem opinionis rigidae" (WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 503).

[67] "Nequaquam igitur hac in re iudices et iuristae catholici proprium suum ingenium arbitrarie sequi possunt, sed a theologis et canonistis sunt edocendi, imo suorum Ordinariorum et, quatenus opus est, Sedis Apostolicae implorabunt declarationes" (ibid., 704, no. 750). Presumably would be all the more true of spouses than it would be of judges or lawyers, though Wernz does not separately address this issue from their perspective.

by observance of the local authority's general directives, not necessarily consultation in each case.[68]

The provisions of the Third Plenary Council of Baltimore were noted by contemporary commentators even outside of the United States, though sometimes with a similar lack of textual precision as found in the United States. Writing from the Austrian Empire, one canonist commented,

> These things having been noted from the law, it is evident to be entirely in accordance with the sacred canons, that the plenary council should wish that those who have procured for themselves a civil divorce to be decreed by a secular judge be afflicted with grave penalties; and indeed those who, after the sentence of dissolution of the matrimonial bond, will have attempted to enter into another marriage, with excommunication to be incurred ipso facto and reserved to the ordinary (n. 124); but those who will have obtained separation of bed and board, with the bond remaining intact, with penalties to be determined by the judgment of the bishop (n. 126).[69]

While accurate in noting a distinction between canon 124 on divorce and canon 126 on separation, this commentary errs in conflating the penalties incurred by those who divorce and those who, additionally, attempt remarriage; in fact canon 124 mentions the penalty of excommunication only for those who attempt remarriage, while those who divorce are declared to commit grave sin but without any penalty, *ipso iure* or even facultative, being mentioned. Wernz similarly (and correctly) noted Baltimore's excommunication incurred

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[68] On the basis of the legislation of the Third Plenary Council of Baltimore, this would seem to take the form of accepting canon 124's statement of the grave sinfulness of civil divorce, without an obligation to involve ecclesiastical authority, but with an obligation to consult prior to civil separation, per canon 126.

[69] "Quibus e jure enotatis, patet sacris canonibus omnino consentaneum esse, quod concilium plenarium eos, qui divortium civile sibi a judice saeculari decernendum curaverint, gravibus poenis affectos velit; et eos quidem, qui post sententiam solutionis vinculi nuptialis alias inire nuptias attentaverint, excommunicatione, ipso facto incurrenda et ordinario reservata (no. 124); eos vero qui separationem tori atque habitationis, integro vinculo, impetraverint, poenis judicio episcopi determinandis (no. 126)" (N. NILLES, *Commentaria in Concilium Plenarium Baltimorense tertium: ex praelectionibus academicis experta*, ed. domestica, vol. 1, Innsbruck, F. Rauch, 1888, 184–185).

by those who attempt a new marriage, without claiming any penalty for those who merely divorce.[70]

Prior to codification, the principal question in the Church outside of the United States regarding civil divorce as a matter of morality was whether it could ever be morally licit; some said it could, some said it could not, and each drew support from late nineteenth century responses of the Apostolic See. A significant complicating factor was the question of whether or not the responses of the Apostolic See even gave any general guidance, outside of the particular cases. This discussion, though engaged often (but not exclusively) by canonists, was not treated as a matter of canon law, but as a moral issue. Among those who said that divorce could be licit, generally a grave reason was required. Where the intervention of the ecclesiastical authority was mentioned, it was not a requirement but a suggestion—and again, for moral guidance, not liceity of an act.

3.2.3. An Historical Overview of Legislative Activity of Councils in the United States regarding Marriage and the Civil Authorities

Divorce was an issue which vexed the fathers of various councils in the United States in the nineteenth century, but their severest provisions were limited to those who had attempted remarriage while bound by an existing bond.

3.2.3.1. Prior to the Third Plenary Council of Baltimore

The First Diocesan Synod of Baltimore took place in 1791, when the Diocese of Baltimore encompassed all of the territory of the United States. The Synod included

[70] See WERNZ, *Ius decretalium ad usum praelectionum in scholis textus canonici sive iuris decretalium*, 173–174, fn. 45.

legislation establishing that transients were "not to be admitted to marriage, unless after three publications [of banns] have been made […] and especially unless they shall have had altogether sufficient testimony from the pastors of the place whence they departed, that they are free from the conjugal bond,"[71] suggesting that remarriage was a problem—though it is quite possible that such parties would not actually have been divorced, since civil divorce was relatively rare and difficult to obtain in the United States in the eighteenth century. The same problem remained through the Sixth Provincial Council of Baltimore in 1846 (effectively a national council), which legislated similarly regarding all the faithful, not only transients.[72] These provisions were also in response to the lack of binding canonical form (the bishops having repeatedly declined to promulgate *Tametsi*)[73]; people were divorcing, or simply moving away without divorcing, and remarrying.

The Fifth Provincial Council of Baltimore, occurring in 1843, warned bishops that "in their synods, under penalty of excommunication *ipso facto*, they prohibit those who are separated by civil divorce from entering into new vows, the legitimate bond being disregarded."[74] The council did not legislate directly regarding the lay faithful, but

[71] "Vagi et peregrini ad matrimonium non sunt admittendi, nisi post tres publicationes factas juxta præscriptum Concilii Tridentini, et præsertim nisi testimonium omnino sufficiens habuerint a Pastoribus loci unde discesserunt, ipsos conjugali vinculo liberos esse" (FIRST DIOCESAN SYNOD OF BALTIMORE, Statuta Synodi Baltimorensis anno 1791 celebratæ, in *Concilia provincialia, Baltimori habita ab anno 1829 usque ad annum 1849*, editio altera, Baltimore, MD, Joannis Murphy, 1851, 17, no. 15).

[72] See SIXTH PROVINCIAL COUNCIL OF BALTIMORE, Concilium Baltimorense provinciale VI, decreta concilii, in *Concilia provincialia, Baltimori habita ab anno 1829 usque ad annum 1849*, 244, no. 3.

[73] See e.g. FIFTH PROVINCIAL COUNCIL OF BALTIMORE, Concilium Baltimorense provinciale V, decreta concilii, in *Concilia provincalia, Baltimori habita ab anno 1829 usque ad annum 1849*, 17, no. 4; FIRST PLENARY COUNCIL OF BALTIMORE, *Concilium Plenarium totius Americae Septentrionalis Foederatae, Baltimori habitum anno 1852*, Baltimore, MD, John Murphy, 1853, 31, 34–35.

[74] "Cum lege divina vetitum sit homini separare quos Deus conjunxit, monemus Episcopos ut in suis synodis sub pœna excommunicationis ipso facto, prohibeant iis qui divortio civili sejuncti sunt, ne ad nova transeant vota, legitimo vinculo posthabito" (FIFTH PROVINCIAL COUNCIL OF BALTIMORE, Concilium Baltimorense provinciale V, decreta concilii, 216–217, no. 3).

instructed diocesan bishops to establish their own legislation punishing divorce and remarriage. The tenor of the council fathers' motivation is expressed in startling terms in the pastoral letter of the same council:

> We deplore the enormous scandal of some who, having already contracted marriage, enter into new engagements during the life time of their lawful consorts. Others, though few in number, have sought from the civil authority a divorce from the bond of matrimony, and have ventured to pass to a second marriage, notwithstanding the indissoluble character of the marriage-tie,—God having prohibited the separation of those whom he has united. We are determined to employ the severest authority of the Church against persons guilty of so heinous a crime, and to cut them off from her communion, delivering them over to Satan, that by humiliation in time, their spirit may be saved in the day of Christ.[75]

What the council may have lacked in direct canonical effect—it did not create a prohibition *sub poenam excommunicandi*, but warned diocesan bishops to create the same—it made up for in rhetorical effect, stating the bishops' determination to employ the Church's severest authority (in the form of excommunication), even "delivering over to Satan" those who attempted divorce and remarriage. No council or commentator addressing the matter since then has quite matched the strength of this bombast. Nevertheless, the Council did not pretend (in either its decrees or its pastoral letters) to apply such a provision to all those who attempted divorce alone, nor even those who "enter into new engagements during the life time of their lawful consorts," but only to those who sought civil divorce after an indissoluble[76] marriage tie and then compounded this with civil remarriage.

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[75] FIFTH PROVINCIAL COUNCIL OF BALTIMORE, *Pastoral Letter of the Most Reverend the Archbishop of Baltimore and the Rt. Rev. the Bishops of the Roman Catholic Church in the United States of America Assembled in Provincial Council in the City of Baltimore in the Month of May 1843 to the Clergy and Laity of Their Charge*, Baltimore, MD, John Murphy, 1843, 12.

[76] The word "indissoluble" may have been intended to exclude those who sought civil divorce from a marriage invalid in the Church due to an impediment, or whose marriage could be dissolved by the Pauline privilege. See S.B. SMITH, *Notes on the Second Plenary Council of Baltimore*, New York, P. O'Shea, 1874, 251–252.

The Second Plenary Council of Baltimore recalled the decree of the Fifth Provincial Council, repeating it without explicitly reissuing it.[77]

3.2.3.2. The Third Plenary Council of Baltimore

As discussed in Chapter One, the drafting of the provisions on marriage of the Third Plenary Council of Baltimore was entrusted to the bishops of the Province of Cincinnati, who had met in 1882. Although this Provincial Council did not address civil divorce directly in its decrees, it did make legal provision regarding civil separation and mentioned civil divorce in its pastoral letter.

The Fourth Provincial Council of Cincinnati of 1882 established the reserved sin of approaching the civil authorities for *separationem a mensa et thoro* without consulting ecclesiastical authority.[78] Chapter One previously discussed how this provision of title IV of the Fourth Provincial Council became a model for canon 126 of the Third Plenary Council of Baltimore, with drafting of the chapter on marriage having been entrusted to the bishops of the Province of Cincinnati. Divorce existed in Ohio at that time, with grounds for divorce being multiplied over the course of the nineteenth century;[79] there seems no clear reason why the provincial bishops could not have referred to civil divorce in their decree, had they wanted to do so.

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[77] See SECOND PLENARY COUNCIL OF BALTIMORE, *Acta et decreta concilii Plenarii Baltimorensis II in Ecclesia Metropolitana Baltimorensi a die VII ad diem XXI Octobris A.D. MDCCCLXVI*, editio altera mendis expurgata, Baltimore, MD, Joannis Murphy, 1877, 172, nos. 326-327.

[78] See FOURTH PROVINCIAL COUNCIL OF CINCINNATI, Decrees of the Fourth Provincial Council of Cincinnati, in *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 223, title IV.

[79] See J.M. KOVACHY, "The Evolution of Ohio Divorce Laws: Their Development to Meet Present Day Needs," in *Western Reserve Law Review*, 5 (1953), 66.

Indeed, the pastoral letter issued by the same council did address divorce. However, its message is somewhat ambiguous and difficult to understand precisely:

> The State has no power to dissolve Christian marriages […]. The religious part of the marriage contract does not come under the control of the State. This is of God, and is above and beyond the control of the State to legislate upon. But it is the duty of the State to legislate on the civil consequences of marriage— the property and the personal safety of the married couple.
>
> DIVORCE. When the married couple can not live in peace and Christian love, both Church and State may, for good and sufficient reasons, grant divorce from "bed and board," as it is called; but divorce by which parties once validly married can again, while both parties are living, legitimately and validly remarry is impossible. "What God hath joined together let no man put asunder," are words that leave no pretext for doubt. […]
>
> This is the Catholic doctrine, and a Catholic once validly married can not be divorced by either Church or State; and if such Catholic attempt to re-marry, before the death of his or her partner, under the pretense that he or she has been divorced by the courts, such Catholic must be denied the sacraments, and, dying without repentance, be deprived of Christian burial.[80]

The letter certainly generally opposes divorce and explicitly allows for civil separation of bed and table. Yet the meaning of "can not" in "can not be divorced by either Church or State" is not legally clear. Certainly, this is a statement of fact inasmuch as the state cannot end the true bond of marriage; the state action is incapable of achieving this effect. But this is not quite the same thing as *may not*, a prohibition or instruction. The Pastoral Letter limits its denial of the sacraments to those who attempted remarriage after divorce (like the aforementioned provision of the Fifth Provincial Council of Baltimore, reprinted together with the acts of the first four Plenary Councils of Cincinnati),[81] not those who have merely petitioned for or obtained a civil divorce.

In this context, then, canon 124 of the Third Plenary Council of Baltimore states:

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[80] FOURTH PROVINCIAL COUNCIL OF CINCINNATI, Pastoral Letter of the Fourth Provincial Council of Cincinnati, in *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 253–254.

[81] FIFTH PROVINCIAL COUNCIL OF BALTIMORE, Decreta Concilii Provincialis Baltimorensis V, in *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 286, 61.

> Since it is established that through marriage two become, "as it were, one flesh; and that the nuptial bond is thus, by the will of God, intimately and strongly joined, so that it cannot be dissolved or broken by anyone among men" (Leo XIII, apostolic letter *Arcanum*, February 10, 1880); it clearly appears that those are guilty of the gravest fault who petition for marriage to be dissolved by the civil magistrate, or—what is more serious—after having obtained civil divorce, attempt to enter into a new marriage, disregarding the legitimate bond which still remains before God and the Church. To restrain these crimes, we establish the penalty of excommunication, reserved to the Ordinary, incurred *ipso facto* by those who, after having obtained civil divorce, have dared to attempt marriage.[82]

There are two distinct situations addressed: the declaration that it is sinful (indeed, gravely so) to petition for civil dissolution of marriage; and second, the establishment of the legal penalty of excommunication (and its reservation to the Ordinary) for those who attempt marriage after civil divorce (the Fifth Provincial Council of 1843, as noted above, having warned each bishop to make the same provision in every diocese).

There is no mention or provision of *licentia*, dispensation, or other involvement of ecclesiastical authority to mitigate the grave sin of divorce (as consultation with the ecclesiastical authority is mentioned in canon 126 prior to seeking civil separation; see Chapter One). One possible reason for this is simply the prospect of a drafting error resulting in inconsistency of language; something which can never be excluded when considering legislation of this era. Yet assuming a rational legislator, the best explanation would be consistent with the interpretation implicit in the 1886 response of the Holy Office

[82] "Quoniam constat per matrimonium duos 'unam veluti carnem fieri; et nuptiale vinculum sic esse, Dei voluntate, intime vehementerque nexum, ut a quopiam inter homines dissolvi aut distrahi nequeat' (Leonis XIII. Lit. Ap. *Arcanum*, 10 Febr. 1880); manifeste apparet gravissimae culpae illos esse reos, qui a magistratu civili matrimonium dissolvi postulant, vel, quod gravius est, divortio civili obtento, novum matrimonium inire attentant legitimo vinculo posthabito, quod coram Deo et Ecclesia adhuc manet. Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, ipso facto incurrendam ab eis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare" (THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis tertii, A.D. 1884*, Baltimore, MD, Typis Joannis Murphy et sociorum, 1886, 63–64, no. 124).

and other more incendiary responses to the situation in France: that civil divorce is intrinsically immoral and therefore could never be tolerated, even by episcopal approval.

3.2.4. Literature in the United States regarding Civil Divorce in the Nineteenth Century

The literature in the United States concerning divorce and the civil authorities in the nineteenth century is well illustrated in the works of Francis Patrick Kenrick and Sebastian Bach Smith; and especially in the relationship between their works, and the visible influence of the Third Plenary Council of Baltimore. As with the responses of the Apostolic See, the primary question being addressed (explicitly or implicitly) is not *in what circumstances* a Catholic may seek a civil divorce and what procedure (such as "permission" from ecclesiastical authority) he must first undergo; it is whether it can *ever* be licit to seek a civil divorce.

The stature of Francis Patrick Kenrick as "the leading American moral theologian of his generation"[83] has already been described in Chapter One regarding his writings on separation with the bond remaining. As Archbishop of Baltimore from 1851 to 1863, he presided over the First Plenary Council of Baltimore in 1852. Here we examine his writings on seeking civil divorce.

Kenrick's *Theologiae moralis*,[84] written while Archbishop of Philadelphia and published in three volumes from 1841 to 1843, addressed the matter in a simple and direct

[83] NOLAN, "Kenrick, Francis Patrick," in *New Catholic Encyclopedia*, 145.

[84] See F.P. KENRICK, *Theologiae moralis*, Philadelphia, PA, Eugenium Cummiskey, 1841–1843, 3 vols.

manner. Having established that civil divorce does not end the bond of marriage *coram Deo*, he continues,

> […] if a most serious reason for seeking divorce presses, namely lest the husband be compelled to pay the debt of the wife [or] that all right to inheritance may be taken away from her, it could be questioned whether it is permitted for a Catholic to seek divorce of the bond, intending to use it only for civil effects. If the law grants *divortium a thoro*, […] this will generally have to be sought. However, in most states divorce from the bond only is granted, and where the option of either is given, this [i.e. divorce from the bond] is almost always chosen, since it alone is considered an effective barrier against external annoyances. It seems permitted to seek this in certain most serious circumstances of affairs, for one's own security: for the exercise of civil power over the bond is not considered approved, when one does not make use of the civil liberty restored to him; but unless a most serious reason is present, he ought not to make use of this as a remedy.[85]

Kenrick describes a number of conditions which must be met before civil divorce can be morally licit: the spouse must not intend to dissolve the true bond of marriage, nor to enter into another (civil) marriage; the civil authority is not recognized, and only the civil effects are intended. Furthermore, in the specific circumstances, there must be a most serious reason for seeking the divorce (citing examples of property); and civil separation, if available, must be insufficient to address this serious reason. These can be grouped according to two criteria: recognition that the civil decision does not affect the canonical rights and obligations of marriage; and a very serious reason for seeking civil divorce. These conditions having been met, however, Kenrick prescribes no further procedures or intervention by ecclesiastical authority. No permission or consultation is required from the Ordinary or even from the confessor; neither in anticipation of the act nor for its

[85] "Si matrimonii vinculum coram Deo subsistat, constat non licere divortium civile quærere animo novas ineundi nuptias: hoc enim divina legi repugnat. Quod si gravissima urgeat ratio divortii quærendi, nempe ne cogatur maritus æs alienum uxoris solvere, et ut huic ad hæreditatem omne eripiatur jus, dubitari poterit, utrum Catholico liceat divortium vinculi quærere, eo tantum ad effectus civiles usuro. Si lex concedat divortium a thoro, prout in Pennsylvania, hoc plerumque quærendum erit. Cæterum in plerisque Statibus divortium a vinculo duntaxat conceditur, et ubi alterutrius optio datur, hoc fere semper eligitur, quod unice habetur efficax contra alienas molestias repagulum. Videtur licere illud petere in gravissimis quibusdam rerum adjunctis, ad propriam securitatem: non enim probare censetur potestatis civilis exercitium in vinculum, quum libertate civili illi restituta non utatur: sed ni gravissima suppetat ratio, non debet hoc uti subsidio" (KENRICK, *Theologiae moralis*, vol. 3, 321, no. 112).

retrospective absolution (if it had been done illicitly). This paragraph is substantially identical in the successor publication *Theologia moralis*, published while Kenrick was Archbishop of Baltimore.[86]

Kenrick also adopted a rather permissive view regarding Catholic lawyers and judges, allowing their pursuit of or judgment in favor of divorce when there is reason to believe that the civil divorce is necessary to protect rights, even when knowing that the client intended to enter a new marriage.[87] However, the paragraphs regarding lawyers and judges were entirely removed (though not repudiated) from the successor work,[88] perhaps in response to a changing atmosphere regarding the participation in unjust civil laws, or perhaps even due to the Holy Office's response to Southwark in 1860, the same year as *Theologia moralis* was published.

Kenrick's work was used explicitly as a reliable source by other authors writing in English. Smith, one of the more prolific canonical authors in the United States in the late nineteenth century, wrote in 1874,

> […] would it be lawful in that case to apply to the civil courts for an absolute divorce, if this result could not be achieved by a partial divorce? We think with Kenrick that it could be done.
>
> Not that there could be any real intention of absolutely severing the bond of marriage, which is supposed to be firm and valid; since the parties only make use of the law in order to obtain exemption from unjust burdens. Kenrick says:
>
> "In these cases, it seems justifiable to seek divorce in the civil court, not thereby recognizing any such power in these tribunals, or intending actually to dissolve the bond, but merely to escape unjust annoyances and demands" (*Mor*. vol. ii. tract. xxi. cap. iv).

[86] F.P. KENRICK, *Theologia moralis*, vol. 1 [1860], 306, no. 112.

[87] See KENRICK, *Theologiae moralis*, 321–322, nos. 113-114.

[88] See KENRICK, *Theologia moralis*, 306.

> For the same reasons, it is evidently allowed to procure a civil divorce from bed and board.[89]

Already in 1874, Smith complained of the growing frequency of divorce in American society, in a manner which would not have been out of place in the 1950s:

> It is scarcely necessary to add that in America the number of absolute divorces granted for comparatively insignificant and frivolous reasons is almost appalling. The sanctity of the matrimonial alliance is fast disappearing, and in its stead a mere human contract is being placed, the stability of which depends on the will or caprice of the parties.[90]

Kenrick's opinion endured to the eve of the Third Plenary Council:

> We say, "by authority of the proper ecclesiastical judge;" for it is not permitted, at least *per se*, to have recourse to the civil or secular courts for a divorce, whether *quoad vinculum* or only *quoad thorum*. Yet, as we have shown in our "Notes on the Second Plenary Council of Baltimore," from Kenrick, whose opinion is indorsed by the illustrious Feije,[91] Catholics, not only in the United States but also in Europe, may at times apply to the secular authorities for a divorce, not indeed as though they recognized in the civil power any authority to grant divorces, but simply and solely for the purpose of obtaining certain civil effects, which have been fully described in our above "Notes."[92]

Civil divorce is certainly not preferred or a matter of no weight; but it can be tolerated under the same twin criteria as previously mentioned: lack of intent that civil authorities would end the true bond of marriage, and grave cause. Smith does not mention any obligation to involve the ecclesiastical authorities.

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[89] SMITH, *Notes on the Second Plenary Council of Baltimore*, 252–253. Smith's quotation of Kenrick (which seems to be a reference to KENRICK, *Theologia moralis*, vol. 2, 305–306) seems to be a paraphrase rather than a true quotation, but is nevertheless an accurate summary of Kenrick's view.

[90] SMITH, *Notes on the Second Plenary Council of Baltimore*, 248–249.

[91] Smith here cites FEIJE [FEYE], *De impedimentis et dispensationibus matrimonialibus in usum auditorum suorum*, 456-458, no. 583.

[92] S.B. SMITH, *Elements of Ecclesiastical Law*, vol. 2, New York, Cincinnati, OH, St. Louis, MO, and Einsiedeln, Benziger Brothers, 1882, 385, no. 1438. Emphases in original. The modern intelligibility of other paragraphs of *Elements* is hampered by consistent use of the word "divorce" to mean *primarily* ecclesiastical separation with the bond remaining, a transliteration of *divortium*. Yet in the quoted passage, the reference to "civil or secular courts for a divorce […] *quoad vinculum*" is clear.

This passage remains the same in the fifth edition, published in 1887 and allegedly "thoroughly revised according to […] the Third Plenary Council of Baltimore" (S.B. SMITH, *Elements of Ecclesiastical Law*, 5th ed., vol. 2, New York, Cincinnati, OH, and Chicago, IL, Benziger Brothers, 1887, i). Yet noting Smith's citation of canons 124 and 126 in *The Marriage Process in the United States*, 1893, discussed below, it appears that this passage in *Elements* was reprinted identically in the new editions of *Elements* without the revisions that would have brought it into conformity with Smith's later work.

Yet by the time of the publication of *The Marriage Process in the United States*, first published in 1893,[93] Smith's stance had been modified or at least clarified. After noting that canon 124 imposed excommunication of those who attempt remarriage,[94] Smith asks "is it allowed to apply for a civil divorce, in the case, solely for the purpose of obtaining certain necessary civil effects?"[95] No longer relying primarily on Kenrick, Smith cites the various replies of different dicasteries of the Roman Curia, mostly those mentioned above, which he uses to support each of "two opinions, both held by approved Catholic authors."[96] The first opinion, more permissive, and focused on the Catholic holding the civil office of judge, cites various responses of the Holy Office, recounted above. The second opinion, which denies that it could ever be licit to allow the civil law to "deprive [the parties] of the right to live together as husband and wife," cites the responses of the Holy Office, "especially of May 24, 1886, with regard to France."[97] Ultimately Smith retains the more permissive view regarding the question of whether it can *ever* be licit to seek civil divorce; but adds a criterion which had not been present in his prior works—the involvement of ecclesiastical authority:

> [T]he parties cannot apply to the secular courts for an absolute divorce, except for *very grave reasons*, to be approved beforehand by the ordinary.[98] Nay, the Third Plenary Council of Baltimore, n. 126, wisely enacts that where circumstances make it necessary to have recourse to the secular courts, even though for a separation *a thoro et mensa* only, the advice of the ecclesiastical authority should be first sought.[99]

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[93] See S.B. SMITH, *The Marriage Process in the United States*, New York, Benziger Brothers, 1893.

[94] See ibid., 33.

[95] Ibid.

[96] Ibid.

[97] Ibid., 34.

[98] Smith here cites FEIJE [FEYE], *De impedimentis et dispensationibus matrimonialibus in usum auditorum suorum*, 456-458, no. 583.

[99] SMITH, *The Marriage Process in the United States*, 35. Emphasis in original.

Here we see a very early (perhaps even the first) use of canon 126 to support something other than what is mentioned in the canon itself. Smith accurately recounts that the canon refers to "separation *a thoro et mensa*," and that it requires advice, not permission. Yet he uses it to buttress an argument regarding a requirement for the involvement (even "approval") of ecclesiastical authority in "absolute divorce" without mentioning the discrepancy between the text and the argument.

It also seems notable that Smith cites the same paragraph of Feye as he previously cited, but only now using it to support an obligation of prior approval of the ordinary. This element was present in Feye all along,[100] but Smith did not previously mention it, even when he previously cited[101] the same paragraph to support his position that civil divorce could ever be permissible.

There is a marked shift in US commentary across the nineteenth century. As early as 1840 Kenrick held the rather permissive opinion, by no means universal at that time outside of the United States, that civil divorce could *ever* be morally legitimate. His criteria for its use were strict but not overly so, relying largely on the spouse's distinction between

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[100] "Leges nostrae civiles praeter separationem (*Cod. civ*. art. 306 sqq.) admittunt etiam divortium quoad vinculum (art. 227, 229 sqq.). Hoc quidem etiam in conscientia uti licet iis quorum matrimonium canonice irritum est […], dummodo in casu, quo juxta dicenda cap. sq. necessaria est, non praetermittant praeviam auctoritatis ecclesiasticae interventionem" (FEIJE [FEYE], *De impedimentis et dispensationibus matrimonialibus in usum auditorum suorum*, 456, no. 583). The references to the Civil Code are to that of Belgium.

It does not appear to the present author that Feye is speaking of "prior intervention of ecclesiastical authority" as a preliminary to civil divorce specifically. Instead he seems to have in mind his argument immediately following that divorce is licit when the marriage is canonically null; and therefore the "prior intervention of ecclesiastical authority" is that which previously declared the nullity of the marriage. When Feye discusses *other* circumstances in which divorce can be licit, he does so without mentioning the intervention of the ecclesiastical authority: "in casu omnino peculiari et propter incommoda alia, quam quae pro omnibus incolis ex civilibus circa separationem legibus derivantur, catholicus revera alio sibi providendi medio foret destitutus" (ibid., 456–457, no. 583). This interpretation is strengthened by the fact that this paragraph of Feye cites Kenrick as its footnote—and Kenrick, of course, likewise did not mention a need to involve the ecclesiastical authority, if the conditions were met.

[101] SMITH, *Elements of Ecclesiastical Law (1882)*, 385, no. 1438.

the civil contract and the true bond of marriage. If these criteria were met, Kenrick did not require any further involvement of ecclesiastical authority. Smith maintained this perspective prior to 1884. But the Third Plenary Council of Baltimore, which condemned divorce as gravely sinful and demanded *consultation* with ecclesiastical authority prior to civil separation, seems to have marked a watershed moment. No longer would divorce be described in the United States as tolerable according to the spouse's own evaluation; it was now said that the bishop was required to be involved. This did not draw directly from the texts of the Council, but nevertheless reflected—somewhat blurrily—the Council's tone of hostility toward civil interference in the Church's rights regarding the marriages of Catholics.

It is interesting to consider whether Baltimore III would have addressed these matters differently if Kenrick had been president and Apostolic Delegate, as he had been for Baltimore I. While this question cannot be answered with certainty, the disparity between Kenrick's opinion—admittedly, before he became Archbishop of Baltimore—and the text of Baltimore III reminds us again that the positive ecclesiastical law and its interpretation are not fixed; not divisible simply into Catholic opinions and heretical opinions, but historically contingent and mutable.

3.3. The Era of the 1917 Code of Canon Law

The 1917 Code of Canon Law does not mention civil divorce or civil separation, although there were suggestions during the drafting process that these could have been addressed. This lacuna in the legislation did not prevent discussion of those matters in canonical literature during the time when the *CIC/17* was in effect. If anything, the lack of codified law provided an opportunity for commentators to claim their own ideas as law.

3.3.1. The Drafting of the 1917 Code of Canon Law

The doctoral thesis regarding the redactional history of the *CIC/17* on separation of spouses has already been written, and the reader is directed to it in order to find a thorough account of the proposals of the consultors.[102] Nevertheless, it is worthwhile to mention here two elements which have special relevance to the relationship between ecclesiastical separation and the civil authorities.

During the course of the codification process, the use of the term *divortium* changed, reflecting its changed use more generally, and ultimately completing that change in canon law. In early schemata, the title was simply called *De divortiis*.[103] However, during the consultation "it was proposed for the first time that the word 'divorce' be removed from both the text and the statements in order to avoid logical confusion with civil law."[104] The Cardinal consultors accepted this logic, if not the entirety of the recommendation, and in 1906 changed the title of the chapter to *De divortio semipleno, seu separatione thori, mensae et habitationis*.[105] However, by 1916 in *Schema I*, for reasons unrecorded, the article had become titled simply *De separatione tori, mensae et habitationis*,[106] which remained its title in the *CIC/17*. By changing the title to reflect the prevalent civil meaning of "divorce" (rather than tenaciously retaining its traditional, broader, canonical meaning) the drafters implicitly acknowledged the de facto dominance of civil authorities.

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[102] See L.A. PRADOS RIVERA, *La separación de los cónyuges en el iter redaccional de la codificación de 1917*, Series canonica, no. 9, Rome, Pontificia Università della Santa Croce, 2003.

[103] See ibid., 69.

[104] Ibid., 167.

[105] See ibid., 171–172.

[106] See ibid., 202.

Janssens, in his comments regarding the initial draft of *De divortiis*, "raised one of the concerns about the regulation of divorce by asking whether something should be added to this chapter about divorce pronounced by civil law."[107] However, this question does not seem to have been specifically addressed (with the partial exception of Hollweck's proposal regarding civil separation, detailed in Chapter One).

3.3.2. The Reserved Sin of Divorce and Civil Separation in Particular Law in the United States

It has not been possible, within the scope of this study, to compile a complete recounting of all nineteenth- and twentieth-century particular legislation in the United States regarding the intervention of the civil authorities regarding marriage, particularly divorce; there would simply be too many sources lost to time, and no way of assessing the completeness of the record.

However, in one narrow aspect of the question we are able to rely on a contemporary study[108] which appears to provide a comprehensive contemporary catalogue of US particular churches[109] in which censures were established or in which sins were reserved, including sins regarding separation and divorce. The study was thorough, including data from all 123 dioceses existing at that time in the United States,[110] and

[107] Ibid., 150.

[108] R.J. ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," in *Theological Studies*, 8 (1947), 365–403.

[109] Hereafter, for the sake of brevity, "dioceses"; though the survey also includes two Eastern Catholic exarchates, the military ordinariate, a vicariate apostolic, and a territorial abbey.

[110] Including all dioceses in what are now the fifty states; Alaska and Hawaii, not states at that time, were included in the survey, though other U.S. territories such as Puerto Rico and Guam were not.

receiving written confirmation of accuracy from all but two of those.[111] Although it is certainly possible that errors may have occurred on the part of the compilers or diocesan correspondents, it appears that dioceses generally responded with diligence, and that the authors of the study exercised critical evaluation of the answers they received.[112] The introduction to the article is written in English, but the editors' commentary on the legislation is written in Latin. The legislation is reported mostly in Latin, but with some diocesan responses quoted in English.

Separate from the issue of censures (that is, canonical penalties) or from commands, the reservation of a sin was the decision of the Ordinary that certain sins were reserved to his own judgment, "limiting for inferiors the power of absolving" (can. 893, §1, *CIC/17*).[113] "Cases of reservation should be very few, namely three, or at most four, of the gravest and most atrocious external crimes specially determined."[114] Local ordinaries were not normally to reserve sins without having discussed the matter in the diocesan synod,[115] which appears to be reflected in the fact that most of the reservations are cited to legislation of diocesan synods. *Ipso iure*, the canon penitentiary had the faculty to absolve reserved sins,[116] as did the pastor during the time for satisfaction of the Easter duty,[117] as well as

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[111] See ibid., 365. The two dioceses not responding were Youngstown and Rapid City. See ibid., 374, 393.

[112] See e.g. ibid., 366, regarding the reservation of the sin of sending children to a non-Catholic school.

[113] The concept of reserved sins is not found in the *CIC/83*, but remains in the *CCEO* (can. 728).

[114] "Casus reservandi sint pauci omnino, tres scilicet vel, ad summum, quatuor ex gravioribus tantum et atrocioribus criminibus externis specifice determinatis; ipsa vero reservatio ne ultra in vigore maneat, quam necesse sit ad publicum aliquod inveteratum vitium exstirpandum et collapsam forte christianam disciplinam instaurandam" (*CIC/17* c. 897).

[115] See *CIC/17* c. 895.

[116] See *CIC/17* c. 899, §2.

[117] In the United States, this was (and is) reckoned from the First Sunday of Lent until Trinity Sunday. See SECOND PLENARY COUNCIL OF BALTIMORE, *Acta et decreta concilii Plenarii Baltimorensis II in ecclesia metropolitana Baltimorensi a die VII ad diem XXI Octobris A.D. MDCCCLXVI*, 138, no. 257.

missionaries while conducting a mission.[118] Furthermore, the Ordinary was instructed to grant the same faculty to vicars forane, indeed also with the faculty of subdelegation. Moreover, the reservation did not apply in certain circumstances.[119] In short, reservation of the absolution of specific sins to the Ordinary had real legal effect, but was not a literal reservation to the diocesan bishop himself, and most Catholics could have found a confessor with the faculty to absolve without too much difficulty, especially during Lent and the Easter season.

Although the reservation of the power of absolution regarding a certain sin is a matter of law, the question of what exactly is sinful remains a moral matter. What has been previously said in relation to the Plenary Councils of Baltimore about "declaring" sin remains applicable here; legislation could modify which confessor had the authority to grant absolution, but could not *make* an act sinful if it was not in fact sinful.

The majority of the legislation reported in the survey concerns various matters of clergy discipline. Beyond the scope of this study to examine in detail, numerous dioceses established the reservation of the sin or a censure for a Catholic attempting marriage before a civil official and/or a non-Catholic minister or for attempting marriage while a current (canonical) spouse was still living. No diocese established a censure or reservation of a sin merely for a spouse (or spouses) separating de facto without approaching the ecclesiastical authorities. For the Archdiocese of Chicago, clergy disciplinary legislation is recorded, but none regarding marriage—a fascinating lacuna considering that it was at exactly this time that the archdiocesan Separation Court judges were threatening "excommunication" to

[118] See *CIC/17* c. 899, §3.

[119] See *CIC/17* c. 900.

parties who approached the civil authorities without their permission, as later described in Chapter Four.

In addition to diocesan particular law, the survey notes provincial and national particular law. Only for the Province of Cincinnati is provincial particular law relevant to our issue reported: the same provision of the Fourth Provincial Council of 1882 which (as described in Chapter One) served as a prototype for canon 126 of the Third Plenary Council of Baltimore. The Provincial Council established that

> Since […] matrimonial cases pertain to ecclesiastical judges, for requesting separation from bed and board (*separationem a mensa et thoro*), it is not permitted to approach civil tribunals, unless the case has first been examined by an ecclesiastical judge, for the sole purpose of legally establishing civil effects. Therefore, to those seeking such separation from a civil tribunal, without consulting ecclesiastical authority, absolution is to be denied, and the case is reserved to the Bishop.[120]

This was, then, a reservation to the bishop of the sin of seeking civil separation without previously consulting ecclesiastical authority. Although the Diocese of Lansing reported to the survey that "obtaining a civil divorce without ecclesiastical permission" was "by diocesan interpretation, a sin reserved by provincial law,"[121] the editors note that "from diocesan interpretations, this sin reserved by provincial law is in force only in the Diocese of Lansing, where even the diocesan statute makes mention of civil divorce

[120] "Cum definita sit Catholica doctrina causas matrimoniales spectare ad judices ecclesiasticos (Conc. Trid. sess. 24, can. 12), ad separationem a mensa et thoro petendam, tribunalia civilia adire non licet, nisi causa prius probata a judice ecclesiastico, ad rationes dumtaxat civiles legaliter stabiliendas. Quare hujusmodi separationem a tribunali civili, inconsulta auctoritate ecclesiastica, petentibus deneganda est absolutio et casus Episcopo reservatur" (ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," 399). See FOURTH PROVINCIAL COUNCIL OF CINCINNATI, *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 223.

[121] "Ex interpretatione diocesana: peccatum reservatum ex iure provinciali" (ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," 376, fn. 7).

alone."[122] The conflation of civil separation and civil divorce—a recurrent theme throughout this thesis—is obliquely noted in this instance by the editors. Diligent attention to this distinction on the part of the editors is indicated by their meticulous choice of cross-references to canons 124, 126, or both, of the Third Plenary Council of Baltimore, depending on whether the diocesan legislation mentioned civil divorce, civil separation, or both.

In the Archdiocese of Cincinnati, the sin reserved was that of "spouses who approach civil tribunals in a case not decided by an ecclesiastical tribunal, to obtain divorce or separation from bed and board (*divortium seu separationem a toro et mensa*), even if they intend only civil effects."[123] Read literally, the conjunction *seu* means that in this context *divortium* and *separationem a toro et mensa* have the same meaning. The use of *aut* would have made clear that *divortium* and *separationem a toro et mensa* were different things, the former ending the civil bond.[124] This reservation is cited to the Fourth Diocesan Synod of Cincinnati, which occurred in 1920, distinct from the Fourth Provincial Council of Cincinnati of 1882.

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[122] "Ex interpretationibus diocesanis hoc peccatum reservatum iuris provincialis viget tantum in dioecesi Lansing, ubi etiam statutum diocesanum mentionem facit de solo divortio civili" (ibid., 399, fn. 35). The Diocese of Lansing was created out of the Archdiocese of Detroit, which (as the Diocese of Detroit) was part of the Province of Cincinnati at the time of the Fourth Provincial Council in 1882.

[123] "Coniugum, qui tribunalia civilia, causa a tribunali ecclesiastica non diiudicata, adeant ad divortium seu separationem a toro et mensa obtinendum, quamvis effectus civiles solos intendant. Syn. IV, can. 75" (ibid., 373).

[124] When the reservation was lifted in 1975, the only reservation mentioned was that of "the sin of seeking a civil divorce without permission" (J. BERNARDIN, letter [likely to priests], in *CLD*, vol. 8 (1975), 562). See also ID., Extra-Synodal Decree, in *CLD*, vol. 8 (1975), 562. In the language of the 1970s, "divorce" meant exclusively divorce of the bond; but in the language of the legislation abrogated, *divortium* apparently also included separation of bed and table. This lacuna does not appear to be soluble except as a drafting error on one or both occasions.

The Diocese of Fort Wayne used an identical sentence, but added that "separation from bed and board is not to be permitted unless a declaration in writing is given stating that such separation is only a separation from bed and board and that the bond of marriage is in no way affected, nor do the parties intend at any time to enter into new marriages while the spouse is living."[125] The Diocese of Lafayette in Indiana,[126] erected from the Diocese of Fort Wayne in 1944, continued to apply the legislation of the latter's 1926 Synod.

In the Archdiocese of Indianapolis and the dioceses of Cleveland, Columbus and Evansville alike, the sin of seeking civil divorce without prior consent of the diocesan bishop was reserved, as provided in the faculties of the respective dioceses.[127] Similarly, in the Diocese of Covington the sin was reserved of "those who seek civil divorce without the license of the diocesan bishop,"[128] while in the Diocese of Nashville, the sin was reserved of "those who have sought civil divorce without the prior consent of the Ordinary."[129] In the Diocese of Grand Rapids, absolution was reserved in the case of spouses seeking separation—but apparently not divorce of the bond—in civil tribunals without consulting the diocesan bishop; the use of *a mensa et toro* and *inconsultis*[130] clearly

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[125] "Separatio a mensa et toro non est permittenda nisi declaratio in scriptis data sit talem separationem tantum esse separationem a mensa et toro et vinculum matrimonii nullo modo affici nec partes ullo unquam tempore vivente coniuge ad novas nuptias transire intendere" (ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," 378–379).

[126] Ibid., 379, fn. 11.

[127] Indianapolis and Evansville: "Divortium civile absque Nostro praevio consensu quaesitum" (ibid., 377–378). Cleveland and Columbus: "Divortium civile quaesitum absque praevio Nostro consensu" (ibid., 373).

[128] "Qui sine licentia Nostra divortium civile petunt" (ibid., 380).

[129] "Qui divortium civile quaesiverint absque praevio Ordinarii consensu" (ibid., 380–381).

[130] "Divortium a mensa et toro, a conjugibus apud tribunalia civilia petitum, Nobis inconsultis" (ibid., 375).

echoes the 1882 Fourth Provincial Council of Cincinnati and, in turn, canon 126 of the Third Plenary Council of Baltimore.

All of the dioceses mentioned in this section up to this point were part of the Province of Cincinnati at the time of the Fourth Provincial Council in 1882,[131] or were created or translated from sees which once were part of the Province in 1882. Of the 123 dioceses surveyed in 1947, 18 were represented at the Fourth Provincial Council of Cincinnati in 1882, while 11 of those 18 (61%) reported relevant legislation regarding civil separation or divorce. But among the 105 dioceses *not* represented at the Fourth Provincial Council, only 5 reported relevant legislation regarding civil divorce (less than 5%). The strong positive association between presence at the Council and reporting relevant legislation regarding separation or divorce[132] suggests a high degree of heritability in ecclesial culture, or at least in legislation, stemming from the Fourth Provincial Council of 1882, enduring decades later even in dioceses which had long since left the province. The Fourth Provincial Council of Cincinnati appears to have been doubly influential, then, with regard to legislation against approaching the civil authorities regarding the marriage; initially influencing the Third Plenary Council of Baltimore as noted in Chapter One, but remaining especially influential in its own territory after that.

The five dioceses which reported relevant legislation but were not in the Province of Cincinnati in 1882, though few, demonstrate much greater variation in the kinds of legislation reported, illustrating the variety of ways which imaginative bishops and their

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[131] See FOURTH PROVINCIAL COUNCIL OF CINCINNATI, *Acta et decreta quatuor conciliorum provincialium Cincinnatensium 1855–1882*, 169.

[132] $\varphi \approx 0.592$, $p < 0.00001$, $N = 123$.

canonists sought to address the issue of Catholics approaching the civil authorities for legal intervention in their marital problems.

In the Archdiocese of Milwaukee, citing diocesan statutes, the sin of "attempting civil divorce without consulting the Ordinary"[133] was reserved, matching canon 126 of Baltimore III regarding *consultation*, but diverging from it regarding the proscribed legal action.

For the Diocese of Paterson, the legislation (Directive of the Ordinary, May 1, 1946) is extensively quoted. The general principles of licit separation are recounted, followed by the assertion that "[i]n no case […] may the injured party go before the secular court for legal separation, much less may he or she attempt to secure a civil divorce so-called."[134] Canon 126 is then quoted in English, accurately rendering "*separatio a thoro et mensa*" as "separation from bed and board" but entirely missing the clause "*ne inconsulta auctoritate ecclesiastica*." Then the extract reaches the part where particular law is established:

> After July 1, 1946, any Catholic in the diocese of Paterson who, knowing of this prohibition, nevertheless attempts without proper permission to secure a civil divorce is guilty of a sin reserved to the Bishop of the diocese and cannot be absolved save under the conditions described in moral theology.[135]

From the words "civil divorce" a footnote is added, stating that "by diocesan interpretation, the sin of those who seek either civil divorce *or civil separation* is reserved,"[136] an acknowledgment that the text of the legislation includes only civil divorce

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[133] "Divortium civile attentantes Ordinario inconsulto" (ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," 381).

[134] Ibid., 383.

[135] Ibid.

[136] "Ex interpretatione diocesana reservatur peccatum eorum qui petunt tum divortium civile tum separationem civilem" (ibid., fn. 13). Emphasis added.

and not civil separation. This reservation is the only one found which is limited to those who knew of the prohibition; the others seem to apply irrespective of knowledge. The neighboring[137] Diocese of Trenton has identical legislation, issued on June 10 of the same year and coming into effect, as in Paterson, on July 1;[138] presumably the Diocese of Trenton copied the Diocese of Paterson regarding this matter.

In the Diocese of Helena, the sin was reserved of one "who, without having previously obtained the license of the Ordinary, request from the civil magistrate either for the dissolution of marriage or for separation from bed and board."[139] However, this is complicated by the editors' footnote that while the words indicate a reserved sin, "in the page of faculties it is given under the heading 'They are subject to excommunication *latae sententiae* reserved to the Ordinary'";[140] which therefore would be a censure, not merely a reserved sin, even if the responding diocesan authorities did not recognize the difference.

Only for the Diocese of Little Rock was a censure claimed for separation or divorce:

> *Excommunicatio Ordinario loci reservata*. Any Catholic who obtains a civil divorce without the permission of the Ordinary, incurs ipso facto excommunication, even though the party does not attempt a second marriage.[141]

From *reservata* is added the footnote "Ex interpretatione diocesana: censura Ordinario loci reservata." The source of the extract is a "private letter of [the] Chancellor, August 24,

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[137] The two dioceses shared a border until the Diocese of Metuchen was created in 1981 out of the territory of the Diocese of Trenton. See JOHN PAUL II, Apostolic Constitution Erecting the Diocese of Metuchen, 19 November 1981, in *AAS*, 74 (1982), 195–196. Both were within the Province of Newark.

[138] See ibid., 383–384.

[139] "Peccatum reservatum Ordinario Helenensi incurrunt qui absque praevia obtenta Ordinarii licentia a magistratu civili sive matrimonii dissolutionem sive separationem a mensa et toro postulant" (ibid., 390–391).

[140] "Ex verbis videtur esse peccatum ratione sui reservatum, sed in pagella facultatum datur sub rubrica 'Subsunt excommunicationi latae sententiae Ordinario reservatae'" (ibid., 390, fn. 22).

[141] Ibid., 384.

1944." "The reservation of a censure impeding the reception of the sacraments brings about the reservation of the sin to which the censure is attached";[142] censure and reservation of the sin were not mutually exclusive. But a censure could not be established merely by "diocesan interpretation"; if the diocese had no legislative text but merely an interpretative custom reserving the absolution to the ordinary, it seems more likely that the object of the reservation was the sin, and not a censure.

Neither of the dioceses which, however confusedly or implausibly, suggested a censure regarding recourse to the civil authorities was ever part of the Province of Cincinnati.

The national particular law of the Third Plenary Council of Baltimore is also noted in the survey; specifically, the excommunication established by canon 124 of "those who, after having obtained civil divorce, have dared to attempt marriage"[143] and the provision of canon 127 that "Catholics, who have contracted or attempted marriage before a minister of any non-Catholic sect […] incur excommunication reserved to the Bishop."[144] Canon 126 is not cited as a national norm of reservation or censure, but only as a cross-reference to diocesan particular law on the matter of separation.

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[142] *CIC/17* c. 2246, §3.

[143] "Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, ipso facto incurrendam ab eis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare" (ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," 400). See THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis tertii (public edition)*, 63–64.

This penalty was abrogated in 1977. See CONGREGATION FOR BISHOPS, rescript, October 22, 1977, prot. no. 757/77, in *CLD*, vol. 8, 1213–1214.

[144] "Item decernimus Catholicos, qui coram ministro cujuscumque sectae acatholicae matrimonium contraxerint vel attentaverint, [...] in quolibet statu vel territorio sub ditione praesulum qui huic concilio adsunt vel adesse debent, excommunicationem incurrere Episcopo reservatam" (ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," 400). See THIRD PLENARY COUNCIL OF BALTIMORE, *Acta et decreta Concilii Plenarii Baltimorensis tertii (public edition)*, 65.

Reserved sins in particular law regarding civil separation and divorce had recurring elements, though there are also many differences. Dioceses within the same provinces often had identical or similar legislation. The effect of the Fourth Provincial Council of Cincinnati is clearly visible; these dioceses were much more likely to address the issue in particular legislation. Some texts require consultation while others require permission, some require a license, and some require consent of the ecclesiastical authority; some name the authority as the diocesan bishop, yet for some it is merely the ordinary. Some apply to civil separation, some to civil divorce, and some to both. None of this legislation, despite the varied texts, is outside of the envelope of commentaries on canons 124 and 126 of the Third Plenary Council of Baltimore. The known, accessible texts of canons 124 and 126 were, as we will examine next, often interpreted without close reference to the texts even by mainstream, published canonical authors. As is hinted in the editors' comments regarding the responses of the dioceses of Lansing and Helena (and the possible confusion in the Diocese of Little Rock regarding the matter of the "censure"), it seems plausible that diocesan legislation, no doubt often more obscure, might similarly have been applied with a lack of precision, at times erasing the details of the legislative texts.

3.3.3. Literature in the United States in the Era of the 1917 Code of Canon Law

Twentieth-century canonical commentaries in the United States demonstrate varied opinions regarding civil divorce and the moral and canonical implications thereof. Most, which we will call the majority position, repeat in one form or another the claim that there is a legal obligation to obtain ecclesiastical permission before approaching the civil authorities for separation and especially for divorce, often rooted in what appears to amount

to a collective blind spot regarding canons 124 and 126 of the Third Plenary Council of Baltimore. This misunderstanding is all the more remarkable as many of the commentators quote (in Latin or in English translation) or paraphrase the same canons accurately, before immediately making an inaccurate summary of the same texts. A different opinion—a minority—held that civil divorce was not prohibited as a matter of law, but that its morality was to be evaluated according to the individual circumstances and the usual principles of moral theology without requiring the specific involvement of hierarchical authority, echoing Kenrick's conclusions a century earlier. Again, especially among the majority, there is an unacknowledged conflation of moral and legal obligations. This author is choosing to give particular attention to the nuanced views of those who concluded that divorce without permission was *not* prohibited; yet let this not obscure for the reader the fact that the great majority of US commentary on this issue in the middle of the twentieth century states that civil divorce was prohibited by law without ecclesiastical approval.

Immediately following the promulgation of the codified law, the question of civil divorce did not have the prominence that it acquired a couple of decades later. Ayrinhac's original 1918 edition of *Marriage Legislation in the New Code of Canon Law*[145] mentions, as an aside, that "[f]rom a moral standpoint it may, however, be permitted, at times, for a Catholic to apply to the civil court for corporal separation under certain conditions,"[146] but does not devote significant detail to the question, nor address the question of civil divorce of the bond. The 1932 edition, however, revised by Lydon ("Professor of Moral Theology

[145] See H.A. AYRINHAC, *Marriage Legislation in the New Code of Canon Law*, New York, Benziger Brothers, 1918.

[146] Ibid., 311–312.

and Canon Law"[147]), introduces a new section titled "Civil Divorce and Conscience,"[148] perhaps reflecting a growing interest in the issue. However, Ayrinhac-Lydon addresses the issue largely from the perspective of the judge and the lawyer, not the parties, reflecting the predominant focus of the replies of the Apostolic See in the previous century. Furthermore, the text generally considers not in what circumstances can divorce be permissible, but whether it can *ever* be permissible. Gasparri is listed among those who believed it could never be permissible,[149] reflecting Gasparri's opinion as published in 1904, not in his updated work of 1932 reflecting the 1906 response of the Holy Office made public for the first time therein.[150] Similarly, shortly after the coming into effect of the *CIC/17*, Bachofen notes in passing that "[a] civil court may indeed give sentence of temporary divorce or separation, but this has merely the effect of private separation, unless the episcopal court accepts the evidence and verdict of the civil court and makes them its own."[151] The emphasis is that the civil separation does not have the effect of a true canonical separation (and is more akin to departure (*discessus*) from conjugal living); but beyond this warning, recourse to the civil authorities is not especially discouraged while no notion of permission is mentioned.

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[147] H.A. AYRINHAC and P.J. LYDON, *Marriage Legislation in the New Code of Canon Law*, new rev. ed., New York, Benziger Brothers, 1932, i.

[148] Ibid., 372–374.

[149] See ibid., 374.

[150] The 1952 edition of Ayrinhac-Lydon reprints the 1932 text on this issue, without making the changes to reflect the fact that the question of whether civil divorce could ever be permitted was, by that time, considered a settled issue due to widespread knowledge of the 1906 response. See H.A. AYRINHAC and P.J. LYDON, *Marriage Legislation in the New Code of Canon Law*, 2nd rev. ed., New York, Benziger Brothers, 1952, 372–374.

[151] A.C. BACHOFEN, *A Commentary on the New Code of Canon Law*, 3rd rev. ed., vol. 5, Saint Louis, MO, Herder, 1923, 377.

However, beginning in the 1930s and reaching a peak in the late 1940s and early 1950s, a more strident tone against divorce was becoming evident in the canonical literature. If legislation was cited at all, it was often not cited accurately, as in *The Pastoral Companion* recalled in the introduction to this chapter. Another typical example of the majority erroneous opinion is found in the 1960 book *Previews and Practical Cases on Marriage*, from O.M. Cloran, an author evidently familiar with the Archdiocese of Chicago and its practices regarding separation and divorce permissions.[152] He quotes canons 124 and 126 of Baltimore III extensively to support his assertion that "it is gravely wrong to petition for a *civil divorce* unless permission is first obtained from the Ordinary, who alone is competent to decide whether the reasons justify it. This doctrine deduced from certain directions of the Holy See was stated clearly by the Third Plenary Council of Baltimore."[153] That the "doctrine" can be "deduced from certain directions of the Holy See" is dubious if we recall the proper distinction between law and moral theology when considering the responses of various dicasteries of the late nineteenth and early twentieth centuries; and even more dubious, when the texts are closely examined. The claim that the Third Plenary Council of Baltimore "stated clearly" any kind of involvement of ecclesiastical authority in regard to *divorce* is entirely absent from the sources Cloran cites, whether in the passages he quotes or in the original texts. Cloran then makes a similar error regarding separation,

[152] Cloran was defender of the bond in the Metropolitan Tribunal of the Archdiocese of Chicago 1940–1950 and professor of canon law 1938–1958 at the University of Saint Mary of the Lake, the archdiocesan seminary (see O.M. CLORAN, *Previews and Practical Cases on Marriage*, Milwaukee, WI, Bruce, 1960, iii). He cites a Chicago-specific publication, CATHOLIC LAWYERS GUILD OF CHICAGO, *Canon Law on Civil Action in Marriage Problems: Lectures Delivered Under the Auspices of the Catholic Lawyers Guild in the Rooms of the Chicago Bar Association*, Chicago, IL, Catholic Lawyers Guild of Chicago, 1944. See CLORAN, *Previews and Practical Cases on Marriage*, 240, fn. 59. Although he does not seem to have been personally involved in the Separation Court of the same archdiocese, his description of the promises to be made by parties requesting permission to approach the civil authorities is identical to those required in Chicago (see ibid., 241).

[153] Ibid., 239. Emphasis in original.

accurately quoting canon 126 and its requirement to "consult the proper Church authority," immediately followed by a summary or conclusion that civil separation "is forbidden unless the *permission* be granted."[154]

Scholarly articles for canonists demonstrate similar characteristics to those found in manuals for the clergy. In a 1946 article, Kelly promisingly begins by observing that "The *Code of Canon Law* […] contains no direct and positive prohibition with regard to approaching the civil courts for the dissolution of the marriage bond."[155] He then quotes and summarizes canon 124 to the effect that the Council "directly and positively prohibits Catholics from approaching the civil courts seeking the dissolution of the marriage bond,"[156] which seems to be not quite accurate; the Council *declared* that divorce was *gravely sinful*, which is not the same as "directly and positively" establishing a legal prohibition. A few pages later, Kelly further expands on the claimed contents of canon 124, asserting that it is "explicitly stated" that Catholics "may not seek a civil divorce without the explicit permission of the Holy See, or at least of the local Ordinary, and that, if they do so, even if only for the civil effects and without any intention of attempting an adulterous union, they commit a grave sin."[157] This assertion seems to be more rooted in an erroneous reading of the 1906 response of the Holy Office, than canon 124 as cited. Three years later Kelly cites canons 124 and 126 as the basis for his claim that "[i]t is obvious that no Catholic may seek a civil divorce without first obtaining the permission of the Holy See, or at least of the local Ordinary,"[158] ignoring the fact that the involvement of ecclesiastical

[154] Ibid., 239–240. Emphasis added.

[155] KELLY, "Separation and Civil Divorce," 218.

[156] Ibid., 219.

[157] Ibid., 223–224.

[158] J.P. KELLY, "Divorce – Some Practical Canonical Considerations," in *The Jurist*, 9 (1949), 198.

authority is not mentioned in regard to divorce, and permission is not mentioned at all in these canons, nor is the involvement of the Holy See. Quinn cites canon 126 to the effect that "[t]he [Third] Plenary Council of Baltimore levelled a penalty against those who obtain a civil divorce without ecclesiastical approval,"[159] ignoring both the distinction between civil separation and divorce, and the distinction between approval and consultation.

Articles in civil law journals made similar claims. Edward Burke, one of the founding judges of the Separation Court of the Archdiocese of Chicago, wrote in the journal of a Chicago Catholic law school that "[t]he Third Council of Baltimore […] decreed that Catholics may not approach the civil courts either for separation or divorce without the consent of the Bishop of the diocese,"[160] ignoring the distinction between separation requiring ecclesiastical *consultation* (not *consent*), and divorce, for which no ecclesiastical involvement is named by the same Council.

An article in the journal of the University of Notre Dame law school elides the difference between separation of bed and board mentioned in canon 126, and divorce of the bond mentioned in canon 124, apparently relying on the fact that the Church does not recognize divorce of the bond at all. The *divorce* mentioned in canon 124 and the separation *a thoro et mensa* of canon 126 are conflated, to the effect that "[t]he Third Council of Baltimore […] forbids Catholics in the United States to apply to the civil authority for such

[159] H.G. QUINN, "Permission for Separation and Divorce," in *The Jurist*, 14 (1954), 248.

[160] E.M. BURKE, "Marriage, the Chancery Court, and the Catholic Church," in *DePaul Law Review*, 4 (1955), 213.

a divorce without first obtaining the permission of the ecclesiastical authority"[161]—adding the usual error regarding permission. In a book published for Catholic lawyers in Detroit, the essential elements of canon 124 are accurately summarized, but canon 126 is misused to claim a requirement for "permission,"[162] which error then pervasively infects the commentary on what a lawyer is to do before assisting a client regarding a divorce suit.[163] An article by Dailey—unique among all those seen by the present author—explicitly notes the discrepancy between the text of canon 126 and the widespread opinions of other authors. Dailey accurately paraphrases canon 126 in respect of "judicial separation in civil tribunals without consulting ecclesiastical authority." He then notes, "[t]he important clause 'without consulting ecclesiastical authority' is generally interpreted in the literature to mean 'without obtaining the permission of ecclesiastical authority.'"[164] While it is undoubtedly true, as has been demonstrated exhaustively in the present study, that this is the manner in which the cited clause of canon 126 "is generally interpreted in the literature," the sources cited by Dailey in his footnotes only illustrate the point, rather than giving specific arguments in favor of this interpretation.

Academic theses by American authors display many of the same issues. Goldsmith quotes canon 126 accurately in Latin, but then states that the spouse "must obtain

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[161] A.L. SCHLITZER, "The Catholic Lawyer and Divorce Cases," in *Notre Dame Law Review*, 29 (1953), 43. That Schlitzer includes all divorces, not merely divorces *a mensa et thoro* i.e. separations, is clear from the following sentence on the next page: "The statutes of the Third Council of Baltimore bind all Catholics within the United States, and that Council laid down that the permission of the ecclesiastical authorities must be obtained before the civil court may be approached for the purpose of obtaining a divorce."

[162] C.J. MALLOY, "Civil Divorce and Separation," in *Catholic Lawyers Guide*, Detroit, MI, Catholic Lawyers Society of the Archdiocese of Detroit, 1963, 104.

[163] Ibid., 105–108.

[164] R.H. DAILEY, "The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case," in *University of Detroit Law Journal*, vol. 38, no. 3 (1961), 270–271.

permission"[165] for a civil separation; for civil divorce, parties would likewise need to obtain "permission for this from the proper ecclesiastical authority,"[166] though without any cited norm. King accurately summarizes canon 124 that "there is no penalty […] in the particular conciliar law for this country against those who seek a civil divorce, nevertheless the same decree of the Council of Baltimore calls attention to the grave sin involved in seeking such action."[167] However, he immediately continues, "[t]herefore, the permission of the local ordinary is a necessary requisite for licit action [for divorce] in every instance"[168]—the same *non sequitur* as other authors.

A similar interpretive—or perhaps more precisely, intelligibility—problem is displayed regarding other councils. For example, the provision of the Fifth Provincial Council of Baltimore ordering bishops *to establish in their dioceses* the penalty of excommunication for divorce and remarriage[169] was misinterpreted into a claim that the council itself, in its "third decree *ipso facto* excommunicated [those] who should attempt remarriage after being divorced by the law of the State,"[170] when this is plainly contrary to the text of the law.

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[165] J.W. GOLDSMITH, *The Competence of Church and State Over Marriage – Disputed Points*, Canon Law Studies, no. 197, Washington, DC, The Catholic University of America Press, 1944, 96, and fn. 115.

[166] Ibid., 96.

[167] J.P. KING, *The Canonical Procedure in Separation Cases: A Historical Synopsis and a Commentary*, Canon Law Studies, no. 325, Washington, DC, The Catholic University of America Press, 1952, 155.

[168] Ibid., 155–156.

[169] See FIFTH PROVINCIAL COUNCIL OF BALTIMORE, Concilium Baltimorense provinciale V, decreta concilii, 216–217, no. 3, discussed above.

[170] P. GUILDAY, *A History of the Councils of Baltimore (1791–1884)*, New York, Macmillan, 1932, 138.

Most authors appear to believe that the matter was morally and legally very simple; as though the grave evil of divorce necessitated an inversion of the provisions of *CIC/17* c. 19, such that the extent of the legislation was to be exaggerated at every opportunity. These authors do not quite argue that divorce is intrinsically evil (if it were, not even the Apostolic See could permit it); but their conclusion seems to be that divorce is not only a grave social evil in general, but also (and therefore) *presumptively* forbidden in every case unless and until it has been permitted by ecclesiastical authority.

Among the majoritarian interpretations, few acknowledge the existence of different interpretations. Kelly and Hines both summarize the responses of the Holy See as previously mentioned, and different interpretations drawn from them. Hines even acknowledges "that the Holy See does not take replies given in particular cases as norms according to which other cases may be judged,"[171] in contrast to the pseudo-ultramontanism of other authors who do not give due consideration to the genre, author or details of each reply. Hines even allows for consideration of the national and political context in which the responses were given—like authors around the turn of the century, but unlike his contemporaries:

> The reason why the Holy See tolerated the judge's sentence of divorce in one nation, namely Belgium, and prohibited it in another, namely France, arises from particular circumstances. In France recent laws directly attacked the rights and laws of the Church; cooperation with them would have harmed the Church. Therefore, the Church, denying such cooperation, acted rightly. Nevertheless, it must never be forgotten that this prohibition was not general, but particular, directed to one nation alone.[172]

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[171] V.J. HINES, *De coniugum separatione ac de civili divortio in iure canonico et in iure civili Statuum Foederatorum Americae Septentrionalis*, Pontificium Institutum utriusque iuris, Theses ad lauream, no. 62, Rome, Catholic Book Agency, 1949, 74, no. 2.

[172] Ibid., no. 3.

Nevertheless, Hines concludes that "before approaching the civil tribunal, spouses must obtain permission from the local Ordinary,"[173] an assertion which does not find its origin in any of the specific sources he cited, except an inaccurate reading of the 1906 response of the Holy Office. Following a useful summary of the evolution of the responses over time of the conventionally-cited responses of the Holy See in the late nineteenth and early twentieth centuries, Kelly concludes that

> [m]ost modern authors, writing since the Holy Office granted that one permission in the particular case in 1906, have assumed that the policy of the Church has become less severe on this matter (an assumption which is hardly warranted, I would think, when based on only one private response in a particular case). Many of these authors express rather lax opinions, and the treatment which almost all of them give to this subject is vague, confusing, and generally unsatisfactory.[174]

Among the "modern authors" whom Kelly specifically accuses of expressing "lax opinions" and giving "vague, confusing, and generally unsatisfactory" treatment are Gasparri, Capello, and Wernz-Vidal,[175] indicating how U.S. literature had, by this point, become significantly out-of-step with respected canonists in the rest of the world.

Implicit in much of the US literature of this era is the idea that social goods and obligations have primacy over individual fulfillment and, at times, rights. Some make this argument explicit: "the stability of the family […] must always and necessarily outweigh the social interest in the personal improvement, desires and claims of husband and wife. […] That monogamy works personal hardships in particular cases is no valid reason for rejecting it. Every beneficial law necessitates sacrifices on the part of some individuals."[176]

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[173] Ibid., 76.

[174] KELLY, "Separation and Civil Divorce," 233–234.

[175] See ibid., 222, fn. 84.

[176] B.F. BROWN, "The Natural Law, the Marriage Bond and Divorce," in *The Jurist*, 15 (1955), 32–33.

Burke, as usual, employs some hyperbole to make his point: "divorced couples […] are walking out on contracts and are destroying the very fabric of society. Society through the judge must defend itself."[177] Even at this time, however, their views were increasingly at odds with the changing social values and secular domestic relations law; Kelly laments that "modern worldlings are convinced that they alone are concerned in the marriage contract, and that their own happiness and convenience alone are to be considered. With such people all sense of obligation to God or to the commonweal seems to have disappeared."[178]

Authors unable to refer to the national particular legislation of Baltimore had to be more resourceful in their reasoning. One of the more considered opinions on the derivation of a requirement for episcopal permission for divorce comes from the English priest Edward Mahoney. Mahoney begins by acknowledging that "[i]n the common law there is no very firm and explicit statement directing persons to secure the Ordinary's permission before getting a civil divorce."[179] Nevertheless, Mahoney reasons that even where particular law does not provide for it, two reasons necessitate the intervention of the Ordinary:

> [F]irstly, in order that a decision may be given on the necessity of civil divorce for the purpose of obtaining the civil effects, a decision which will depend on the circumstances of each case and on the civil law; secondly, for the purpose of removing the scandal caused by a Catholic apparently flouting the divine law on the indissolubility of Christian marriage, and manifestly affronting the Church by bringing an important marriage cause to a civil tribunal.[180]

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[177] E.M. BURKE, "The Legal Profession in regard to Separation and Divorce Cases," in *The Jurist*, 15 (1955), 431.

[178] KELLY, "Separation and Civil Divorce," 187.

[179] E.J. MAHONEY, "Ordinary's Permission for Civil Divorce," in L.L. MCREAVY (ed.), *Priests' Problems*, London, Burns & Oates, 1958, 313.

[180] Ibid., 314.

Mahoney makes explicit what is implicit in some other authors: the decision of the local Ordinary is necessary as a kind of precaution to prevent the party from making an incorrect judgment of his own regarding the permissibility of civil divorce in his case. Like other authors he is concerned with the problem of overlapping Church and state jurisdiction regarding marriage; again, his conclusion is not based on intrinsic necessity, but an extrinsic good, the avoidance of scandal. Unusually, Mahoney acknowledges that his previously-published opinion was too strict.[181] Although mentioning canon law in framing the questions, Mahoney's reasoning to his conclusion is clearly that of moral theology, not law, in common with some other authors on the subject—even those claiming to give a legal answer.

Only a minority of authors acknowledge what is in my view the correct opinion: that no provision of universal law (codified or otherwise) or of the Third Plenary Council of Baltimore creates a canonical prohibition against recourse to the civil authorities for divorce or demands ecclesiastical involvement prior to doing so. This minority of authors tends to make more nuanced considerations, concluding that the canonical ineffectiveness of civil divorce makes it irrelevant; and therefore, moral or immoral depending on the intentions of the spouses and the uses to which they plan to put it. These authors certainly agree, however, that it is immoral and perhaps canonically illicit if the parties would use a civil divorce as an instrument to end their obligations toward each other or, even worse, to facilitate remarriage.

[181] Mahoney now states that recourse to the Ordinary for the readmission to the sacraments by one who previously divorced without permission was not "necessary" but merely "advisable" (ibid., 314, fn. 1). For his previous opinion, see E.J. MAHONEY, "Civil Divorce," in *The Clergy Review*, 20 (new series) (1941), 181–182.

Bouscaren, Ellis and Korth in their *Canon Law: A Text and Commentary*, presume a situation where "the permission of the Ordinary [can be] given to obtain a civil divorce,"[182] without stating an obligation to obtain such "permission"; despite its title, the book seems to address this question from a moral rather than a canonical perspective. The authors conclude that "[r]espectable moral authorities hold that the legal proceedings of divorce cases, prescinding from the intention of the parties to marry again, are not *malum in se*; and hence that the cooperation of judge or lawyer, *for a proportionate reason*, may be permitted on the principle of the double effect,"[183] echoing the opinion of Kenrick and others that civil divorce was an unwelcome social development in general, but ultimately canonically irrelevant and therefore not to be treated as a grave problem in individual cases, provided that the parties did not attribute to it a power which it did not truly have, viz., to end the real (i.e. ontologically existing) bond of marriage. Notably, they do not address the question from the perspective of the parties themselves, but only for members of the legal profession.

Woywod explains with remarkable clarity and insight that

> [a]pplication has been made repeatedly to the Holy Office and to the Sacred Penitentiary [...] to declare whether [...] persons who have cause for separation and obtain permission from the Church to separate can apply for a divorce. The Holy See has invariably given an evasive answer, which shows clearly that the Church does not as yet want to decide the question definitively. The answers which have been given are worded in such a manner that nothing certain can be concluded from them.[184]

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[182] T.L. BOUSCAREN, A.C. ELLIS, and F.N. KORTH, *Canon Law: A Text and Commentary*, 4th rev. ed., Milwaukee, WI, Bruce, 1963, 636. Emphasis in original.

[183] Ibid. Emphasis in original.

[184] S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, 2nd rev. ed., vol. 1, New York, J.F. Wagner, 1926, 724. The section on separation has been completely revised from Woywod's earlier work, which summarized the canons of the *CIC/17* but did not mention the civil authorities. See S. WOYWOD, *The New Canon Law: A Commentary and Summary of the New Code of Canon Law*, New York, Joseph F. Wagner, 1918, 230–231.

Woywod correctly understands the questions posed to Apostolic See as questions of principle (even if prompted by specific situations), not as requests for permission in individual cases. He therefore understands the lack of clear answers as indicative of an uncertainty regarding the general principles, not as refusal of permission in those cases nor as implicit affirmation that permission was required.

Woywod limits his discussion to the situation in which "the party who has a genuine reason for separation recognized by the Church may ask for civil divorce,"[185] having explained immediately prior the circumstances in which a party does or (in the cases of adultery and "reasons […] so urgent that immediate action is necessary for the safety of the injured party")[186] does not need the explicit intervention of the Ordinary regarding the separation. This seems to be particularly influenced by—though not limited to—the situation where a civil divorce is necessary to protect the party's rights according to canon law;[187] Woywod is earlier concerned with the scenario "if the other party objects to the separation allowed by the Ordinary, the injured party cannot break the marital relations without coming into conflict with the civil law, which gives either married party the right to force the other to cohabitation."[188]

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[185] WOYWOD, *A Practical Commentary on the Code of Canon Law*, 723.

[186] Ibid.

[187] "If the other party has no conscience, and takes advantage of the pretension of the civil power and under its protection marries again, this wickedness should not prevent the innocent party who has a right to separation from making his or her right effective by getting a civil divorce" (ibid., 725).

[188] Ibid., 724. Taking the concern expressed by Woywod regarding the harm which a party could suffer when the civil authorities might attempt to enforce the fulfillment of the civil obligations of marriage even when contrary to a canonical separation, one could reverse the situation to create an additional argument

After explaining the civil authority's lack of jurisdiction over the bond of Christian marriage,[189] save for their power over its "civil consequences," "it seems that a Catholic who, according to the law of the Church, has a right to separation but cannot make his right effective unless he gets the civil divorce, has a right to apply for it."[190] No mention whatsoever is made of consultation with or permission from the ecclesiastical authorities regarding the approach to the civil authorities; since thorough treatment is given in the previous section regarding the Ordinary's role in separation, it seems reasonable to conclude that Woywod finds that it is not necessary to involve the ecclesiastical authority in the decision to seek civil divorce.

Certainly, neither Bouscaren-Korth-Ellis nor Woywod treat the breakdown of the common life or the intervention of the civil authorities in Christian marriage with disregard. And both are careful to limit the terms of their answers; the former, to the legal profession, and not to the spouses themselves; the latter, to situations where separation is licit according to the law of the Church. Yet both conclude that it is precisely the ineffectiveness of civil divorce regarding the bond of marriage which makes it possible to have recourse to it when

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in favor of a requirement to seek ecclesiastical approval prior to approaching the civil authorities. That is, that the ability to fulfill the canonical obligation to preserve the communion of conjugal life expressed in *CIC/17* c. 1128, could well be practically prevented by the interference of the civil authority; and that therefore there could be some obligation in turn to secure ecclesiastical approval before making such an approach to the civil authorities. I am not aware of any American author making this argument; they seem to rely largely on canon 126 and the responses of the Apostolic See. Even where they mention the reservation of matrimonial causes of the baptized to the ecclesiastical judge, it is with the tenor of preserving the principle of ecclesiastical jurisdiction, rather than consideration of how the civil authorities might prevent a party from being able to fulfill a canonical obligation. In any event, to the current author it appears that the connection between the canonical matrimonial obligation and the potential civil interference therein is a weighty moral matter, but lacking specific legal connection to a "permission" to be therefore received from any ecclesiastical authority.

[189] Additionally, the civil authority has no power over the bond even of non-sacramental marriage validly contracted.

[190] Ibid.

necessary and when those limits are observed in conscience, according to the normal terms of moral theology and without the need to involve the ecclesiastical authority in each case.

3.4. Interpretation, Understanding, and Customary Legislation

Those arguing in favor of a canonical obligation to receive ecclesiastical permission prior to approaching the civil authority generally did so on the basis of promulgated legislation; that is, the canons of the Third Plenary Council of Baltimore or of the *CIC/17*; or at least of the Roman responses which were *treated as* something analogous to legislation, albeit incorrectly. On these bases the authors believed they were on firm legal ground. Having addressed these arguments and found them wanting, it seems necessary to consider whether the prevailing weight of canonical opinion might itself have given legal effect to arguments which could not be sustained in source texts alone. Could there have arisen a law, or an interpretation or understanding with the force of law, which obliged spouses in the United States to seek ecclesiastical *permission* prior to approaching the civil authorities regarding the marriage, and especially for *divorce*?

Although there were authentic interpretations relating to separation of the spouses with the bond remaining,[191] none addresses the issue of approaching the civil authorities, and therefore there is no authoritative interpretation as defined by *CIC/17* c. 17, concerning

[191] See COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CANONS OF THE CODE, Response on the Acquisition of Domicile, in *AAS*, 14 (1922), 526, English translation in *CLD,* vol. 1, 83; ID., Responses on the Separation of Spouses, in *AAS*, 24 (1932), 284, English translation in Administrative Decree of Separation, in *CLD*, vol. 1, 554–555; ID., Response on the Separation of Spouses, in *AAS*, 33 (1941), 173, English translation in Separation of Husband and Wife: Cases Never Become *res iudicata,* in *CLD*, vol. 2, 552.

the civil authorities, either as regarding *CIC/17* c. 1128-1132*,* or the Third Plenary Council of Baltimore.[192]

> Ecclesiastical laws are to be understood according to the meaning of their own words considered in their text and context; as for those things that remain unclear or in doubt, reference should be made to parallel provisions in the Code, if there are any, to the purposes and circumstances of the law and to the mind of the legislator.[193]

For the common understanding of ecclesiastical laws, then, this takes place first of all "according to the meaning of their own words considered in their text and context" (*secundum propriam verborum significationem in textu et contextu consideratam*). Regarding canons 124 and 126 of the Third Plenary Council of Baltimore, the proper meaning of the words is clear: civil dissolution of marriage and separation with the bond remaining (*seu* of bed and table) are clearly distinct matters, admitting of no confusion of meaning; likewise regarding the distinction between permission and consultation. Therefore there is nothing "unclear or in doubt" such that the questions of "the purposes and circumstances of the law and to the mind of the legislator" become relevant.

Separate from the issue of interpretation and understanding of ecclesiastical laws is the possibility that ecclesiastical norms could have arisen by custom (*consuetudo*).[194]

> A custom beyond the law, if it has been knowingly observed by a community with the intention of obliging itself, leads to law, if the custom was equally reasonable and legitimately observed for forty continuous and complete years.[195]

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[192] There having been no subsequent plenary council for the United States, there was no "legislator or his successor" according to the terms of *CIC/17* c. 17, §1 to interpret the decree of the Third Plenary Council of Baltimore; but the Apostolic See could have interpreted its decrees by special commission if necessary.

[193] *CIC/17* c. 18: "Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum."

[194] See *CIC/17* c. 26.

[195] *CIC/17* c. 28: "Consuetudo praeter legem, quae scienter a communitate cum animo se obligandi servata sit, legem inducit, si pariter fuerit rationabilis et legitime per annos quadraginta continuos et completos praescripta."

For a custom *praeter legem* to obtain the force of law, it would need to be observed by a community *with the intention of obliging itself* (*cum animo se obligandi*). Prescinding from the question of observation for forty continuous years, the practice and opinion in the United States of claiming an obligation to receive permission and regarding divorce was founded in claims of existing legislation. Therefore, those observing and promoting the supposed obligation lacked the intention of establishing new customary law *precisely because they believed that they were already following the law*.

3.5. Concordats

As particular law issued by the Apostolic See but outside of the codes of canon law, concordats can provide insight into the Church's legal aims. Regarding troubled marriages, this seems manifest in two particular respects: a preference for the state to decide separation with the bond remaining, and distinctive mentions of civil divorce not found in the codified law.

3.5.1. Treatment of the Separation with the Bond Remaining in Concordats

Even in the era of the *CIC/17*, the Church was willing to hand over to the state the power to judge cases of separation of spouses with the bond remaining wherever possible, even on a general basis over the whole country. These concordats place separation cases largely outside of the provisions of *CIC/83* c. 1692 (which did not come into effect until after these concordats), but they provide relevant and concrete examples of the Church's preference in the legal order. Jurisdiction granted to the civil authorities by concordat is separate from the issue of "supplied jurisdiction" to the civil authorities of countries

without concordats as Gasparri suggested regarding England and France in the nineteenth century.

In Italy, "for causes of personal separation, the Holy See allows them to be judged by civil judicial authorities."[196] Not only the merely civil effects of marriage, but also the obligation (and later, in the *CIC/83*, the right) to conjugal living, are simply handed over to the civil authorities.[197] This may seem surprising, considering the jealous tone of, for example, the late nineteenth century responses of the Holy See. It is more understandable, however, when we read those responses as pertaining not to something essentially constitutive of the Church's sacramental order and jurisdiction over her members, but to the legal and political situation in France at that time. When those Church-state conflicts are able to be resolved—as they were, comprehensively, with the 1929 Lateran Pacts—then the Church's preference is that legal separation be decided by the authority most effectively able to adjudicate the matter; that is, the civil authorities.

As is so often the case, the situation in Italy may have had outsized influence on the Church and on canonical legislation. Here, we have a situation not merely where a matter addressed in canon law is, in practice, relatively rare in Italy (for example, the presence of non-Catholic Christians), but the de facto renunciation of the Church's jurisdiction over an entire institute of the universal law. The effective suspension in Italy

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[196] Concordato tra la Santa Sede e l'Italia, in *AAS*, 21 (1929), 291, art. 34. Most concordats are signed and published both in Italian and in the principal language of the country, both versions being equally authentic. For the sake of consistency, I will cite and translate from only the Italian versions.

[197] This is, however, "without prejudice to the right of the faithful to have recourse to ecclesiastical jurisdiction when they are bound only by a religious bond or when reasons of conscience so require. In the latter cases, the spouses concerned may ask the diocesan bishop to issue a decree (cf. can. 1692, §1) or apply to the diocesan tribunal which […] will proceed […] in accordance with cann. 1693-1696" (EPISCOPAL CONFERENCE OF ITALY, Decreto generale sul matrimonio canonico, in *Notiziario della Conferenza Episcopale Italiana*, no. 10 [1990], 276, art. 55).

of the universal law regarding ecclesiastical competence over separation of spouses with the bond remaining and the consequent relative disinterest from Italian canonists regarding the matter, may have facilitated a splintering of the canonical literature into more locally-centered schools. This is not necessarily a bad thing; especially when the subject of the law concerns social circumstances and interaction with the civil authorities, law and literature ought to address local circumstances. But when the local literature *fails to understand that it is local* and seems to make universal claims, there is a danger that historically-contingent ideas may take too deep a root. This is in fact what I argue happened in the United States.

In Colombia, "cases of separation of spouses bound by canonical marriages shall be dealt with by the judges of the state."[198] However, there is then the unique additional provision that "at the request of one of the spouses, the case shall be suspended in the first instance and for one time only, for a period of thirty days, to allow for conciliation and pastoral action by the Church."[199] This "conciliation and pastoral action" does not have juridical effect.

In the Dominican Republic, spouses entering a canonical marriage thereby renounce the right to request a civil divorce,[200] and ecclesiastical decisions of nullity of marriage and dissolution of *ratum tantum* marriages and by the Pauline privilege are civilly effective;[201] but still, the Holy See consented to cases of separation of spouses being adjudicated by the civil authorities.[202] Given the great deference granted by the Dominican

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[198] Concordato tra la Santa Sede e la Repubblica di Colombia, in *AAS*, 67 (1975), 425, art. 9.

[199] Ibid.

[200] See Concordato tra la Santa Sede e la Repubblica Dominicana, in *AAS*, 46 (1954), 442, art. 15, §2.

[201] Ibid., 442–443, art. 16, §1.

[202] Ibid., 443, art. 16, §1.

state to the Church regarding divorce and nullity of marriage, it is difficult to imagine that jurisdiction over separation cases was not freely, even eagerly, relinquished by the Church.

3.5.2. Divorce in Concordats

The 2004 concordat with Portugal provides a unique quasi-prohibition against civil divorce. The concordat does not give separation cases to the state, or indeed mention separation with the bond remaining at all. However, it does contain a singular provision regarding civil divorce. Following various articles providing for civil recognition of canonical marriages, the concordat states that "[t]he Holy See, while reaffirming the doctrine of the Catholic Church concerning the indissolubility of the matrimonial bond, reminds the spouses who have contracted a canonical marriage of the grave duty which lies upon them, not to make use of the civil faculty of seeking divorce."[203] It is an unusual phrase, recognizing that the possibility of seeking civil divorce exists, while also stating—on the part of the Holy See, though not of the Portuguese state—that there is a "grave duty" not to use this possibility. The provision has been glossed as a consequence of canon 1671 reserving matrimonial causes of the baptized to the ecclesiastical judge.[204] Essential context is perhaps found in the next article of the concordat, which provides for civil recognition of ecclesiastical declarations of nullity of marriage, and of pontifical dissolution of non-consummated marriages.[205] Therefore, because of the possibility of civil

[203] "La Santa Sede, mentre riafferma la dottrina della Chiesa Cattolica circa l'indissolubilità del vincolo matrimoniale, ricorda ai coniugi, che hanno contratto matrimonio canonico, il grave dovere, che ad essi incombe, di non valersi della facoltà civile di chiedere il divorzio" (Concordato tra la Santa Sede e la Repubblica Portoghese, in *AAS*, 97 [2005], 37, art. 15, §2). The concordat also has a parallel Portuguese-language text, equally authentic (see ibid., 50).

[204] See M. MARCELLO, "Venti anni di concordato in Portogallo : Una rilettura del testo concordatario alla luce del principio di cooperazione," in *Ius Ecclesiae*, 37 (2025), 299–314.

[205] See ibid., art. 16.

recognition of ecclesiastical nullity and dissolution (at least in such cases as those processes would be applicable), it should not be assumed that formal, legal disapproval of civil divorce would apply in those places where there was *not* the possibility of receiving civil recognition of such ecclesiastical decisions; the statement may well be predicated on the fact that there is an effective ecclesiastical alternative to purely civil divorce.[206]

In the concordat with East Timor, "the Holy See reaffirms before the Democratic Republic of East Timor the permanent value of the doctrine of the Catholic Church concerning the indissolubility of the matrimonial bond,"[207] fulfilling a broadly similar function, and at a similar place, to the warning against divorce in the Concordat with East Timor's former colonial power Portugal. For East Timor, however, there is no explicit reference to divorce, nor mention of a "grave duty not to use this possibility."

On the other hand, the 1953 concordat with the Dominican Republic completely excludes the possibility of recourse to civil divorce for spouses who have contracted a canonical marriage;[208] the provision is a truly effective prevention in both civil law and canon law, not merely a warning or threat of punishment for those who would do the thing prohibited.

These examples illustrate different provisions of the Holy See in particular legislation regarding civil divorce in different circumstances. Their existence reminds us that the universal codified law makes no prohibition regarding civil divorce; it would have

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[206] This is a kind of parallel to canon 1692, §2: one of the circumstances in which the diocesan bishop can give *licentia* to approach the civil forum in cases of separation with the bond remaining is if the ecclesiastical decision does not have civil effects.

[207] Accordo tra la Santa Sede e la Repubblica Democratica di Timor-Leste, in *Communicationes*, 49 (2017), 18-19, art. 16.

[208] See Concordato tra la Santa Sede e la Repubblica Dominicana, 442, art. 15, §2.

been simple enough for the universal law to contain a similar phrase to that found in the concordat with Portugal. The fact that no such provision appears should warn us against interpreting the universal law (and in particular, *CIC/83* c. 1692, §2) as though such a provision did exist.

3.6. Causes of Separation of the Spouses with the Bond Remaining in the 1983 Code of Canon Law

While the text of the 1983 Code of Canon Law did not fundamentally reorder the institute of separation of the spouses with the bond remaining, it did introduce into the codified law, for the first time, procedural norms for such cases. This procedural law provides for separation cases to be decided by the civil authorities in individual instances.

3.6.1. The Revision of the Codified Law: *De processibus*

The drafting process for the 1983 Code of Canon Law regarding the procedural law of separation of spouses with the bond remaining provides insight into the varied opinions of influential canonists at that time and also illustrates the meaning of the legislative text which was to come.

3.6.1.1. The 1971 Schema

"The 1917 Code […] contained no canons regulating procedures for separation cases; these canons were first introduced in the 1976 schema."[209] In fact this statement is not quite accurate; these canons were introduced in draft form by a *parvus coetus* in February 1971.[210] Nevertheless, it is true that the *CIC/17* contained no procedural canons

[209] L.G. WRENN, "Processes (Cc. 1400-1752)," in *CLSA Comm1*, 1016.

[210] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), diebus 19-22 aprilis 1971 habita, in *Communicationes*, 40 (2008), 143.

regarding separation, in contrast to, e.g. its provisions regarding procedural canons to declare the nullity of marriage. There is no record of why or how it was decided to introduce these canons to the codified law; nevertheless, they appear more-or-less from the very beginning of the work of the *coetus de processibus*. The *parvus coetus* was led by Raimondo Bidagor. Bidagor was well-versed in the procedural law regarding separation of spouses, having written an article on recourse in separation cases which addressed many of the *lacunae* left by the absence of codified procedural law on the matter.[211] The first schema[212] regarding causes of separation of the spouses with the bond remaining stated, in part:

> Can. 1 § 1. Causes of personal separation of baptized spouses are to be brought before the ecclesiastical judge, unless it be otherwise provided by particular law.
>
> § 2. Where the ecclesiastical decision does not produce civil effects, and when a civil sentence is foreseen not to be contrary to the law of the Church, the Ordinary of the place where the spouses reside may, in individual cases, after weighing the particular circumstances, grant the *licentia* to approach the civil forum.[213]
>
> […]
>
> Can. 6. When a cause of separation is proposed which at the same time involves questions concerning the merely civil effects of marriage, unless particular law provides

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[211] See R. BIDAGOR, "Recursus in causis separationis coniugum," in *Monitor ecclesiasticus*, 77 (1952), 273–284.

[212] Meaning "draft," *schema* was the noun used by the consultors regarding the fourteen draft canons prepared by the *parvus coetus* regarding separation of spouses with the bond remaining. See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 144. Insofar as possible, *Schema* will refer to a formally published draft of a book or similar-sized section of the Code, e.g. the 1976 *Schema de processibus* (see PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*, Typis polyglottis Vaticanis, 1976) while "schema" will refer to any other draft of a portion of the revised Code.

[213] "Can. 1 § 1. Causae separationis personalis coniugum baptizatorum ad iudicem ecclesiasticum deferantur, nisi iure particulari aliter caveatur.

§ 2. Ubi decisio ecclesiastica effectus civiles non sortitur, et quando sententia civilis praevidetur non infensa iuri Ecclesiae, Ordinarius commorationis coniugum poterit, singulis in casibus, perpensis peculiaribus adiunctis, licentiam concedere adeundi forum civile. […]

Can. 6. Quando proponitur causa separationis quae simul implicet quaestiones circa effectus mere civiles matrimonii, nisi ius particulare aliud caveat ad normam can. 1961, curet iudex ut causa ipsa, inde ab initio, de licentia Ordinarii deferatur ad forum civile" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* [Sessio XI], 144–145).

> otherwise in accord with the norm of can. 1961,[214] the judge is to see to it that the cause itself, from the beginning, with the *licentia* of the Ordinary, be referred to the civil forum.

At the beginning, then, the canons reflect a preference to bring the case before the ecclesiastical judge, with an exception providing that a *licentia* to approach the civil forum may be granted if the civil sentence is not foreseen to be contrary to the law of the Church *and* if the ecclesiastical decision alone would be civilly ineffective. Furthermore, canon 6 presumes that this is the preferred option if the case concerns the civil effects (though not *only* the civil effects), still with the *licentia* of the Ordinary.

The draft canons reflect some of the tensions with which the Church had struggled for the previous couple of centuries in particular: the intent to protect the principle of the Church's theologically-based right of jurisdiction over the marriages of the baptized, balanced against the desire to avoid wherever possible discordant civil and ecclesiastical status. The possibility of particular law providing for the civil power to judge separation cases, as suggested in canon 1, §1, was not new; such was already the case in Italy,[215] and Gasparri himself had argued for a roundabout application with the same result in England.[216] Hollweck had suggested that the universal law grant to the civil authority the ability to decide civil effects, even including the mutual support of the spouses, with the ecclesiastical judge only deciding these matters if the civil law was absent or contrary to natural justice or the rights of the Church.[217] Consequently, "[t]he *procedural law schema*

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[214] Can. 1961 of the *CIC/17*: "Cases that concern merely the civil effects of marriage, if these are the principal matters, belong to the civil magistrates according to the norm of Canon 1016; but if these matters are raised only incidentally and as accessory [concerns], they can also be treated by the ecclesiastical judge as part of his power to adjudicate and decide."

[215] See Concordato tra la Santa Sede e l'Italia, 291, art. 34.

[216] See GASPARRI, *Tractatus canonicus de matrimonio (1891)*, 333–334, no. 1165, and discussed previously in Chapter Three.

[217] See PRADOS RIVERA, *El iter redaccional*, 123.

seems to operate from the perspective of a Church existing in a concordat situation, with ecclesiastical nullity or separation judgments having civil-law implications"[218]; it does not attempt to provide for the means by which the private lives of the spouses are to be regulated from a moral perspective. The *licentia* to approach the civil authority, to be granted by the ecclesiastical authority, then, is not a way of making licit what would otherwise have been illicit or even criminal *for the spouses*; it is a way of granting *to the civil authority*, in individual cases, the ecclesiastical effects of the separation judgment.

Therefore, while these new canons reflect a fairly maximalist choice to grant authority over Christian marriage to the civil power, they are still made within a fundamentally consistent understanding of the law as it had previously been understood. The law of separation, for the most part, regulates the public or external lives of the spouses. The matter of *departure*, distinct from legal separation, is not mentioned; but it does not need to be mentioned; this distinction is part of the tradition, and does not necessarily need to be explicitly provided for in the procedural law.

The reasoning of the *parvus coetus* for not entrusting separation cases *always* to the civil magistrate was that marriage cases of the baptized belong by right to the ecclesiastical judge, that some marriages are only canonical and not civilly-recognized, that ecclesiastical grounds for separation are not always recognized in civil law, that separation could be imposed or refused contrary to divine law, and that divorce could be facilitated since (in some places) separation of a certain duration was itself legal grounds for divorce. Nevertheless, the *parvus coetus* was also aware of the problems which could arise from

[218] T.J. GREEN, "The Revision of Canon Law: Theological Implications," in *Theological Studies*, 40 (1979), 665. Emphasis and capitalization as in original. Although Green was writing specifically regarding the 1976 *Schema de processibus*, this is also an apt analysis of its predecessor parts.

conflicting civil and canonical jurisdictions. These problems were believed to be addressed by the provision for particular law, and the facultative referral to the civil authorities in individual cases.[219]

The American member of the *coetus*, Stephen Kelleher held a fundamentally different opinion about the nature of ecclesiastical separation.[220] Kelleher first proposed a modest textual revision: "Causes of separation [...] are to be brought before the civil judge, unless it is otherwise provided by particular law";[221] inverting the law's preference and exception, but without entirely dissolving the nature of the institute. Bidagor opposed this, arguing that "causes of separation are principally spiritual causes, and therefore cannot, by general law, be assigned to the lay judge (*ad iudicem laicum*)",[222] though allowing for particular law to provide otherwise. Kelleher then explained himself more fully: "The fourth Consultor insists on this point, that separation is brought about by the will of the spouses themselves, and therefore the judge has nothing to judge, but should only sign such a decision and establish the civil effects."[223]

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[219] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 147.

[220] The minutes published in *Communicationes* refer to "the fourth consultor," and Kelleher is either the third or the fourth listed, depending on whether the relator is counted among the consultors. See ibid., 143. It is revealed to be Kelleher by name in the original minutes. See Coetus studii *de processibus*, Sessio XIa (diebus 19-22 aprilis 1971 habita), in *Acta et documenta coetus studi «de processibus»*, vol. 4, (unpublished, in archives of the Dicastery for Legislative Texts), 5–6. Unless otherwise necessary, the version of the minutes published in *Communicationes* will generally be cited.

[221] "Causae separationis [...] ad iudicem civilem deferantur, nisi iure particulari aliter caveatur" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 148).

[222] "Lay judge" as a synonym for "civil judge"; not specifically a repudiation of the idea of laypersons as ecclesiastical judges, although the *CIC/17* did not allow for this.

[223] "Rev.mus quartus Consultor in eo quod separatio inducitur ex propria voluntate coniugum, ideo iudex nihil habet iudicandum sed tantum subscribere debet talem decisionem et effectus civiles statuere" (ibid.).

One can only imagine the thoughts, and perhaps the faces, of the other consultors present. What Kelleher was now arguing for was nothing less than a complete relinquishment of ecclesiastical dominion over the common conjugal life; indeed, of any legal authority other than the spouses themselves. Among other things, Kelleher's vision involved a very practical definition of separation, not allowing for the distinction between de facto separation and legal separation; legal separation is either abolished as a concept, or automatically brought about by the de facto separation. Only the civil effects remain to be judged, not any moral or spiritual obligations of the spouses toward each other.

It is perhaps unsurprising that Kelleher's interventions regarding matrimonial procedural law were difficult to reconcile with canonical tradition. Kelleher had previously argued that "the tribunal should be abolished entirely"[224] regarding nullity of marriage and believed in "the right of the divorced Catholic to a true and sacramental second marriage,"[225] arguing that "the teaching on indissolubility is wrong and the law which flows from it [is] unjust."[226]

Kelleher's argument was unpersuasive, and so the contrary proposal of the relator was accepted by vote of 6-1,[227] Kelleher presumably being the only dissenting vote. All seven other votes at the same session regarding separation canons are recorded with the same tally,[228] likely with only Kelleher against. Even the vote regarding canon 6 was so

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[224] S.J. KELLEHER, "The Problem of Intolerable Marriages," in *America*, 119, no. 7 (1968), 181.

[225] S.J. KELLEHER, "Looking Back, Looking Ahead: The 'Intolerable Marriage' Ten Years Later," in *America*, 139 no. 16 (1978), 355. It is clear that Kelleher understood the term "right" in a very literal, almost absolute, legal and moral sense.

[226] Ibid., 356.

[227] See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 148.

[228] See ibid., 148–152.

divided. This canon, we recall, provided that separation cases concerning the merely civil effects were to be referred by the judge to the civil authority from the beginning, with the *licentia* of the Ordinary; yet this mere *preference* for the civil authority did not go far enough for Kelleher. Although his argument against this canon is not recorded, we can observe that it contradicts his previous argument by allowing the ecclesiastical authority to refuse to refer to the civil authorities; and by limiting itself only to those cases of the merely civil effects, it implies that there are effects of marriage *other than merely civil* which could be legally regulated in the external forum. Kelleher is here specifically recorded as the sole dissenting voice.[229] The only canon where it is noted that all of the consultors agreed, was that stating the duty of the judge to encourage reconciliation.[230]

Despite the great differences of opinion between Kelleher and the other consultors regarding the nature of separation of spouses with the bond remaining—a matter of the public good, or a matter only for the spouses themselves—there is nevertheless a fundamental agreement that they are discussing the causes to establish separation of spouses with the bond remaining: the process or procedure by which the legal rights and obligations of the spouses toward each other are decided in law (whether canon law, civil law, or both). Even Kelleher's suggestion is within that framework, consistent with his other ideas about the primacy of the spouses' own decision making above that of the public authorities. He does not misread the discussion to be one about "permission" to obtain a civil divorce as an act distinct from ecclesiastical separation. No consultor makes interventions consistent with the idea that they were discussing the establishment or

[229] See ibid., 150. See also Coetus studii *de processibus*, 7.

[230] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 151.

creation of a process to give ecclesiastical authorization for civil divorce, or for other approach to the civil authority regarding the marriage *except* as the means by which the civil decision could be ecclesiastically recognized.

3.6.1.2. The 1976 *Schema de processibus*

The 1976 *Schema de processibus*[231] comprised a complete draft of what was to become Book VII of the *CIC/83*; the canons regarding causes of separation of spouses were now integrated into this more complete text. The *Praenotanda* explains the principles influencing the reform on each question, and then summarizes the main provisions of the canons. Having noted that "in Book IV of the [*CIC/17*] there is nowhere any mention of such causes, rather than of recognition, it is a matter of a construction to be made now for the first time,"[232] the principles previously mentioned in 1971 are recounted. Then the specific decisions made are explained:

> 61. In order to reconcile these diverse demands, it has been proposed that:
>
> a) with particular law being preserved, separation may be decreed either through the administrative or judicial path (can. 356, §1): in the judicial path the summary contentious process is to be employed, unless the ordinary process is requested (can. 357);
>
> b) when the ecclesiastical decision does not produce civil effects, and [*et*] the civil sentence is not foreseen to be contrary to divine law, the Bishop may, according to the circumstances, grant authorization [*licentiam concedere*] to approach the civil forum (can. 356, §2);

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[231] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*. This booklet was distributed *reservatum* to those working on the revision of the code, and has never been formally published. For the sake of consistency, and because the apparent typographical error is all the more striking when considered within the same physical document, I generally refer to this booklet. The *Praenotanda* with its explanatory notes was published contemporaneously in PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Litterae transmissionis, praenotanda schemati, in *Communicationes*, 8 (1976), 183–200. The text of the canons of the *Schema de processibus* was not published until 2009, see COETUS STUDII *DE PROCESSIBUS*, Schema canonum de modo procedendi pro tutela iurium seu de processibus, in *Communicationes*, 41 (2009), 350–447.

[232] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*, XVI, no. 60.

> c) if the cause concerns merely civil effects, care is to be taken that from the beginning it be brought before such a forum (can. 356, §3).[233]

As regards the civil authorities, then, the matter was to be brought to the civil forum from the beginning if the cause concerned only the civil effects; but otherwise (implicitly) the preference of law was for the matter to be heard by ecclesiastical authority. Nevertheless, the diocesan bishop could grant a *licentia* to approach the civil forum even if the cause did not concern only the civil effects—but only if the ecclesiastical decision itself would not have civil effects *and* if the civil decision was not foreseen to be contrary to divine law. The mention of "divine law" is new here; the 1971 schema stated that the civil decision would need merely not to be contrary to the law of the Church. Although there was some passing mention of the importance of avoiding the imposition of "separation against the divine law,"[234] there was no proposal to change the text of the canon; and therefore the source of the substitution is unclear.

The 1976 Schema introduced another change, however, which may well not have been deliberate; the canons differ from the explanation given in the same book. For while the 1971 schema and the 1976 *Praenotanda* join the conditions for the *licentia* to approach the civil authority with "and" (*et*), the 1976 *Schema de processibus* itself joins them differently:

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[233] "61. Ad componenda haec diversa postulata propositum est quod:

a) salvo iure particulari, separatio decerni possit via administrativa vel judiciaria (can. 356, § 1): in via iudiciaria adhibeatur processus contentiosus summarius, nisi petatur processus ordinarius (can. 357);

b) quando decisio ecclesiastica non sortitur effectus civiles, et sententia civilis non praevidetur contraria iuri divino, Episcopus poterit, iuxta adiuncta, licentiam concedere adeundi forum civile (can. 356, § 2);

c) si causa respiciat effectus mere civiles, curandum est ut inde ab initio ad tale forum deferatur (can. 356, § 3)" (ibid., no. 61).

[234] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 147.

> §1. Personal separation of baptized spouses, unless otherwise has been lawfully provided for particular places, can be decreed:
>
> a) by decree of the Ordinary; or
>
> b) by sentence of an ecclesiastical judge according to the norm of the canons which follow.
>
> §2. Where an ecclesiastical decision does not produce civil effects, or (*vel*) if a civil sentence is foreseen not to be contrary to divine law, the Ordinary of the spouses' domicile can, in individual cases, after weighing the particular circumstances, grant permission to approach the civil forum.
>
> §3. If the case also concerns effects that are merely civil of marriage, the judge is to take care that, with the prescription of §2 being observed, the cause be referred from the beginning to the civil forum.

There is no evidence that this was a deliberate change; the discrepancy with the *Praenotanda* suggests that it was an error. Nevertheless, the new conjunction survived the analysis of the world's episcopal conferences and canon law faculties, attracting no comments.

3.6.1.3. Comments on the 1976 *Schema de processibus*

In the comments on the 1976 *Schema de processibus* offered by the dicasteries of the Roman Curia and by episcopal conferences and faculties of canon law it is notable that the marriage nullity process attracted most attention and in particular, whether the provisional norms of *Causas matrimoniales*[235] (and parallel similar provisions for equivalents in specific countries, such as the American Procedural Norms for the United States[236]) derogating from the *CIC/17* requirements of collegiate tribunals, double conforming affirmative decisions, and norms on competency, would be extended into the

[235] See PAUL VI, Apostolic Letter Determining Norms for Expediting Marriage Cases *Causas matrimoniales*, in *AAS*, 63 (1971), 441–446.

[236] See COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, De procedura in causis matrimonialibus concessa conferentiae episcopali U.S.A., in *Periodica de re morali canonica liturgica*, 54 (1970), 563–593, English translation in American Procedural Norms, in *CLD*, vol. 7 (1970), 950–966.

revised code. In comparison to these matters, the procedural canons regarding separation of spouses with the bond remaining received comparatively little attention.

Moreover, most of the comments received regarding these canons were not requests for specific improvements but attempts to have the matter removed from the universal law, either entirely or by more extensive provision for particular law. It was stated that "[t]his matter could be suppressed, because spouses never come to ecclesiastical tribunals for causes of separation (Episcopal Conference of Austria), or it could be entirely entrusted to the Episcopal Conferences (Episcopal Conferences of Canada, France, Antilles)."[237] "All the Consultors, however, hold that this title cannot be lacking in the general law, given the competence of the Church concerning causes of separation of spouses."[238]

As with the substantive canons regarding separation, most of the requests from episcopal conferences to establish more clearly a role for particular law (whether diocesan or national) do not seem to be motivated by a strong desire to have specific particular legislation to enable them to address separation in their own dioceses or regions, but as a kind of compromise, conceding to other places the right to make provision for causes of separation should they need them, while avoiding any obligation on their own parts to begin hearing these causes which were, in the experience of many of them, effectively defunct. They wished to have the matter effectively absent, at least in any detail, from the universal law.

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[237] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studii de processibus (Series Altera, vol. I [Synthesis animadversionum quas organa consultationis fecerunt]: Relatio recognitio schematis), in DLTA (1978), 191.

[238] PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Opera Consultorum in recognoscendis schematibus canonum, coetus studiorum *De processibus*, in *Communicationes*, 11 (1979), 272–273.

The Inter-Episcopal Conference report prepared for the episcopal conferences of England and Wales, Scotland, and Ireland, suggested that "[t]he words *singulis in casibus* should be omitted. It is not necessary to apply to the Bishop in each case. A general policy statement would suffice."[239] Perhaps this was proposed with the understanding that the diocesan bishop would grant a kind of general delegation or supply of jurisdiction to the civil authorities regarding separation cases in his diocese; perhaps it was proposed with little consideration of the nature and effects of ecclesiastical separation, and was motivated only by the desire to relieve the Church of the whole matter and hand it over to the civil authorities without consideration of the canonical effects.

A nuanced—perhaps even contradictory—response was given by the Antilles Episcopal Conference, which stated,

> Separation is a moral problem, not a problem of justice/injustice – except where one party considers he/she has been unjustly treated and seeks justice from the Church. Separation by mutual consent should be treated by pastoral counseling, not judicial action (it may be sinful, but that does not make it matter for judicial decision). This should be made clear – and the title should be rather "Cases for Resumption of Common Habitation." […] If an individual believes he/she has sufficient moral grounds to separate, that individual should be free to do so especially if he/she acts with the pastoral advice of a priest; if civil action is to follow, particular legislation should determine whether or not the permission of the Ordinary should be required.[240]

So, separation is not a legal matter if done by mutual consent and even one party "should be free" to separate by his own decision; but there is a "problem of justice/injustice" if "one party considers he/she has been unjustly treated and seeks justice from the Church." Quite how the wronged party would receive "justice from the Church" in a context which rejects

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[239] EPISCOPAL CONFERENCES OF ENGLAND AND WALES, OF IRELAND AND OF SCOTLAND, *Schema canonum de modo procedendi pro tutela iurium seu de Processibus: An Analysis Prepared by an Inter-Episcopal-Conference Meeting in Dublin*, 17.

[240] ANTILLES EPISCOPAL CONFERENCE, Letter regarding the Schema *De processibus*, December 22, 1977, 1–2, DLTA 179.02.92. Emphasis in original.

justice in favor of advice, is not at all clear. The question of "permission" for "civil action" appears to be of a disciplinary nature, not in order to imbue the civil decision with ecclesiastical effects. In general, the response of the Antilles Episcopal Conference seems to misunderstand the nature of the procedural canons, perhaps addressing more the very existence of the institute.

A contrary view was expressed by the Episcopal Conference of Tanzania, seeking clearly-defined roles for the ecclesiastical and civil authorities, including a decisive role for the Church in making the substantive decision regarding conjugal living:

> On the question of cases of judicial separation, the procedure should be as follows:
>
> a) The Church deals with the case as such up to the discovery of the solution, i.e. separation or dissolution.
>
> b) The case is taken to the Civil Court for separation or legal Divorce – and only then.
>
> c) The Church may announce or publish such or such marriage has been declared null [*sic*] or as the case may be.[241]

The language used here is most confusing. Despite the fact that the comments are structurally identified with separation of spouses with the bond remaining, one "solution" mentioned is "dissolution." Perhaps this could generously be interpreted as dissolution of conjugal living, not of the bond of marriage. But no such tenuous explanation is possible for the announcement that the "marriage has been declared null"—an issue not under discussion here. Perhaps what this demonstrates most is widespread confusion about the meaning of canonical separation and the Church's role in it.

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[241] EPISCOPAL CONFERENCE OF TANZANIA, Letter regarding the *Schema de processibus*, September 9, 1977, appendix 8, in DLTA 178.04.30.

3.6.2. The Text of the 1983 Code of Canon Law

The law of the Church regarding the respective roles of Church and state regarding marital breakdown is contained not only as explicitly provided in the *CIC/83*, but also in what may be deduced from particular legislation and from *lacunae*. The codified law regarding the interaction of canon law and civil law in respect of separation of spouses with the bond remaining is contained entirely in canon 1692. We will consider each paragraph of the canon in turn.

3.6.2.1. Canon 1692, §1: The Right of the Church to Decide

> Can. 1692 §1 Unless lawfully provided otherwise in particular places, the personal separation of baptised spouses can be decided by a decree of the diocesan Bishop, or by the judgement of a judge in accordance with the following canons. [242]

The first paragraph makes clear that separation cases can be decided either by decree of the diocesan bishop—that is, by an administrative process—or by judgment issued in the course of judicial procedure (the distinction having been a matter of some debate among the consultors, especially in 1971,[243] but which is not particularly relevant to this study). The principle of canon 1671, §1, that "[m]arriage cases of the baptized belong to the ecclesiastical judge by proper right," is preserved.

However, this may be forestalled by alternative provisions of law in particular places. First among these would be concordats, which may make other provision, including deferring all separation cases to the civil authority. Alternatively, diocesan particular

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[242] "Separatio personalis coniugum baptizatorum, nisi aliter pro locis particularibus legitime provisum sit, decerni potest Episcopi dioecesani decreto vel iudicis sententia ad normam canonum qui sequuntur."

[243] See e.g. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, Coetus studiorum *De processibus* (Sessio XI), 149.

legislation could provide for some other procedural means. Since the universal law has not granted to episcopal conferences the capacity to legislate on this issue, they are not capable of doing so without a special mandate.[244] This further supports the impression that episcopal conferences which, in the 1970s, suggested that the law should provide for episcopal conferences to legislate on the matter, in fact had no interest in doing so.

3.6.2.2. The *licentia* to Approach the Civil Courts

> Can. 1692 §2 Where the ecclesiastical decision does not produce civil effects, or if it is foreseen that there will be a civil judgement not contrary to the divine law, the Bishop of the diocese in which the spouses are living can, in the light of their particular circumstances, give them *licentia* to approach the civil courts.[245]

3.6.2.2.1. The Nature of the *licentia*

I have consistently chosen throughout this study not to translate *licentia* simply as "permission," though that has generally been the most common rendering of this term, especially in the context of this canon. While this is certainly one of the possible meanings of the word, in this context it has created confusion regarding the nature of the bishop's action, implying—or being read to imply—that without the "permission" it is forbidden or otherwise violates canon law to approach the civil authorities regarding the marriage. However, *licentia* has other meanings, and one of these gives us the correct understanding

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[244] See can. 455, §4. I am not aware of any episcopal conference which has sought or received such a mandate or of any diocesan particular legislation regarding jurisdiction concerning personal separation, promulgated since 1983.

[245] "Can. 1692 §2. Ubi decisio ecclesiastica effectus civiles non sortitur, vel si sententia civilis praevidetur non contraria iuri divino, Episcopus dioecesis commorationis coniugum poterit, perpensis peculiaribus adiunctis, licentiam concedere adeundi forum civile."

The translation of *forum civile* as "civil courts" is perhaps too restrictive. While many jurisdictions use a court-based, judicial, system for legal separation in marriage, the canon does not exclude referral to e.g. an administrative civil process if that were the mechanism used in a certain place. The CLSA translation has "civil forum."

of the paragraph—and from the paragraph, the correct relationship between ecclesiastical separation of spouses and the civil law.

"If the request is not for the granting of a favor [as for a rescript] but for the exercising of a right to which the petitioner is entitled but which has certain public limitations in view of the common good, the result will be the granting of permission."[246] This describes the situation in canon 1692, §2: if the petitioner has *fumus boni iuris* for a cause of separation of spouses then he has a right to the process; but in view of the public good, exercise of this right is generally limited to the process before the ecclesiastical authorities. However, with the granting of permission (properly understood), the petitioner may exercise the right via the civil authorities.

In his article on singular administrative acts, Daniel finds that "[a] *licentia*—which can be translated as permission, authorization, and the like—is variously defined in doctrine. […] Its concession makes it possible for a person to exercise some faculty or right as a prior guarantee of the validity or liceity of the permitted act."[247] Among the various categories of *licentiæ* in the law, the *licentia* can be "a favor granted by rescript"[248] in which category is found "authorizing spouses to approach the civil forum for a cause of separation (*CIC*, c. 1692, §2; *CCEO* c. 1378, §2)."[249] In my opinion, "'[a]uthorization' makes clearer that the purpose of the concession is to 'make it possible for a person to exercise [the] faculty' 'to approach the civil forum for a cause of separation' properly understood—that

[246] J. CANOSA, "Rescripts," in *Exegetical Comm*., vol. 1, 558–618.

[247] W.L. DANIEL, "The Singular Administrative Act in Canon Law," in *Studia canonica*, 50 (2016), 243. Also Huels: "*licentiae*, which may be translated as 'permissions' or 'authorizations'" (J.M. HUELS, "Determining the Correct Canonical Rules for Ambiguous Administrative Acts," in *Studia canonica*, 37 [2003], 7).

[248] Ibid., 244.

[249] Ibid., 245.

is, to obtain the status of separated spouses in the society of the Church."[250] This *licentia* enables the canonical effectiveness of the civil decision; it does not permit something which was otherwise forbidden, since there is no universal law forbidding approach to the civil authorities.

3.6.2.2.2. Circumstances in Which the *licentia* Can Be Granted

As previously noted, the exclusion of situations "contrary to divine law" was added between 1971 and 1976, replacing a previous text which had excluded situations "contrary to the law of the Church." The concept of "contrary to divine law" has considerable pedigree in relation to civil decisions regarding marriage. The 1885 decree of the Holy Office seems to hinge upon it, and contemporary authors seemed to equate it more-or-less with a civil divorce which dissolved a canonically valid marriage; it was not merely a euphemism for any separation decision with which the Church might disagree.

Every provision of ecclesiastical law must always be interpreted with the condition "[…] unless doing so would be contrary to divine law"; these words in the paragraph, therefore, cannot be interpreted simply as a warning against doing something which could lead to an immoral result in the concrete circumstances. They must be interpreted not as an obligation upon the diocesan bishop to second-guess whether or not the civil court decision would be "fair" or even "just," but in continuance of the meaning of the same words as used previously in canonical tradition, that is, referring to the genre or kind of civil decision which fundamentally respects the ecclesiastical bond of marriage. However, not all civil decisions of divorce are contrary to the divine law of the indissolubility of marriage, since

[250] V. GARDINER, "The Separation of the Spouses: Old Law, New Questions," in *Proceedings of the Canon Law Society of America*, 81 (2019), 176.

some civil marriages do not enjoy the presumption of canonical validity: "unless contrary to divine law" is narrower and more precise than a blanket exclusion of civil divorce.

There are two conditions for considering the *licentia* to approach the civil forum: "where the ecclesiastical decision does not produce civil effects, or if it is foreseen that there will be a civil judgement not contrary to the divine law." As previously noted, these conditions[251] were joined by the conjunction *et* in the 1971 schema and in the 1976 *Praenotanda*, but were joined by the conjunction *vel* in the 1976 *Schema de processibus* and subsequent versions of the canon until 1983 and indeed to the present.

I believe that the initial change circa 1976 was a typographical error. Nevertheless, the text of the canon as promulgated in 1983 has not been amended or corrected in any way; it is not among the "distressing number of editing and printing errors"[252] in the 1983 promulgation subsequently corrected via *AAS*.[253] Indeed, by 1983 it was no longer an error, but simply the (draft) text considered and subsequently promulgated by the legislator; we must consider it to be the law, despite the happenstance of its origin. We must consider, then, the possibilities of the *licentia* being given when *only one* of the conditions is fulfilled.

If the eventual civil decision is not foreseen to be contrary to divine law, the diocesan bishop can give the *licentia* even if a solely ecclesiastical decision would have had civil effects. This remains subject to the clause of the first paragraph, "unless lawfully

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[251] In the 1971 schema, more precisely, the second condition referenced not "divine law" but "the law of the Church," before its modification by 1976.

[252] E.N. PETERS, Master Page on the Johanno-Pauline Code of 1983, https://www.canonlaw.info/masterpage1983.htm (October 3, 2025).

[253] See A. CASAROLI, Codex iuris canonici [September 22, 1983], in *AAS*, 75, no. 2 (1983), 321–324 (which does correct an error in canon 1692, §1) and ID., Codex iuris canonici [November 21, 1988], in *AAS*, 80 (1988), 1819.

provided otherwise in particular places"; if, by concordat or other law, the Church had expressly relinquished jurisdiction over separation cases then the general provisions of the second paragraph yield to the more specific law.

A curious illustration is found in the case of Brazil. In the concordat with Brazil, "the *exequatur* of ecclesiastical sentences in matrimonial matters, confirmed by the superior oversight body of the Holy See, shall be carried out according to the terms of Brazilian legislation relating to the exequatur of foreign sentences,"[254] without limitation to decisions of nullity or dissolution of marriage as in many other concordats[255]; the expression "matrimonial matters" presumably includes all matrimonial decisions, including those with the bond remaining, since no other provision of the concordat makes separate mention of separation of spouses with the bond remaining. Therefore in Brazil, despite the potential civil effectiveness of an ecclesiastical decision regarding the separation of spouses, this is on a case-by-case basis only; and therefore the diocesan bishop can grant the *licentia* to approach the civil forum, but only if the civil decision is not foreseen to be contrary to divine law.

On the other hand, if the ecclesiastical decision does not have civil effects, the diocesan bishop can grant the *licentia* to approach the civil forum even if the civil decision

[254] Accordo tra la Santa Sede e la Repubblica Federativa del Brasile sullo statuto giuridico della Chiesa Cattolica in Brasile (November 13 [2008]), in *AAS*, 102 (2010), 126, art. 15, §1ºº.

[255] In those countries where ecclesiastical decisions of nullity (and dissolution) of marriage are civilly effective but separation with the bond remaining is nowhere mentioned in particular legislation, separation cases would fall under the universal law for places where ecclesiastical separation decisions do not have civil effects.

is foreseen to be contrary to divine law.[256] This may sound bizarre, even morally impossible, but it remains an "ordinance of reason"[257] if "civil judgement not contrary to the divine law" is correctly understood. "Civil judgements contrary to divine law" is, in this context, a canonical term of art for those civil decisions which dissolve the civil bond of a marriage which continues to enjoy the presumption of canonical validity; more-or-less, but not entirely, it correlates to civil divorce. Therefore, the diocesan bishop can grant the *licentia* to approach the civil forum for *ecclesiastical effects*, even if it is foreseen that the civil decision itself might be one which dissolves the civil bond of marriage. Even if the *licentia* were granted to approach the civil authorities for a civil divorce, this could not dissolve the true bond of marriage, and the civil decision would be recognized within the Church effectively as merely a separation with the bond remaining, albeit one of indefinite or permanent duration.

In some jurisdictions there is no distinct civil separation with the bond remaining, only civil divorce. This problem greatly vexed nineteenth-century moralists, and many considered the unavailability of civil separation to be a circumstance which allowed for the possibility of civil divorce. The correct, permissive interpretation of *vel* in this context allows for the diocesan bishop to authorize spouses to approach civil authorities in such

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[256] "In these cases, it seems that permission could be obtained even for situations where it can be foreseen that the civil sentence will be contrary to divine law" (J. CARRERAS, "Cases concerning the Separation of Spouses," in *Exegetical Comm*, vol. 4/2, 1898). For a distinction between an act contrary to divine law and *effects* contrary to divine law, with actions leading to the latter being sometimes permissible, see GASPARRI, *Tractatus canonicus de matrimonio (1891)*, 395, no. 1238. For an opinion contrary to Carreras, concluding that the *vel* of c. 1692, §2 does not permit the *licentia* to be given if the civil judgment is foreseen to be contrary to divine law, see MARAGNOLI, G., "La separazione personale dei coniugi tra legge della Chiesa e legge dello Stato in Italia," in *Quaderni di diritto ecclesiale*, 13 (2000), 178-179.

[257] THOMAS AQUINAS, "Treatise on Law," in D.J. SULLIVAN (ed.), *The* Summa theologica *of Saint Thomas Aquinas Translated by Fathers of the English Dominican Province*, vol. 2, Chicago, IL, William Benton, 1923, 208, I-II Q90 art. 4 co.

circumstances. If the diocesan bishop could only authorize approach to civil authorities when the decision would be "not contrary to divine law," i.e. not dissolving the (civil) bond, this would have left separating spouses in such countries without any means of having a judgment recognized by both Church and state. Nevertheless, the law does not limit the diocesan bishop to authorize the use of the civil divorce courts *only* in those places where civil separation is not possible.

The diocesan bishop would no doubt wish to consider the legal availability and practical sufficiency of civil and/or ecclesiastical separation before granting *licentia* to approach the civil authorities in a manner which might foreseeably result in civil divorce. It would seem useful to remind the spouses of their enduring bond *coram Deo*. Indeed, the parties' willingness to respect the true bond of their marriage despite the wording of a civil judgment of "divorce" could well be among the "particular circumstances" which the bishop would have in mind when deciding whether or not to grant the *licentia*. Obreption or subreption in the seeking of the *licentia*—for example, by stating or implying a desire to respect the bond of the marriage while actually intending to attempt civil remarriage—could render the *licentia* invalid.[258] The *licentia* could be granted under explicit conditions, even for validity,[259] of not seeking civil divorce, or of not intending remarriage; if the condition were violated, the civil decision would not be recognized in the Church.

We take it as obvious that *vel* here is an inclusive "or"; it is not the exclusive "or" which would have been implied by the use of *aut ... aut*. Therefore, the *licentia* can be

[258] See c. 63, §§1–2.

[259] See c. 39.

given not only when only one of the conditions is present, but also when both conditions are fulfilled.

When the *licentia* has been granted according to the terms of this canon, the civil authorities would decide not only the usual "merely civil effects" but in fact the entire cause of separation, including matters such as the fundamental obligation of mutual support and conjugal living, usually reserved to the ecclesiastical authorities. Such a civil decision then would be recognized by the Church, and binding in canon law upon the spouses and upon others in the Church, in the same manner as a purely ecclesiastical decision of separation of spouses.

3.6.2.3. Preference for the Civil Courts regarding the Merely Civil Effects

> Can. 1692 §3. If the case is also concerned with the merely civil effects of marriage, the judge is to endeavour, without prejudice to the provision of §2, to have the case brought before the civil court from the very beginning.[260]

The second paragraph explains whether the separation case might be referred to the civil authorities; the third paragraph *encourages* the ecclesiastical authority to make this referral in certain circumstances. This endeavor is to be made by the judge, not the diocesan bishop. But if the judge neglects to do so, or is unsuccessful in his attempt to persuade the parties, the Church retains jurisdiction over the matter. Or at least in theory: the Church's lack of an enforcement mechanism for a decision regarding the civil effects may render the decision rather toothless if a party chooses not to adhere to the decision.

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[260] "Can. 1692 §3. Si causa versetur etiam circa effectus mere civiles matrimonii, satagat iudex ut, servato praescripto §2, causa inde ab initio ad forum civile deferatur."

However, the exact circumstance in which this referral is preferred is the subject of an unacknowledged inconsistency. The CLSGBI translation, used generally in this thesis, translates *etiam* as "also"; meaning, in context, that if the disputed matter includes not only purely ecclesiastical matters but civil effects as well, the matter should preferentially be referred to the civil authorities. However, the CLSA translation renders the first clause "If a case concerns *only* the merely civil effects of marriage […]."[261] This is a significant difference; the CLSA translation would need to be read to mean that cases which include even partially the ecclesiastical effects do not fall under the paragraph's preference for referral to the civil authority. *Etiam* means primarily "and also, and furthermore, also, likewise, besides,"[262] though other senses are not excluded. Approved translations in other languages share the CLSGBI preference for "also" rather than "only." The renderings of *etiam* in this paragraph in Italian (*anche*),[263] Spanish (*también*),[264] German (*auch*),[265]

[261] *Code of Canon Law: Latin-English Edition, New English Translation*, Washington, DC, Canon Law Society of America, 1999. Emphasis added. The first CLSA translation renders the paragraph in a somewhat different order, but like its successor has "only" rather than "also". See CANON LAW SOCIETY OF AMERICA, *Code of Canon Law: Latin-English Edition*, Washington, DC, Canon Law Society of America, 1983.

[262] C.T. LEWIS and C. SHORT, *A Latin Dictionary*, Oxford, Clarendon Press, 1879, s.v. *etiam*.

[263] See G. ACCORNERO (ed.), *Codice di diritto canonico : testo ufficiale e versione italiana, sotto il patrocinio della Pontificia Università Lateranense e della Pontificia Università Salesiana*, Rome, Unione Editori Cattolici Italiani, 1983.

[264] See INSTITUTO MARTÍN DE AZPILCUETA, *Código de derecho canónico: Edición bilingüe y anotada*, 6th ed., Pamplona, Universidad de Navarra, 2004.

[265] See W. AYMANS et al. (eds.), *Codex des kanonischen Rechtes: Lateinisch-deutsche Ausgabe*, Kevelaer, Verlag Butzon & Bercker, 1983.

French (*aussi*),[266] Portuguese (*também*),[267] and Polish (*także*)[268] all express "additionally," not "exclusively."

Even setting aside the evidence of other translations, understanding the canon as casting as wide as possible the preference for civil decisions regarding separation is consistent with the Church's historical preference. With the exception of occasions when the local ecclesiastical authorities have been quarrelling politically with the state for control of marriage, discordant civil and ecclesiastical statuses have been treated as something to be avoided wherever possible, and often this has been resolved by the Church quietly but clearly renouncing jurisdiction over the matter.

Although conjugal living and the basic obligation of mutual support are, in principle, ecclesiastical matters, the Code expresses a preference that even these matters be referred to the civil authority whenever any civil matter is also disputed in the same case. Taking the Code alongside the various concordats, it is clear that the Church's priority is for a singular and effective decision. For all the posturing and histrionic language used in various places to demonstrate and assert the Church's exclusive jurisdiction over marriages of the baptized, the preference expressed in the laws of the Church is that, wherever possible, the Church herself should avoid hearing cases of separation of spouses with the bond remaining, and leave these matters to the civil authorities.

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[266] See E. CAPARROS et al. (eds.), *Code de droit canonique bilingue et annoté*, 5th ed., Montreal, Wilson & Lafleur, 2024.

[267] See *Código de direito canónico: promulgado por S.S. o Papa João Paulo II : versão portuguesa*, 4th rev. ed., Lisbon, Braga, Conferência Episcopal Portuguesa, Editorial Apostolado da Oração, 2007.

[268] See E. SZTAFROWSKI, P. HEMPEREK, and K. DYNARSKI (eds.), *Codex iuris canonici: auctoritate Ioannis Pauli PP. II promulgatus=Kodeks prawa kanonicznego: przekład polski zatwierdzony przez Konferencję Episkopatu*, Poznań, Pallotinum, 1984.

3.6.3. Literature of the United States in the Era of the 1983 Code of Canon Law

The torrent of literature in the United States on the ecclesial status of separation and divorce slowed to a trickle from the time of the Second Vatican Council onwards, featuring largely works which would have been begun before the Council, or new editions of larger works where the commentary on separation and divorce appears to have been reprinted without additional consideration. With separation as for so many other areas of the law, the 1970s was a nadir for the literature, caused by antinomian attitudes and the uncertainty stemming from the ongoing revision of the 1917 Code of Canon Law. The promulgation of the 1983 Code of Canon Law provided the opportunity for commentary on the entire body of the new legislation, including subjects which—like separation of spouses—had been neglected for a time. Although there is a new tone toward separated and divorced Catholics, in general this is manifest in downplaying the importance or effect of "norms" against approaching the civil authorities for separation or divorce—the existence of continuing norms against civil divorce remains assumed.

The first CLSA commentary (of 1985) on the revised Code takes a very different tone from earlier commentary regarding separation and divorce. Legal aspects are downplayed, even in this canonical work. Separation, legal or de facto, is seen in it as an unfortunate event which the Church can help to soothe, not an offense to be punished: "There are no ecclesiastical penalties for failure to observe the canons on separation."[269] A scholion on civil divorce is annexed to the commentary on the substantive canons on

[269] T.P. DOYLE, "Marriage (cc. 1055-1165)," in *CLSA Comm1*, 822a.

separation, canons 1151–1155, *CIC/83*: "Although Catholics should obtain ecclesiastical permission to initiate civil divorce action, in fact a good number do not seek such a permission. […] They are neither excommunicated nor prohibited from receiving the sacraments or fully participating in the Church's life."[270] Doyle does not provide a source for his claim that "Catholics should obtain ecclesiastical permission to initiate civil divorce action." A likely explanation may be an uncritical assumption that the great mass of authors on this subject of the previous generation must have had their own good reasons for making the claim—though the explicit statement that there is no excommunication or punishment for violating the "norm" would have been unlikely to be made in the prior era of literature. The corresponding commentary in the same volume on the new procedural canons for separation is very scant, noting only that they are new, and that proposals to relegate the matter to particular law had been rejected.[271]

Woestman's commentary on the issue is rather brief, and seems to misunderstand the law; the discrepancy between "the local ordinary" of canon 1153, §1, and "the diocesan bishop" of canon 1692, §1, is duly noted, but its significance seems to be missed; it is not recognized that canon 1153 discusses departure (*discessus*) while canon 1692 provides for legal separation (*separatio*).[272] In this light, the statement (as a comment on c. 1692, §2) that "the diocesan bishop may permit a Catholic to approach a state court"[273] does not seem

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[270] Ibid.

[271] See WRENN, "Processes (Cc. 1400-1752)," 1016a.

[272] See W.H. WOESTMAN, *Special Marriage Cases: Non-Consummation, Pauline Privilege, Favor of the Faith, Separation of Spouses, Validation-Sanation, Presumed Death*, Ottawa, Faculty of Canon Law, Saint Paul University, 1990, 71. These passages remain the same in the latest edition (see W. KOWAL and W.H. WOESTMAN, *Special Marriage Cases and Procedures: Ratified and Non-Consummated Marriage, Pauline Privilege, Favor of the Faith, Separation of Spouses, Validation, Presumed Death*, 4th ed., Ottawa, Faculty of Canon Law, Saint Paul University, 2008, 141).

[273] WOESTMAN, *Special Marriage Cases (1st Ed.)*, 72.

to understand this as a grant of jurisdiction, but as a precautionary or disciplinary measure. The example used of a sentence contrary to divine law is one "requiring the non-Catholic education of children,"[274] thus echoing *CIC/17* c. 1060.

In the second CLSA commentary (of 2000), Beal wrote that "[a]lthough the Church does not consider a civil divorce to have any effect on the bond of marriage, it imposes no sanctions or disabilities on members of the faithful who receive a civil divorce,"[275] perhaps indicating that civil divorce is technically contrary to the Church's law, albeit without consequence for violation.

One article regarding the relationship between canonical and pastoral aspects of separation references "permission to approach a civil court"[276] but in the context of jurisdiction and civil effects; it seems ambiguous regarding an obligation to approach the civil authority if the civil decision is not intended to apply in the Church.

Another article from the twenty-first century regarding civil divorce in the United States context concludes that "according to the *CIC* [*CIC/83*] the spouses are obliged to obtain the permission of the diocesan bishop before obtaining a civil divorce"[277]—finding in *CIC/83* cc. 1692-1696 an obligation to receive permission to approach the civil

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[274] Ibid.

[275] J.P. BEAL, "Separation with the Bond Remaining (Cc. 1151–1155)," in *CLSA Comm2*, 1378a. The commentary on the procedural canons does not mention divorce. See P.J. JUGIS, "Cases of Separation of Spouses (cc. 1692-1696)," in ibid., 1790–1791.

[276] P.J. BROWN, "Legal Separation: A Pastoral Alternative," in *Studies in Church Law*, 4 (2008), 246.

[277] A.R. ST. LOUIS-SANCHEZ, "Separation of Spouses *propria auctoritate* and the Nature of Ecclesiastical Intervention," 530.

authorities for divorce, rather than (as I argue[278]) merely a description of how the civil decision could have juridic effects in the Church.

Still, at least one canonical author observed that "[i]n the chapter of the *Code of Canon Law* 'On the separation of spouses,' [...] [t]here is no article on divorce because divorce is a topic for moral theology."[279] Such a distinction was rarely acknowledged in US mid-twentieth century literature.

A special comment is necessary regarding English-language literature of Spanish origin regarding separation of spouses. The *Exegetical Comm*[280] and *CCLA*[281] are widely used by Anglophone canonists; the former, for example, being described as "a magnificent achievement."[282] Nevertheless, the reader must be aware that these works are largely translations of Spanish-language originals, indeed being largely the work of scholars in Spain in particular. The canon law in Spain regarding separation of the spouses with the bond remaining followed its own particular path in the mid-twentieth century, in some ways the opposite of that in Italy. For decades in Spain in the twentieth century there was no civil divorce nor civil separation; these matters were decided solely by the ecclesiastical authority and then enforced by the civil authority. This is reflected in the Spanish canonists' thorough understanding and detailed exposition (unlike their Anglophone colleagues) of

[278] See GARDINER, "The Separation of the Spouses," 174–177.

[279] C.J. HETTINGER, "The Difficult Marriage," in *Homiletic and Pastoral Review*, 99, no. 5 (1999), 23, fn. 33.

[280] See Á. MARZOA et al. (eds.), *Exegetical Commentary on the Code of Canon Law*, English language ed., Gratianus series, Montreal, Wilson & Lafleur, 2004.

[281] See E. CAPARROS and J.I. ARRIETA (eds.), *Code of Canon Law Annotated*, 4th ed., Collection Gratianus, Chambly, Wilson & Lafleur, 2022.

[282] E.N. PETERS, "Review: Exegetical Commentary on the Code of Canon Law," in *The Jurist*, 67 (2007), 541.

matters such as the distinction between de facto separation and legal separation,[283] and of the institute of "malicious abandonment,"[284] largely without benefit where the ecclesiastical decision has no civil effects. Therefore, statements regarding the "'constitutive' nature of the sentence of separation demonstrat[ing] the need to apply a remedy to an embattled situation in a way that legitimately establishes the rights and duties of the parties,"[285] are difficult to apply in situations where a sentence of separation is not effectively constitutive in establishing as a remedy the legal rights and duties of the parties, but is de facto declarative.

Canon law is, for the most part, not a fast-moving field; this is doubly true where the law has been largely ignored for decades. Regrettably, this has created the opportunity for an ongoing disparity between the law and what little literature there is regarding separation of spouses with the bond remaining. In particular, this seems to have been manifest in Anglosphere literature even under the *CIC/83*, written of a milieu which may have wished that the law were more permissive, while largely accepting at face value the claims of older literature which were more restrictive. Civil divorce has been, for the most part, acknowledged as prohibited *de iure* but not in practice; it had, furthermore, become a

[283] See J. HERVADA, "Separation While the Bond Remains," in CAPARROS and ARRIETA (eds.), *Code of Canon Law Annotated*, 893–897.

[284] See J. ESCRIVÁ IVARS, "Separation While the Bond Remains," in *Exegetical Comm*, vol. 3/2, 1585–1586.

[285] CARRERAS, "Cases concerning the Separation of Spouses," 1900.

prerequisite to exercising the right to petition for a declaration of nullity of marriage.[286] The legal foundation for the prior literature was not significantly examined.

3.6.4. The Catechism of the Catholic Church

The Catechism of the Catholic Church is not a legal text, but it is "a sure norm for teaching the faith."[287] Since we have already found it necessary to consider various secondary texts mixing moral theology with canon law regarding divorce, and since—as we have concluded—there is no legal norm of the universal Church addressing civil divorce, it is useful to consider how the Church has resolved (at least for now) the doctrinal questions raised by the growth of civil divorce.

Divorce is addressed in paragraphs 2382 to 2386, as a portion of the chapter "Offenses against the Dignity of Marriage." Such a title, of course, immediately suggests a negative, even hostile attitude to divorce; and this is certainly reflected in parts of the text. In the Catechism, "divorce" or *divortium* is used exclusively to mean an (attempted) breaking of the bond; although separation with the bond remaining is mentioned in these paragraphs, this is *in contrast* to "divorce"; it is no longer counted as a species of divorce.

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[286] "[I]n countries like the United States ecclesiastical tribunals have been instructed not to entertain an action for a determination of nullity unless and until there has been a civil divorce. This policy may give the impression that the Church somehow sanctions civil divorce. Nevertheless, it remains as a […] requirement in such jurisdictions. Unfortunately, this kind of policy may unintentionally undermine the Church's teaching on the indissolubility of marriage" (BROWN, "Legal Separation," 224).

[287] The meaning of "norm" as a reliable measure, not necessarily as a legal provision, is reflected by *regula* in the original Latin text. See JOHN PAUL II, Apostolic Constitution Promulgating the Catechism of the Catholic Church *Fidei depositum*, in *AAS*, 86 (1994), 117. English translations of this Apostolic Constitution and of the text of the *Catechism of the Catholic Church* are taken from *Catechism of the Catholic Church*, 2nd ed., Washington, DC, United States Catholic Conference, 1997. On the subject of divorce, there are no changes between the 1992 initial version, the 1994 first English-language edition, and the 1997 *editio typica* from which the English translations are taken. See *Catechism of the Catholic Church: Modifications from the* Editio typica, Washington, DC, United States Catholic Conference, 1998, 16.

Paragraphs 2384 and 2385 strongly condemn divorce as a legal institution, because of both its intrinsic falsehood and its effects. "Divorce is a grave offense against the natural law […]. Divorce does injury to the covenant of salvation."[288]

> Divorce is immoral also because it introduces disorder into the family and into society. This disorder brings grave harm to the deserted spouse, to children traumatized by the separation of their parents and often torn between them, and because of its contagious effect which makes it truly a plague on society.[289]

There is no question, then, that the doctrine of the Church remains vigorously opposed to divorce in general.

However, the tone of the Catechism is different when addressing the use of divorce in individual instances. After noting that separation with the bond remaining "can be legitimate in certain cases provided for by canon law,"[290] citing canons 1151–1155, the Catechism continues that "[i]f civil divorce remains the only possible way of ensuring certain legal rights, the care of the children, or the protection of inheritance, it can be tolerated and does not constitute a moral offense." This is not a declaration that divorce is not a moral matter, but that its use can be "tolerated" in individual circumstances; a term of art of moral theology, and indeed one used by the Apostolic See in responses regarding recourse to the civil authorities in the late nineteenth century.

The Catechism mentions canon law regarding the fact of separation (including, in context, departure from conjugal living); similarly, paragraph 1635 of the Catechism mentions the necessity of, and requirements to receive, permission or dispensation for mixed marriage and from the impediment of disparity of cult. The absence of any mention

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[288] *CCC*, no. 2384.

[289] *CCC*, no. 2385.

[290] *CCC*, no. 2383.

of necessity or benefit for ecclesiastical permission or any other procedure or form of approval before attempting civil divorce must be seen, in context, as another *adminiculum* that there is no such obligation or process in the universal law.

3.6.5. The Letter of the Pontifical Council for Legislative Texts of November 4, 2015

The only public statement of any dicastery of the Apostolic See since codification regarding separation, divorce and canon law is a letter of November 4, 2015, from Cardinal Francesco Coccopalmerio in his capacity as president of the Pontifical Council for Legislative Texts.[291] The letter is written to a bishop and responds to four other listed communications in 2014 and 2015; evidently, it was a question which had arisen repeatedly in that bishop's correspondence with the Pontifical Council.

The letter addresses two principal questions: first, "whether or not the local bishop's permission is required for a baptized Catholic to initiate a civil divorce." The response is framed in terms of canon 1692, §1; the ability of the ecclesiastical authorities to decide personal separation, "unless other provision is legitimately made in particular places:"

> Since distinct positions are possible, depending on each conference of bishops' particular legislation as well as any concordat with the civil government, the diocesan bishop's permission for a Catholic spouse to initiate civil divorce may or may not be a requirement in a given place. In practice, this means that where there is no particular legislation or concordat to direct otherwise, and where the ecclesiastical decision has no civil effects (cf.

[291] See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Letter regarding Bishop's Permission for Divorce, prot. no. 15181/2015, November 4, 2015, in *Roman Replies and CLSA Advisory Opinions 2021*, Washington, DC, CLSA, 2021, 23–24. Also published on the website of the (now) Dicastery for Legislative Texts: https://www.delegumtextibus.va/content/dam/testilegislativi/CHIARIMENTI%20NORMATIVI/Ch%20Normativi%20Risp%20Particolari/Chiar%20normativi%20CIC/On%20whether%20a%20bishop's%20permission%20is%20needed%20for%20a%20civil%20divorce%20(can.%201692%20CIC).pdf (October 11, 2025). Hereafter, the "PCLT Letter."

> c. 1692 §2 *CIC*), the local bishop's permission would not be an obligation—whether juridical or moral.[292]

The letter acknowledges that particular legislation could create an obligation to receive the diocesan bishop's permission, but concludes that in the absence of such particular legislation, there is neither a juridical nor moral obligation to receive such permission. This interpretation is consistent with understanding canon 1692 as the procedural norms for canonical separation of spouses, not regulating in general the spouses' interactions with the civil government; if the civil decision does not create canonical effects, and as long as it is not otherwise prohibited, then episcopal permission is not relevant.[293]

The second question addressed in the letter is "whether the decision by a Catholic spouse to initiate a civil divorce without a bishop's permission is contrary to divine law"; the reference to "divine law" is in the context of canon 1692, §2, where a diocesan bishop can refer the parties to the civil authorities if (as one of the circumstances) the civil sentence is not foreseen to be contrary to divine law. First, we note that the premise of the question makes little sense; if the decision can be made at all, even with the bishop's permission, it cannot be contrary to divine law; no ecclesiastical authority can make licit something which

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[292] Ibid. The line "distinct positions are possible" appears to be paraphrased from the *Exegetical Comm*: "[…] distinct positions are possible, according to each country's legislation relative to marriage and the family, as well as any concordat relationships between the nation and the Church" (CARRERAS, "Cases concerning the Separation of Spouses," 1898).

[293] According to the letter, there is no obligation to receive permission "where there is no particular legislation or concordat to direct otherwise, *and* where the ecclesiastical decision has no civil effects (cf. c. 1692 §2 *CIC*)" (emphasis added). At first glance it may appear that the letter's use of "and" and not "or" is contrary to the text of the law. However, the letter is answering a different question from the canon. The canon addresses when episcopal reference to the civil authorities for separation (or perhaps, by exception, divorce) can have the effect of ecclesiastical separation; but the letter addresses whether "in practice" there is an obligation to receive permission to divorce, independent of what effects it may or may not have in the Church. The letter seems to imply that an ecclesiastical decision not having civil effects would be one of the factors supporting the lack of obligation to receive episcopal permission.

is prohibited by divine law. Furthermore, it becomes tautological: if a bishop *could* legitimize something otherwise contrary to divine law, then once he had done so, the mention of "divine law" in canon 1692, §2, would no longer apply, and the question would be irrelevant. Sidestepping these issues, however, the letter quotes the Catechism of the Catholic Church, no. 2383, which names circumstances in which civil divorce "can be tolerated and does not constitute a moral offense." If it can be tolerated—even sometimes—and does not constitute a moral offense, then by definition it cannot be constitutively contrary to divine law.

The letter explains that the faithful "may request advice from their bishop for reasons of prudence, pastoral clarification, or avoidance of scandals" in individual circumstances, and regarding the matter in general "the faithful should feel free to address [questions or doubts] directly to their diocesan bishop or his judicial vicar." It is notable that advice and clarification is available, but it is not obligatory, even as a matter of consultation. This approach is consistent with the Catechism; divorce is a social evil but its use in individual cases is not universally condemned. The letter in this respect also echoes the 1906 response of the Holy Office, which mentioned the involvement of the diocesan bishop for the mitigation of scandal, but not to judge whether or not the divorce could be allowed.

Conclusion

In the mid-nineteenth century, US authors such as Francis Kenrick believed civil divorce and civil separation to be largely moral not canonical matters and furthermore, that civil divorce could be sought for very grave reasons, provided the parties respected the indissoluble marital bond. The question of permission or other intervention from the

ecclesiastical authorities was not even considered. Authors outside of the United States were certainly wary of civil divorce, and considered whether it could ever be licit, but did not invoke episcopal permission.

In 1882, however, the Fourth Provincial Council of Cincinnati enacted legislation severely restricting access to civil divorce and separation. The bishops of the same province were entrusted with drafting the canons of the Third Plenary Council of Baltimore of 1884, leading to national legislation which declared divorce to be gravely sinful (can. 124) and that ecclesiastical authorities must be consulted prior to seeking civil separation (canon 126). *Permission* for either action was not mentioned by the Plenary Council.

In the same year, a new divorce law was introduced in France. Despite it being substantially identical to the law already in effect in Belgium, it prompted a series of responses of the Apostolic See attempting to prevent French Catholics from utilizing such laws. In retrospect—and, in truth, in the texts of the responses themselves—these must be recognized as applicable to the political situation in France at that time, and not as universal statements of Catholic law or belief.

These two canonical events—one American, one French—combined in the United States to lead to the apparently unshakable belief that civil divorce was prohibited by the law of the Church, at least in the United States, and that permission of the diocesan bishop was required before it could be licitly sought. Authors such as Smith, who had previously held Kenrick's more permissive position, yielded to the rhetorical weight, if not precisely to the text, of the Plenary Council. In such an atmosphere, the 1906 response of the Holy Office—first coming to widespread attention in 1932—was ripe for misinterpretation; its

mention of an episcopal duty to mitigate scandal was seen as a confirmation of the obligation of the faithful to receive episcopal permission.

We have found not a single authoritative primary source establishing or stating an obligation to receive permission before approaching the civil authorities for separation or divorce; examples such as the late nineteenth century responses of the Holy Office and of the Sacred Penitentiary, and the 1906 response of the Holy Office, disappear as mirages the closer one examines them, whether for reason of scope or of content. Canon 126 of the Third Plenary Council of Baltimore made a requirement for *consultation* prior to seeking civil separation, but there was and is no national law for the United States obliging *permission* for civil separation, nor any interaction with the Church prior to seeking civil divorce.

Especially in the 1940s and 1950s, a surge of canonical and pastoral literature asserted that there was a canonical obligation to receive episcopal approval for civil divorce or civil separation. While this was true in a handful of dioceses (though not the Archdiocese of Chicago), especially those which had been part of the Province of Cincinnati at the 1882 Fourth Provincial Council, in general it was national norms or universal principles which were used to support this—often almost comically contrary to the texts quoted. A principal misunderstanding was the evidently false claim that the Third Plenary Council of Baltimore mentioned “permission.”

Widely divergent opinions and even misunderstandings are evident among those having input into the revision of the Code of Canon Law regarding a new procedural law for separation of spouses with the bond remaining. Kelleher believed that the issue was not a matter of law at all. Others held varied opinions regarding the proper relationship with

the civil authorities. Ultimately, *CIC/83* c. 1692 provides that the diocesan bishop can refer the issue of separation to the civil authorities—a result substantially similar to Hollweck's unadopted proposal for what became the *CIC/17* norms on the subject. Via what seems to be a typographical error made in 1976, the bishop can grant this authorization if the ecclesiastical decision will have no civil effects *or* if the civil decision is not foreseen to be "contrary to divine law."

US literature since 1983 largely continues to accept, albeit often with some reluctance, the received wisdom that some kind of permission is needed before approaching the civil authorities, especially for divorce. However, the Catechism of the Catholic Church presents a more nuanced conclusion: that certainly, divorce is an unwelcome social development, leading to great harm to society in general and often in individual families; but its use can be tolerated in individual circumstances. Ecclesiastical involvement is not mentioned in the Catechism, as one would think that it surely would be if there were an obligation of universal law. Similarly, a 2015 letter of the Pontifical Council for Legislative Texts explains what is already evident from the text and context of the law: there is no obligation in the universal law to receive permission for divorce; and that canon 1692 refers to the manner in which the civil decision can become effective as an ecclesiastical separation.

As a matter of universal law, the civil authorities do not have proper jurisdiction over marriages involving Catholic parties. However, diocesan bishops can provide for the civil decision to have ecclesiastical effects in individual cases, and indeed they are encouraged to do so if any civil effects are in question. This preference for civil jurisdiction over separation cases is indicated in numerous concordats, as well as by canon 1692, §3

(correctly translated). Taken together, canon 1692, §3 and the concordats must lead us to conclude that, although the Church has the innate right to judge separation cases of Catholics, in fact, she generally prefers not to do so, even including those obligations normally described as merely ecclesiastical, such as the obligation of conjugal living.

In the nineteenth century, before the publication of responses concerning the new divorce laws in France, the predominant opinion in the United States was that civil divorce was not prohibited and indeed was permitted without any particular formalities as long as the parties had sufficient reason for using it and did not intend to dissolve the real bond of their marriage. After a diversion in the twentieth century composed of vociferous misinterpretations of the content and canonical nature of key texts, perhaps we are now able to return to this consensus.

4. THE APPLICATION OF THE NORMS ON SEPARATION OF THE SPOUSES: THE CASE OF THE SEPARATION COURT OF THE ARCHDIOCESE OF CHICAGO

This chapter examines the Separation Court of the Archdiocese of Chicago.[1] By all indications, it was the largest, most organized, and longest-operating "separation court"[2] in the United States. In some sense, of course, this uniqueness makes it unrepresentative of other US dioceses. But at the same time, and for many of the same reasons, it was the most influential such institution, shaping discourse on the subject across the country. Even if few other dioceses approached the level of formality demonstrated by the Archdiocese of Chicago Separation Court, the Chicago Separation Court may have been the model for other dioceses. For example, the printed volume of the lectures hosted by the Archdiocese and through which the Separation Court was inaugurated was cited by other authors,[3] as were the Archdiocesan guidelines for lawyers.[4]

Because of its size and its extant records, the Separation Court of the Archdiocese of Chicago merits its own minor monograph as a chapter of this work, illustrating the *practice* of many of the recurrent canonical themes regarding separation and divorce in the Catholic Church in the United States in the twentieth century.

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[1] The institution was universally called a "court" not a "tribunal." The "Metropolitan Tribunal" dealt with all marriage cases, and had component "courts" including the "Separation Court." This terminology seems to have been based on idiosyncratic local usages, not e.g. a principled distinction between the meanings of "tribunal" and "court" as they relate to the ecclesiastical Latin *tribunal*.

[2] In harmony with the usage as found consistently in the documents contained in the archdiocesan archives, "Separation Court" is capitalized when it refers to that institution of the Archdiocese of Chicago. A lower case "separation court" refers to the concept in general, independent of any specific diocese, and in which these courts sometimes operated under different names.

[3] See e.g. SCHLITZER, "The Catholic Lawyer and Divorce Cases," 41, fn. 7; CLORAN, *Previews and Practical Cases on Marriage*, 240, fn. 59; DAILEY, "The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case," 255, fn. 2.

[4] "The excellent canonists of the Archdiocese of Chicago have developed a good, clear set of directives for Catholic lawyers which has become the practice in that Archdiocese" (ibid., 272).

> To attempt to fit the pieces of any sort of litigation into a coherent picture must be a difficult task. Litigation is diverse and confused, as the aims and motives of the parties to it are diverse and confused. But any searcher in the records of the Church courts cannot avoid an attempt to connect his findings with two problems. One is the relation of canonical theory to actual practice. In particular, this raises the question of the relevance of the writing of the canonists. The other is a substantive evaluation of the Church's jurisdiction over marriage and divorce.[5]

Helmholz's summary of the difficulties and opportunities of examining records of ecclesiastical marriage litigation from medieval England is no less applicable to those from twentieth century Chicago. Our consideration of the records of the Separation Court of the Archdiocese of Chicago will attempt to address the same two questions.

First, how was the law observed? Did the Separation Court follow the law, or was it working according to some other, perhaps unwritten, principles? Regarding this question we will need to note not only what the law was, but also what it was widely—if incorrectly—claimed to be in the United States in that era, as discussed in the first three chapters of this work.

Second (and prescinding from the question of whether the Separation Court observed the law or what it believed to be the law), how well did the Separation Court function? Did it meet the tasks it had been given or had set for itself?

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[5] R. HELMHOLZ, *Marriage Litigation in Medieval England*, London, Cambridge Studies in English Legal History, Cambridge University Press, 1974, 187.

4.1. Prologue: Mrs. O'Malley Relinquishes Herself to Her Conscience[6]

In 1969, the Separation Court of the Archdiocese of Chicago wrote to a Mrs. O'Malley:[7]

> It has been brought to the attention of this court by Mr. O'Malley that you intend to file for a civil divorce. If this be true, we hope that you will not initiate such civil proceedings, since no permission has been given and such action would render you unworthy of the sacraments. We have scheduled an appointment for you to discuss this matter.[8]

Mrs. O'Malley replied:

> You are correct in that I have initiated an action to obtain a civil divorce. […] I understand that in the eyes of the Church I will still be married, and this is just fine with me, as I have no intention of remarrying. This is the only way I am going to get this man to leave me alone, once and for all. I do not consider myself unworthy to receive the sacraments. I am not remarrying, just getting a civil divorce, which the Church doesn't recognize anyway, so I don't understand what all the fuss is about. Since the Church does not recognize divorce, why do I need the permission to do something they don't recognize? My conscience tells me that I am not doing wrong and I don't feel God is going to condemn me to Hell. […] Now that I'm doing this, you are telling me I am unworthy of the sacraments. I'm sorry but I just don't feel that I am. In any event, I see no purpose in attending a meeting as he scheduled with a Father Zawistanowicz [the priest the Separation Court scheduled to meet with her]. About four or five years ago, I begged my husband to see a marriage counselor with me, even Father Monaghan at St. Gall's called him twice, to try to get him in, but no avail. Now this is the way I feel, that there would be no purpose in such a meeting.[9]

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[6] This subtitle is in reference and contrast to the title of the introduction, "Elizabeth Schmidin is relinquished to her conscience," in N. MUENKS, The Court of Conscience: Transferring Cases from the Contentious Forum to the Forum of Conscience in Medieval Canonical Jurisprudence and Praxis, JCD thesis, Washington, DC, The Catholic University of America, 2021, 1–9.

[7] All references in this work to the names of parties in cases from the Archdiocese of Chicago Separation Court are pseudonyms. Names of court officers and other archdiocesan officials have not been modified.

[8] ACA SC S-6221-A, letter of September 3, 1969. All sources marked ACA are held by the Archives and Records Center of the Archdiocese of Chicago. SC indicates the case records of the Separation Court. Letter S followed by a number is the case number. All cases are numbered and filed in series. Protocol numbers beginning with the letter S followed by a sequential number are observed from the beginning of the Separation Court until its end in the 1980s. Sometimes a dash separates the letter S from the protocol number, and sometimes it does not. Sometimes the number is followed by a letter A; again, sometimes separated with a dash, sometimes not. The format seems to have varied over time, but the significance of these changes, if any, is unclear. Protocol numbers quoted in this study are exactly as found in the original documents and have not been modified, lest an attempt at consistency accidentally remove meaningful information.

[9] ACA SC S-6221-A, letter received September 11, 1969.

Mrs. O'Malley appears to be a woman who values being a member of the Catholic Church; elsewhere in the letter she mentions her years of contributions to fundraising campaigns, and she notes that she did previously seek the assistance of her pastor in addressing her marital difficulties. Mrs. O'Malley now asks a very reasonable question, an answer to which was by no means suggested in the letter first sent to her: if the Church does not recognize a civil divorce as affecting the bond of marriage, and if Mrs. O'Malley herself acknowledges this fact, what is the purpose, either pastorally or legally, of "permission" to do something inefficacious? Furthermore, what could this "permission"—and given by what authority—add to what she describes as her conscience telling her that she was not doing wrong, and what would be the consequences of her failure to obtain permission? These questions get to the heart of the creation and mutation of the Separation Court of the Archdiocese of Chicago across its four and a half decades of existence, and its relevance to our study as a whole.

Mrs. O'Malley was offered no written answer to her questions, but was sent a form letter in reply:

> We must inform you that because of your disobedience to the ecclesiastical authority in this office you have thereby rendered yourself unworthy to receive the sacraments. Removal of this censure will depend upon your appearing in this office and abiding by the decision rendered.[10]

After this the documentary record is evidently incomplete, for the next extant evidence is a note in which Father Zawistanowicz recounts his telephone call with Mr. O'Malley on October 28 and which implies that the prior decision had been reversed:

> [I] told [Mr. O'Malley that his] wife had permission to continue with divorce action. [He said,] "Why didn't you call him: you said you would. How can you make decision in half an hour time concerning two people you know nothing about." He is

[10] ACA SC S-6221-A, letter of October 5, 1969.

> leaving [the] Church, "how can he go to confession when a priest like you is making decisions?" He may go to Rome and appeal his case. [I] told him he had every right to appeal here. However, I asked him to call [the head of the Separation Court] first. "Why should I?" As a matter of courtesy, I stated he should ask you for permission to appeal. Needless to state I also told him it would have to be another day of the week and both of [the spouses] would have to appear. We cannot force his wife to come in again. He went on and on.[11]

Evidently the prior letter to Mrs. O'Malley had had some effect, since it appears that she presented herself to the court—perhaps together with her husband—and made her case for divorce. This permission having been granted—as the husband alleges, "in half an hour time concerning two people you know nothing about"—the husband now wishes to "appeal" against the decision, but he is discouraged (effectively, prevented) from doing so by bureaucratic hurdles he will be unable to clear. The husband called again the next day, wanting "the name of priest who had originally granted separation permission. He is going to write to somebody about this and he does not know who [to write to] right now." It is not recorded whether the name of a person to receive a letter of complaint was given to him; but from the tone of previous notes it does not appear that the Court was of a mind to entertain or facilitate his grievance. The only further record is that the nullity of the marriage was declared by the Metropolitan Tribunal following the wife's petition in 1977.[12]

This case demonstrates many of the features present throughout the existence of the Separation Court: assertive pseudo-legal letters to parties, procedures which could be described as "summary justice" at best, questions and challenges from the parties going unanswered or being met by obfuscation. Yet this case also marks something of a transition: the wife's insistence on "conscience" would have been unlikely to occur in the 1950s, prior

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[11] ACA SC S-6221-A, handwritten note recording telephone call, October 28, 1969. The reported speech of the husband is indicated by quotation marks.

[12] See T. 46/77, card filed in ACA SC S-6221-A.

to the Second Vatican Council; while the idea of summoning parties and prohibiting them from receiving the sacraments for ignoring the summons or disobeying instructions would have seemed very out of place by the 1970s.

4.2. Brief Context

The Separation Court did not exist in a vacuum, but was influenced by trends in society and by its place within the Archdiocese of Chicago.

4.2.1. In Relation to Marriage in the United States of America

The period of existence of the Separation Court coincided with great changes in the practice of marriage in the United States. The change in the *number* of marriages, especially the great explosion in the late 1940s in the wake of the Great Depression and the Second World War, is widely known. Perhaps less well known are the changes in how and why people married, how they viewed marriage and *their* marriages, why they remained together, and why many of them did not remain together. "The long decade of the 1950s, stretching from 1947 to the early 1960s in the United States […] was a unique moment in the history of marriage. Never before had so many people shared the experience of courting their own mates, getting married at will, and setting up their own households. Never had married couples been so independent of extended family ties and community groups."[13] "[T]hrough the 1950s, wives and husbands tended to derive satisfaction from their participation in a marriage-based nuclear family. That is to say, they based their gratification on playing marital roles well: being good providers, good homemakers, and

[13] S. COONTZ, *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage*, New York, Viking, 2005, 229.

responsible parents."[14] However, from the 1960s onwards, many married people's self-identity was less centered on their marriage and on performing their respective role in it, and changed to a more individualistic assessment: "When people evaluated how satisfied they were with their marriages, they began to think more in terms of the development of their own sense of self and the expression of their feelings, as opposed to the satisfaction they gained through building a family and playing the roles of spouse and parent."[15] "But the more love and marriage are seen as sources of rich psychic satisfactions […], the less firmly they are anchored in an objective pattern of roles and social institutions";[16] marriage became a way of fulfilling one's own needs, and perhaps those of the spouse, but increasingly without recognition of any obligation toward society, whether civil or ecclesiastical.

This shift among American individuals and society at large also affected, and no doubt was affected by, a similar shift in Christianity in the United States. Contemporary American religion embraced the self-fulfillment narrative of marriage, mirroring—with a spiritual sheen—the decline of the institutionalized marriage.[17] "As the divorce rate rose in the 1960s and 1970s, […] divorced congregants turned to their churches for solace, support, and assurances that they had not done anything morally wrong. In response, most religious groups—even conservative Protestant and Catholic churches—modified the way

[14] A.J. CHERLIN, "The Deinstitutionalization of American Marriage," in *Journal of Marriage and Family*, 66 (2004), 851.

[15] Ibid., 852.

[16] R.N. BELLAH et al., *Habits of the Heart: Individualism and Commitment in American Life*, updated ed., Berkeley, CA, University of California Press, 1996, 85.

[17] See A.J. CHERLIN, *The Marriage-Go-Round: The State of Marriage and the Family in America Today*, New York, Alfred A. Knopf, 2009, 105–108.

they responded to divorce."[18] By the 1970s, the Separation Court of the Archdiocese of Chicago was supplying parties with the "assurance that they had not done anything wrong" but often doing little else. The institutional vision of marriage—an objective standard against which to judge the spouses' obligations, and providing some basis to tell the parties (if necessary) that they had "done something wrong"—was gone.

4.2.2. In the Archdiocese of Chicago

The Archdiocese of Chicago was, at the time of the foundation of its Separation Court, the diocese in the United States with the largest self-reported Catholic population.[19] Around 1,650,000 of the 4,480,000 territorial population is reported as Catholic in 1944.[20] For the same year, 16,445 marriages were reported, roughly one per hundred of Catholic population, consistent with national US data for 1944 irrespective of religion.[21] Of the Catholic marriages in the Archdiocese, 12,642 were between two Catholics and 3,803 were "mixed,"[22] indicating a high degree of endogamy within the Catholic community.

Catholic communities were largely urban, composed of a predominant nationality of origin, and focused on the parochial church and its associated institutions.[23] By the 1920s, "the golden age of the Catholic parish,"[24] the levels of active involvement in the

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[18] Ibid., 108.

[19] See *The Official Catholic Directory for the Year of Our Lord 1944*, complete ed., New York, P.J. Kenedy, 1944, 71.

[20] See ibid., 71, 45.

[21] See S.C. CURTIN and P.D. SUTTON, Marriage Rates in the United States, 1900–2018, National Center for Health Statistics, 4, https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.pdf (February 10, 2025).

[22] Mixed: presumably including marriages of a Catholic to a non-baptized person, not only the mixed marriages as defined in law as those between a Catholic and a baptized non-Catholic. See *CIC/17* cc. 1060, 1061; cf. *CIC/17* c. 1071.

[23] See J.P. DOLAN, *The American Catholic Experience: A History from Colonial Times to the Present*, Notre Dame, IN, University of Notre Dame Press, 1992, 197–199.

[24] Ibid., 206.

parish varied, but for a substantial number of Catholics "life did center around the parish church."[25] And within those parishes, the priest was "cult leader, confessor, teacher, counselor, social director, administrator, recreation director for young and old, and a social worker"[26] or even—perhaps with some hyperbole—"ruled as lord and master of the parish."[27]

The social power of the Church embodied in the pastor of each community would have been highest in those many parishes of the Archdiocese of Chicago which were, *de iure* or *de facto*, ethnic or personal parishes, serving the faithful of a particular language or ethnicity and not yet fully integrated into mainstream US society. Many Catholics, especially urban Catholics as in Chicago, lived in distinct communities centered on ethnic parishes, living lives largely oriented on distinctly Catholic institutions, including "the Catholic school system (from elementary school to college), a distinct Catholic worldview based on […] a mythical view of the Catholic Middle Ages, separate Catholic mass media, and myriad Catholic voluntary associations (religious, professional, and recreational)."[28] The Catholic Church in the United States had institutions which operated in parallel to those of American society as a whole; and indeed, in the Separation Court of the Archdiocese of Chicago, it created its own rival or counterpart to the expanding activity of the Cook County domestic relations court.

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[25] Ibid., 207.

[26] P.J. MURNION, *The Catholic Priest and the Changing Structure of Pastoral Ministry, New York 1920-1970*, New York, Arno Press, 1978, 127.

[27] DOLAN, *The American Catholic Experience*, 192.

[28] J. CASANOVA, *Public Religions in the Modern World*, Chicago, IL, University of Chicago Press, 1994, 174. If Casanova intended anything pejorative about a "mythical" perspective on medieval Catholicism, I use the word only in the sense of "a narrative carrying meaning."

Even an institution as mighty as the Archdiocese of Chicago, however, was not immune from the effects of broader changes affecting American society. "The safe cultural haven lasted until the mid-1950s […] [when] the carefully built Catholic subculture was undermined by […] powerful structural forces. World War II, the G.I. Bill, and the general economic boom had set American Catholics on a new journey of emigration and geographical, educational, and occupational mobility, away from the working-class, urban, ethnic neighborhoods into more highly educated, higher-income, and middleclass all-American suburbs."[29] Catholics and non-Catholics alike moved from densely-knit, integrated urban ethnic communities to more automobile-centered suburban communities. For many Catholics this led to a shift in focus away from the parish, or the Catholic Church, being the center of their community. Individuals had more autonomy in their religious and social affiliations, mitigating the consequences of social disapproval due to violation of communal norms.

4.3. Methodology of Research

Documentary evidence regarding the Separation Court was obtained from two principal collections in the Archdiocese of Chicago archives. First, the extant records of the Archdiocese's administrative and executive offices, the records of the Archbishop's and Chancellor's offices regarding the Separation Court, as well as the institutional records of the Separation Court itself. Second, records of individual cases heard by the Separation Court.[30]

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[29] Ibid. See also DOLAN, *The American Catholic Experience*, 364–365.

[30] Over thirty archival boxes were marked as containing Separation Court cases; however, many of these did not contain anything that would be described as separation cases under the terms of the present study, but marriage nullity and dissolution cases prior to the 1920s.

Most canonical analysis begins from the known text of the law and from that data develops its interpretation and application. This method will be used at times in the present chapter, especially in regard to some documents from the Separation Court detailing its operating principles. At times, however, the opposite methodology will be necessary: the documents of individual cases in which the "law" was applied, and more informal notes regarding the Separation Court itself where the "law" was interpreted, must be examined to induce the normative principles by which the institution operated. Only then can the normative operating principles be compared to law by a more conventional method of legal analysis.

Most literature from canonists regarding separation of spouses in the period under study has relied on legislative texts and the published replies of the Apostolic See,[31] a conventional canonical approach to legal interpretation. In contrast, more recent scholarship from historians regarding medieval canonical marriage law has relied extensively on records from individual cases, which has allowed new insights into the

[31] See e.g. R. LE PICARD, *La communauté de la vie conjugale, obligation des époux: étude canonique*, Paris, Libraire du Recueil Sirey, 1930; J.W. GOLDSMITH, *The Competence of Church and State Over Marriage – Disputed Points*, Canon Law Studies, no. 197, Washington, DC, The Catholic University of America Press, 1944; E.A. FORBES, *The Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128–1132*, Series canonica, no. 15, Ottawa, The University of Ottawa Press, 1948; V.J. HINES, *De coniugum separatione ac de civili divortio in iure canonico et in iure civili Statuum Foederatorum Americae Septentrionalis*, Pontificium Institutum Utriusque iuris, Theses ad lauream, no. 62, Rome, Catholic Book Agency, 1949; T.J. GUMBLETON, Separation and Divorce: A Comparative Study of the Canon Law of the Catholic Church and the Civil Law of the State of Michigan, Looking toward a Solution to the Problem of Family Break-Up, Rome, Pontificia Universitas Lateranensis, Institutum Utriusque iuris, 1964; J. KAMAS, *The Separation of the Spouses with the Bond Remaining: Historical and Canonical Study with Pastoral Applications*, Tesi Gregoriana, Serie diritto canonico, no. 20, Rome, Pontificia Università Gregoriana, 1997 (Kamas mentions in an appendix in general terms the unique situation in the Slovak ecclesiastical circumscriptions, but this reflection does not seem to be connected to his wider analysis of the law and of the literature); D.M. MARRERO SARMIENTO, "Lo que Dios unió no lo separe el hombre." Estudio sobre el deber de la vida en común y las causas legítimas de la separación de los cónyuges, JCD thesis, Rome, Pontificia Università della Santa Croce, 2016. Even analysis of local jurisprudence of malicious abandonment as a cause of separation of spouses has perhaps taken for granted its unique legal context, making it difficult to understand or apply outside of this context (e.g. A. FERNÁNDEZ-CORONADO GONZÁLEZ, *El abandono malicioso: estudio jurisprudencial*, Madrid, Editorial Montecorvo, 1985).

practice, development, and interpretation of the law which would not have been possible from the text of the law alone.[32] This chapter—and to a certain extent, this thesis as a whole—is a modest attempt to introduce some of the same methods and questions regarding more recent marriage litigation in the Church.

One great difficulty for the present study is the lack of any organized register, list, or database of cases of the Chicago Separation Court.[33] It is not possible to reconstruct a complete record of cases from the documentary records of individual cases, which are incomplete. Nevertheless, documents remaining from a minority of cases are sufficient to indicate certain notable features of the Separation Court's operation, even if certain conclusions remain somewhat tentative inasmuch as they are based on fragmentary evidence.

A case numbering system beginning at 1 is consistent with the foundation or refoundation of the Separation Court in 1940 or 1941. Protocol numbers advance rapidly until roughly the late 1950s. Until this time period the overwhelming majority of numbers in the sequence do not have a corresponding envelope in the Separation Court archive. One possible explanation for this is that the series was shared with Catholic Family Consultation

[32] See e.g. HELMHOLZ, *Marriage Litigation in Medieval England*; J.T. NOONAN, *Power to Dissolve*; C. DONAHUE, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts*, Cambridge, Cambridge University Press, 2007; W.P. MÜLLER, *Marriage Litigation in the Western Church, 1215-1517*, Cambridge, Cambridge University Press, 2021; MUENKS, *The Court of Conscience*; F. PEDERSEN, *Marriage Disputes in Medieval England*, London, Hambledon Press, 2000, 153–175; L. SCHMUGGE, *Marriage on Trial: Late Medieval German Couples at the Papal Court*, A.A. LARSON (trans.), Studies in Medieval and Early Modern Canon Law, Washington, DC, The Catholic University of America Press, 2012; M. VLEESCHOUWERS-VAN MELKEBEEK, "Marital Breakdown before the Consistory Courts of Brussels, Cambrai and Tournai: Judicial Separation *a mensa et thoro*," in *Tijdschrift voor Rechtsgeschiedenis/Legal History Review*, 72 (2004), 81–90; G. MARCHETTO, *Il divorzio imperfetto: i giuristi medievali e la separazione dei coniugi*, Annali dell'Istituto Storico Italo-Germanico, Bologna, Il Mulino, 2008.

[33] With the exception of the first three months of 1972, as discussed *infra*.

Service (CFCS), and the Separation Court records only contain those cases which were in fact examined by the Separation Court proper. There is no other evident explanation for why so many numbers would simply be absent. After the late 1950s, protocol numbers advance more slowly and there are marked envelopes, even if empty, for almost all of the numbers in the series.

Contents of the case envelopes varied over time. Of those case envelopes not entirely empty, the great majority contain only a form letter of citation. Even for cases for which records beyond citation survive, the contents of the envelopes varied over time. For example, from the mid-1960s onwards, the examination of the facts of each case appears to have been conducted via an interview with a CFCS counselor, and it is evident from notes and letters that the Separation Court's decision was made largely on the basis of a written report from CFCS. However, the report of CFCS was not kept in the Separation Court case envelope, and therefore even for the cases where a decision was made, there is usually no substantive evidence remaining regarding the marriage.

The greatest number of envelopes examined from any point in time contained only a citation letter, and within the parameters of the present study there appeared no possibility of investigating such cases any further. Only files with more written evidence could be examined in greater detail. Naturally this constitutes something of a selection bias in the records examined: since the present study is based on a detailed examination of cases only made possible by the retention of extensive documentation, the great majority of cases for which little information survived are inevitably left largely unexamined. The operation of the Court is revealed most extensively in those case files documenting a complete process; but cases which received that complete process, or retained the documents of it, may not

have been representative of the "average" case. As one more obvious example, situations involving respondents who did not reply to the Court at all—whether out of never receiving the citation, fear, ignorance, shame, simply not caring, or some other reason—are grossly underrepresented in the Court records and, therefore, in this study. Although this study is a canonical examination of the Separation Court itself, and not a sociological study of divorcing Catholics in Chicago, this remains a major lacuna. Furthermore, the very manner by which a few cases gathered more extensive documentary evidence may have made them unrepresentative of other cases. For example, those few cases in which an "appeal" was considered with detailed legal arguments from an appellant, while constituting a small minority of cases, *could* indicate the legal approach followed by the Court in a wider swathe of cases. However, cases which were eventually "appealed" (or at least disputed) were, for the most part, those which had motivated, knowledgeable and acrimonious parties *throughout the process*, which might have shaped the approach followed by court personnel from the beginning. There seems no way to resolve this problem absolutely.

4.4. Chronological Conspectus of the Separation Court

Before beginning a thematic examination of specific issues in the work of the Separation Court, it is useful to give a chronological overview of the Court over time.

4.4.1. Foundation

The Metropolitan Tribunal was reorganized in 1937, in response to the promulgation of the instruction *Provida Mater*[34] the prior year.[35] The increase in marriage nullity cases precipitated thereby was the cause of a rather tart letter in 1939 to Cardinal George William Mundelein, Archbishop of Chicago, from Cardinal Domenico Jorio, Prefect of the Sacred Congregation for Discipline of the Sacraments.[36] Cardinal Jorio objected regarding a number of specific points, all being rooted in the complaint that "nowhere else in the United States are there so many cases in the ecclesiastical courts. The very solidity of the Catholic marital bond seems to require that marriage cases, particularly formal ones, be rare […] if the indissolubility of marriage is to be safeguarded not only in theory but also in practice."[37]

Beginning with the instructive incipit *Maxime stupebam*, Cardinal Mundelein's response in kind is a blistering rejection of Cardinal Jorio's thinly veiled assertion that the former's tribunal was declaring too many marriages invalid. He asserted,

> […] the work of the Chicago Tribunal is regarded, without doubt, as the best in the United States of America. […] Over ten years ago I started sending zealous young priests to Rome to study canon law, so that they could overcome the difficulties peculiar to this country

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[34] See SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction to Be Observed by Diocesan Tribunals in Handling Cases of Nullity of Marriage *Provida Mater*, in *AAS*, 28 (1936), 313–361.

[35] See "Metropolitan Tribunal," in Caritas Christi urget nos*: A History of the Offices, Agencies, and Institutions of the Archdiocese of Chicago*, vol. 1, Archdiocese of Chicago, 1981, 125.

[36] See D. JORIO [Prefect of the Sacred Congregation for the Discipline of the Sacraments], Letter to Cardinal Mundelein, ACA ADMNA135010, 1939, prot. no. 303/39. For a contemporaneous expression of similar general disquiet from the Congregation concerning scandal given by American ecclesiastical tribunals handling cases of nullity of marriage, see A. CICOGNANI, Letter of Apostolic Delegate on Handling of Marriage Cases in the United States, September 23, 1938, in *CLD*, 5th ed., vol. 2, 531–533.

[37] English translations of this remarkable pair of letters are taken from R. GOEDERT, Memorandum, "Cardinal Mundelein's Defense of the Archdiocesan Tribunal," ACA ADMNA135010, 2007.

> and establish a tribunal equipped with such talent, knowledge and skill that its equal, much less its superior, could be found nowhere else on earth.[38]

Throughout the letter Cardinal Mundelein makes clear his pride in the work of the tribunal staff he has developed, and defends himself and the Archdiocese against Cardinal Jorio's criticisms, including the complaint regarding "the great number of formal trials (173) concluded or pending there."[39] Cardinal Mundelein argued that this number, while admittedly larger than that of any other diocese in the United States, must be considered in the context of "the four thousand marriage problems handled in 1938."[40]

It is not clear whence this number of four thousand arises. Some of the discrepancy is to be found in the fact that there was a fairly extensive "preliminary phase" conducted by the tribunal before a petitioner was able to initiate a formal case, involving citation of witnesses regarding the Augustinian *bona* before a "full Tribunal [would be] constituted"[41] to give a judgment on whether or not a *libellus* could even be prepared. Yet the great bulk of this number seems to be, as Mundelein wrote, *problematum matrimonialium*, not limited to attempted ecclesiastical dissolution or nullity of marriage. Mundelein died later in 1939,[42] but his zeal for an institutional response to matrimonial problems continued under his successor Cardinal Stritch; indeed, it seems likely that many of these projects formally unveiled under Stritch had begun to take shape under Mundelein.

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[38] G. MUNDELEIN, Letter to Cardinal Jorio *Maxime stupebam*, ACA ADMNA135010, 1939, 1-2.

[39] JORIO, Letter to Cardinal Mundelein.

[40] MUNDELEIN, Letter to Cardinal Jorio *Maxime stupebam*, 15.

[41] Ibid., 17–18.

[42] See H.C. KOENIG, "Mundelein, George William," in *New Catholic Encyclopedia*, vol. 10, 59–60.

One such project, which came to work inseparably with the Separation Court and in some senses mirrored its trajectory of focus, was the Catholic Family Consultation Service:

> The Catholic Family Consultation Service (CFCS) traces its beginnings to 1941 when Father James Curry, the executive director of the Archdiocesan Council of Catholic Women (ACCW) hired one social worker, Clair Pelletier, to help with children and family problems in the municipal courts. In 1944 […] other workers were added. The work was divided mainly between court appearances and intervention and home visitations, as well as work in the office. These workers would seek to use the benefits of the courts for the protection of the families, which usually required great patience in awaiting hearings and encountering the many delays in hearings.
>
> Not until 1955 […] did Cardinal Stritch approve the name 'The Catholic Family Consultation Service.' […]
>
> During the past forty years the CFCS has undergone extensive changes, from work in the courts in the beginning to extensive psychotherapy with over 900 new couples and families a year. […] It is […] a statement of the Church's belief in the importance of marriage and family life, and the strengthening of relationships so that couples and children can enjoy healthy and responsive relationships.[43]

Many children of divorced parents in Chicago lived in poverty because "the inadequacy of the financial protection they receive is increased by the fact that many support orders are in arrears because the mother has no funds with which to engage an attorney,"[44] and the CFCS assisted the mothers—for it was almost always the mothers—to receive the legal advice necessary to pursue legal recourse against the husbands and fathers for alimony, maintenance, and child support. The CFCS began, then, with a particular focus on protecting legal rights in the civil family courts, especially of women and their children, but by the 1980s had transitioned to providing psychological assistance to strengthen relationships within families.

The Separation Court similarly began in the early 1940s:

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[43] "Catholic Family Consultation Service," in Caritas Christi urget nos, 29–31.

[44] LAW REVIEW EDITORS, "Recent Cases: Unconstitutionality of Illinois Divorce Act," in *The University of Chicago Law Review*, 15 (1948), 770.

> By 1940 the number of divorces and of separations had increased sharply. The spiritual life of Catholics was inevitably affected. The archdiocese had to devise some plan or policy to deal with the new problems. Community of conjugal life is, on the one hand, an obligation of sacramental marriage. Yet, on the other hand, the Church allows separation of spouses for specific and serious reasons. Understanding his responsibility as shepherd of the Chicago archdiocese, Archbishop Stritch organized a new department of the Matrimonial Tribunal with specific rules and guidelines. Msgr. Edward Burke, then the tribunal's Officialis, was given additional priests to aid him in the hearing of cases and in determining whether civil divorces or separations could be allowed to Catholics. Accordingly in 1943, Archbishop Stritch named twelve priests to serve on the new Separation Court.[45]

The Separation Court was established with considerable effort and fanfare. Between March and May of 1944, a series of four "lectures [were] delivered under the auspices of the Catholic Lawyers Guild in the rooms of the Chicago Bar Association" by the chancellor, judicial vicar, vicar general, and archbishop on the theme "canon law on civil action in marriage problems," published the same year in book form.[46] The vicar general, Monsignor George Casey acknowledged that "it is only in very recent years that our Chancery Office has been able to staff its office sufficiently to take care of these cases. Practically all the priests in the Chancery Office, some six or seven, are engaged at least part of the time in these cases. Just recently we have added eight delegate judges who are sitting and hearing exclusively cases of separation referred to this office."[47] The lecture series and accompanying book appear to have been part of an effort to mark and promote the recent enlargement—or de facto establishment—of the Separation Court. Similarly, the theme of the catechetical instruction to be read at Low Mass on Sundays throughout the liturgical year 1943-1944 was "Man, Marriage, Family and the State,"[48] with a particular

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[45] "Metropolitan Tribunal," 125–126.

[46] See CATHOLIC LAWYERS GUILD OF CHICAGO, *Canon Law on Civil Action in Marriage Problems: Lectures Delivered Under the Auspices of the Catholic Lawyers Guild in the Rooms of the Chicago Bar Association*, Chicago, IL, Catholic Lawyers Guild of Chicago, 1944, 1.

[47] G. CASEY, "The Practice," in *Canon Law on Civil Action in Marriage Problems*, 81.

[48] *Program of Instructions for the Ecclesiastical Year 1943-1944*, Archdiocese of Chicago, 1943, 1.

instruction on the thirteenth Sunday after Pentecost entitled "Legitimate Separation: May a Catholic Procure a Divorce?"[49] informing Mass-going Catholics in the Archdiocese of Chicago that except in cases of adultery, separation "should first be taken up with the pastor who will refer it to the bishop,"[50] and of the conditions under which "[a] Catholic may secure a divorce in the civil courts," including that "perpetual separation has been approved by the Church."[51]

In the early years of its existence the Separation Court was sometimes very actively involved in the instruction of cases and in their adjudication, in a way that it would not be later and giving the impression that the judges felt empowered to experiment somewhat regarding the best manner of proceeding in each case. For example, one case in the early 1940s begins with the wife's allegations of alcoholism against the husband being discussed in passing.[52] Then follows a long report of a private investigator contracted by the Separation Court following the same woman petitioner for many hours over several days, detailing observations of her apparently engaged in an affair. Unfortunately, there is no record of the canonical or legal resolution of the matter, how the allegation of her adultery came to the court, or why the Separation Court decided to hire an investigator. In another early case the Separation Court itself seems to have determined the terms of the financial

[49] Ibid., 75.

[50] Ibid.

[51] Ibid., 76.

[52] See ACA SC S53. It is both important and sometimes difficult to keep in mind how differently the Separation Court judges prior to the mid-1960s instinctively viewed marriage cases than would a canonist in the post-American Procedural Norms era. For example, in this case it is noted that the civil wedding was in January 1926, three weeks prior to the Church wedding, and that the woman petitioner "knew him two weeks before civil marriage – not engaged [prior to the civil wedding]." This kind of circumstance, striking to the modern reader, is not uncommon and often uncommented in Separation Court records. Even though the wife requested investigation of the possible nullity of the marriage, this request was dismissed after a few brief answers to questions regarding the Augustinian *bona*; she was not permitted to submit a *libellus*.

settlement rather than allowing this to be determined by the civil courts. The parties each sign agreements saying where the children shall go to school, from whom the wife shall rent a room, the wife's medical treatment and behavior,[53] alimony, the wife's retraining for employment, who will bear the expenses of all of these. Authority to modify the terms was variously given to "the Chancery Office" and to a third party known to the spouses. Nevertheless, it is not clear whether the terms of this agreement were initiated or imposed by the Separation Court, or whether it merely served as a venue and moral authority for an agreement made between the spouses and their attorneys.

4.4.2. Institutionalization

Surviving records from the Separation Court's foundation in the early 1940s through to the late 1950s indicate a process of institutional formalization. For example, the pamphlet *Marriage Laws of the Catholic Church: A Brief Statement of Substantive Principles Together with a Description of the Procedure Followed by Church Courts*,[54] despite its rather universal title, was a publication specific to the Archdiocese of Chicago, explaining in some detail the structure and operation of various bodies attached to the chancery and tribunal of the Archdiocese. The "marriage courts of the Catholic Church" are divided into the "Separation Court" and the "Annulment Court,"[55] the former having

[53] One stipulation, "I will stay away from taverns and places whose primary purpose is the dispensing of liquor and that I will keep from drinking to excess" (ACA SC S 93, agreements dated August 6, 1942) gives insight into the problems plaguing the marriage and why the children were required to go to a boarding school.

[54] See *Marriage Laws of the Catholic Church: A Brief Statement of Substantive Principles Together with a Description of the Procedure Followed by Church Courts*, Chicago, IL, Christian Family Movement, 1953. "So that the reader might feel assured of the accuracy of this explanation of Church law and procedure, the manuscript, before publication, was submitted to the Archdiocese of Chicago chancery office. It was there found not to misstate the Church's position" (ibid., ii).

[55] Ibid., iii. The "Annulment Court" was itself structured into "four divisions […]: The Roman Court; The Defect of Form Court; The Documentary Court; The Tribunal Court" (ibid., 11).

"two divisions […]. The first sits daily and decides petitions to separate and requests for leave to resort to the civil court for separate maintenance. The second, in addition to hearing these petitions, has the power to decide requests for permission to go to the civil courts for civil divorce."[56]

The catechesis instructed to be given at Low Mass on Sundays continued to emphasize the Church's role regarding separation and approaching the civil authorities. The *Program of Instructions* for 1950-1951 reminded congregations on the second Sunday of Lent in 1951 that

> common life must be maintained between spouses and that no Catholic may approach the Civil Courts unless permission has previously been received from the Bishop of the Diocese. This permission must be obtained both for Separate Maintenance and Divorce proceedings. […] The Bishop of the Diocese administers this phase of Diocesan discipline through a Court located in the Chancery Office. The Decision of this Court is binding in conscience. People who would disobey the decision given by the Court would render themselves unworthy to receive the Sacraments.[57]

In the 1950s, an increasing "volume [of separation cases] became impossible to handle at the Archdiocesan level, sometimes resulting in painful delays for those awaiting a decision […]. Pastoral care became impossible at the Diocesan level, resulting in the decision to handle cases in the parish in order to effect quicker, more personal care for the people involved in stressful relationships."[58] As a result, in a watershed moment for the

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[56] Ibid., 6–7.

[57] *Program of Instructions for the Sunday Masses Throughout the Year for the Ecclesiastical Year 1950–1951*, Archdiocese of Chicago, 1950, 29–30.

[58] M.J. DIX, Memorandum "The Separation Court," ACA ADMNA1350596 Separation Court Committee, 1982 (=Dix Memo), 3. In reply to the Dix Memo, the judicial vicar John Dolciamore responded that "[h]istorically, I believe this section of the paper misinterprets the purpose and function of the Separation Court. What is stated may be a goal of the Separation Court, and some judges may now function in the way

Separation Court, initial counseling and assessment was asked to be done by parish clergy who would refer parties to the Separation Court with a "parochial report":

> [I]t is impossible for any Chancery staff to hear these cases as they deserve to be heard *in prima instantia*. […]
>
> It is, therefore, my directive that all these cases be heard, *in prima instantia*, by the priests of the parish […]. I have asked the priests of our Separation Court, and those engaged in The Catholic Family Consultation Service, not to accept a marriage problem for hearing until the petition in question has first been reviewed by the local parish priest. […]
>
> If, after repeated efforts, the parish priest concludes that he is not succeeding, he is asked to fill out the questionnaire which the Chancery Office will supply for this purpose […]. In answering this questionnaire, the priest should give a complete report, together with his considered recommendations. We consider these recommendations very important, and therefore also we will welcome whatever suggestions are made for the better handling or adjudication of the case, since the parish priest is in the best position, through his interviews with the parties, to have gained an accurate opinion about the case and its underlying difficulties and causes. When the questionnaire is completed, the priest is requested to mail it, either to The Catholic Family Consultation Service, if he feels that counseling or psychiatric help might be indicated, or to the Chancery Office, if he deems a juridical decision is necessary. An appointment will be made to see the parties.[59]

Although Cardinal Meyer maintains language carefully protective of the notions of the indissolubility of the marriage bond, canonical obligations of spouses and the possibility of a juridical decision at the Chancery Office, we should not miss what is significantly new. The emphasis on "pastoral" care, on counseling and on advice is absent from both the public and private documents of the Separation Court even ten years earlier. Previously, there does not seem to have been much emphasis on support for the spouses in how to improve the quality of their conjugal living; they were simply told whether or not

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described; however, it would be canonically and historically inaccurate. The office was not set up as a pastoral office, but basically as a judgment office. While it may be (and I sincerely hope that it is) a more pastorally oriented office today, its purpose for the most part has been toward the granting or refusing of permission to approach the civil courts" (J. DOLCIAMORE, Memorandum "The Separation Court," ACA ADMNA1350596 Separation Court Committee, 1982, 2). Dolciamore's critique is correct; the concepts of "pastoral care" and "personal care for the people involved in stressful relationships," as those concepts might later have been understood, do not seem to have been goals of the Separation Court in the 1950s and prior.

[59] A. MEYER, Letter of His Eminence, Cardinal Meyer, to All Archdiocesan Clergy Promulgating New Statute Pertaining to Problem Marriages, in *Pastoral Counseling and Problem Marriages*, Archdiocese of Chicago, 1960, 5–6.

they were obliged to continue it. The only "pastoral counsel" was that they would be excluded from the sacraments if they disobeyed the Separation Court's decision.

Although the reliance on parochial reports from parishes "in fact was not new procedure, but simply a mandating of existing procedure,"[60] its normatization by "Archdiocesan Statute"[61] fundamentally changed the relationship between Separation Court and the parish clergy. As we shall see later, some eventually came to see the Separation Court as adding little value to the work already done by the parish priest.

Even shortly afterwards, it was recognized that

> This statute [of Cardinal Meyer in 1960] as a consequence has changed the contour to some extent of the Separation Court as such. In the old pattern, the great approach upon the part of the Separation Court was one of reconciliation and there was a fair measure of success in reconciling people. Today we hope that most of this reconciling is done on the parish level. Hence, that part of the volume of work does not come to the Separation Court.[62]

Other responses to the overwhelming number of cases before the Separation Court can be imagined. It is beyond the scope of this thesis to weigh whether or not these would have been practical in light of the other demands on the Archdiocese's finances and personnel, but it can be imagined that an ordinary in 1960 *might* have chosen to invest the resources to allow the Separation Court to do its job and do it well, rather than allowing it to continue with inadequate personnel and frontloading large parts of its work to the parish clergy. Similarly, the resources invested in organizations such as CFCS and other marriage programs and organizations could have been invested for the same purpose through the

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[60] Dix Memo, 3.

[61] See MEYER, Letter of His Eminence, Cardinal Meyer, to All Archdiocesan Clergy Promulgating New Statute Pertaining to Problem Marriages, 5.

[62] J.S. QUINN and A.L. ABRAMOWICZ, Memorandum to Members of the Separation Court "The Archdiocesan Separation Court," October 12, 1962, 2.

ministry of the Separation Court. The fact that they were not indicates a choice on the part of the Archdiocesan leadership to move away, at least implicitly and perhaps even without recognizing it, from a primarily juridical and directive solution to marriage problems.

To what extent the procedures described or prescribed in the publications were followed is not always clear. These pamphlets record a highly institutional structure, and no less notably, the effort that went into producing these booklets bespeaks a desire to present the Separation Court as a very formal and authoritative institution.

The shift around 1960 toward more of the preliminary work being done in parishes is reflected also in changes in the pastoral instructions given at Mass. In the directions to be given on the Second Sunday of Lent in 1961, the instruction mentions—unlike its predecessors from the 1940s and 1950s—that certain priests have received "special training" to address "the special nature of some problems such as alcoholism, emotional immaturity, mental illness, etc.,"[63] and these priests were expected to be the primary workers for reconciliation. "Only upon the recommendation of the pastor or his assistant priests are our couples to seek the services of the Catholic Family Consultation Service,"[64] and "again no one is to approach the Separation Court of the Chancery without recommendation by the pastor or his assistant priests."[65]

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[63] *Program of Instructions for the Sunday Masses Throughout the Year for the Ecclesiastical Year 1960-1961*, Archdiocese of Chicago, 1960, 27.

[64] Ibid.

[65] Ibid., 28.

4.4.3. A Solution in Search of a Problem

The 1960 reformulation of Separation Court procedures was overtaken by events and did not have the chance to be practiced for long in the environment for which it was intended. Few institutions in the Catholic Church escaped significant changes in the wake of the Second Vatican Council, often beginning even before the close of the Council. However, the Second Vatican Council is not mentioned in Separation Court records: neither cited in individual cases, nor in surviving documents of the court's own contemporaneous discussions.[66] This is an extraordinary omission. The attentive observer cannot fail to notice the change in perspective of both parties and Court officials which took place beginning in the mid-1960s, yet the Separation Court records themselves rarely comment on this change, and do not attribute it to any particular source.

From this watershed on, the fundamental orientation of the court's activity changes from granting, denying and informing parties to affirming, advising them and supporting them, even while working within elements of the prior structure. For the decreasing number of parties who continue to approach the Separation Court, it appears less and less that their decisions are affected by the court's decisions; they seek the Church's permission out of some sense of propriety or respect, but will separate or divorce if they want to, even without permission. Whether rightly understood or not, a new attitude of "conscience" (as Mrs. O'Malley put it) is evident in the parties.

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[66] The singular exceptions are the 1982 Dix Memo, discussed *infra*, which ascribes the disjunction between the Separation Court and the faithful as a result of "a Post Vatican II community, using a Pre-Vatican II mindset of granting permission" (Dix Memo, 5), and a response to the Dix Memo which discusses the personalist juridic import of *GS* (see DOLCIAMORE, Memorandum "The Separation Court," 3). These sources discuss the Council and its effects in retrospect, as an historical explanation for the social changes which had already affected the Separation Court; no source seems to discuss the Council in the present tense, and whether or how it demands changes of the Separation Court.

In 1966 the Separation Court Judges voted to put together guidelines reflecting "a more lenient attitude in granting permission for divorce,"[67] discussed in more detail *infra*. The guidelines and the process of their creation were characteristic of the Separation Court's two and a half decades' existence prior to that point: formal, written, systematic. The guidelines did not progress beyond "temporary guidelines" in an "interim report."[68] While specific reason for the cessation of this project is not recorded, it is consistent with the more fundamental shift taking place in the Separation Court in the same period: the significant change was not the "more lenient" content of the written guidelines, but a moving away from adherence to written, systematic policy in the granting of permission.

Space precludes mention of all of the internal meetings and memoranda within and regarding the Separation Court discussing its purpose and whether or not it was to continue; the topic seems to have been a matter of constant discussion. The Separation Court continued to operate throughout the 1970s, and Archdiocesan officials presumably believed that it did so in accordance with the law. In a request for a rescript granting the favor of a local court of third instance regarding a petition for nullity of marriage, the archbishop observes that "[a] civil divorce was sought and obtained by the wife in 1974; she acted with all the necessary permissions from the Separation Court of this Archdiocese."[69] Since the man was described by the archbishop as "a simple working man, being employed by the City of Chicago as a plumber, and […] in no position to assume the financial burden of

[67] Minutes of Meeting of Separation Court Judges Held on March 21, 1966, ACA ADMNA1350596 Separation Court Committee, 1966, 2. Discussed more thoroughly *infra*.

[68] See COMMITTEE OF DELEGATE JUDGES, Interim Report – Restatement of Separation Court Policy and Temporary Guidelines, ADMNA1350596, Archdiocese of Chicago Archives, 1966.

[69] Bishop's Recommendation, in SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Petition Granted for Local Court of Third Instance, in *CLD*, vol. 8 (1976), 1087.

an appeal to the Sacred Roman Rota,"[70] it would seem that there was nothing socially exceptional about the parties' circumstances. The rescript was granted by the Apostolic Signatura without comment on the divorce or on the Separation Court.

Nevertheless, it is clear that by the 1970s the Separation Court was a vestige of its former existence. It had once been important in the Archdiocesan bureaucracy and in the lives of the faithful, but no longer was. While none of the laws which (allegedly) necessitated the creation of the Separation Court had been abrogated by the 1970s, and the various evaluations of the Separation Court's operations mentioned assorted legislative texts, the Separation Court no longer operated in strict conformity with any law. In practice, the Separation Court judges allowed themselves to define their own purpose, no longer being bound by the external authority of law. The Separation Court was legally themed, but no longer fundamentally a juridic institution. It continued to exist, but it surely would not have been *founded* in the 1970s for the role it was fulfilling at that time.

4.4.4. Demise

The members of the Separation Court had spent over a decade discussing the question of whether or not the Court should continue to exist, and if so, what its purpose and form was. Even as the number of cases continued to decline, there were still some dozens (or perhaps a hundred or more) petitions submitted and decided each year. If this had been thought to be serving some useful purpose, perhaps it could have continued indefinitely, especially since the judicial vicar, with authority to evaluate the office and to

[70] Ibid., 1088.

close it if necessary, was not aware that he was responsible for it.[71] So perhaps it is understandable that it took an outsider to dissolve the Separation Court.

Joseph Bernardin became Archbishop of Chicago in 1982.[72] As Archbishop of Cincinnati, he had abrogated "the reservation of the sin of seeking a civil divorce without permission of the local Ordinary,"[73] reserved by particular law in Cincinnati, even while affirming that "[s]eeking a civil divorce without permission is still seriously sinful."[74] The end of the Separation Court in Chicago came suddenly and without fanfare. According to a memorandum from Father John Hergenrother ("Director, Executive Services") to Cardinal Bernardin, "[a]t our staff meeting on February 14, 1985, I briefly mentioned the Separation Court, and as I recall you said let's dissolve it right here and now."[75] Father Robert Becker, judicial vicar, responded to the news "I applaud the decision, and see it as the cutting of the Gordian Knot."[76] Nevertheless, Becker wondered whether news of the dissolution of the Separation Court without a replacement ministry "might not leave a vacuum in the services available to the people of the Archdiocese" and therefore "its demise should be kept to ourselves until the diocese can announce plans for being present to the members of its community who are facing the decision to end their marriage."[77]

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[71] "It came to my attention quite by accident that the nearly moribund Separation Court falls to my responsibility historically as Officialis" (R. BECKER, Memorandum, Meeting concerning Separation Court, ACA ADMNA1350596, Separation Court Committee, 1985).

[72] See A.E.P. WALL, "Bernardin, Joseph Louis," in *New Catholic Encyclopedia*, 319.

[73] J. BERNARDIN, "Extra-Synodal Decree," in *CLD*, vol. 8 (1975), 562.

[74] J. BERNARDIN, letter [likely to priests], in *CLD*, vol. 8 (1975), 562.

[75] J. HERGENROTHER, Memorandum, Hergenrother to Bernardin, ACA EXECC055025, 1985.

[76] R. BECKER, Memorandum, Becker to Hergenrother, ACA EXECC055025, 1985, 1.

[77] Ibid.

Indeed, the dissolution of the Separation Court was kept so quiet that the Court continued to appear in the Archdiocesan Directory until and including 1988.[78]

Although the Separation Court as an institution was ended, this did not immediately mean the complete end of ecclesiastical separation and permission to approach the civil authorities in the Archdiocese:

> [Some other priests] and I have been delegated in our faculties to give the permission of the Archdiocese for separation and, if necessary, divorce. So, too, presumably, have all the Separation Court Judges. I presume that those delegations continue in force; although the superstructure of a 'Separation Court' has been dissolved.[79]

Still, the Separation Court was no more. The social factors ultimately leading to its demise were well explained by Becker:

> The decision to terminate a marriage is a decision which many, if not most, Catholics are taking on their own, with little or no consultation with members of the 'faith community.' The fact that this is being done, without comment or concern expressed either by the community itself or by its leadership in the parishes and dioceses, does I believe say something about the way in which we view the role of the married state in the Church.[80]

Earlier, as General Secretary of the NCCB and USCC, Bernardin had contributed to discussion regarding the establishment of procedural safeguards for rights in the Church. He had written,

> [T]he Church should exert her leadership by ensuring […] rights and freedoms among her own members. We should not be afraid, therefore, to examine closely our legal apparatus to see if it will stand the test of today's needs and aspirations. We must listen to those who insist that our procedures are not adequate. Then, on the basis of actual fact rather than emotion or an effort to prove some preconceived idea, we must decide whether changes are needed and, if so, what kind.[81]

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[78] See *Official Directory of the Archdiocese of Chicago*, 1988, 18. Not appearing in *Official Directory of the Archdiocese of Chicago*, 1989, 19.

[79] BECKER, Memorandum, Becker to Hergenrother, 2.

[80] Ibid., 1. A reference to "canon 1016" was annotated at the time as being incorrect, but it is not clear which canon—in the 1917 or 1983 Codes—Becker was intending to cite.

[81] J. BERNARDIN, "Due Process in the Church," in *Homiletic and Pastoral Review*, 69 (1969), 755–757.

In dissolving the Separation Court, Bernardin was clearly "not afraid" to end a "legal apparatus" he considered not to "stand the test of today's needs and aspirations"; he "listen[ed] to those who insist that our procedures are not adequate." However, it is also evident that he did not believe that the rights associated with marriage were to be considered as some of those "rights and freedoms" which due process in the Church could ensure "among her own members." In evident contrast to what was accepted only thirty years—indeed, in some documents, less than twenty years—earlier, he does not seem to believe that "due process" has any role in adjudicating a dispute between husband and wife regarding marital separation, nor in granting permission to approach the civil authorities.

4.5. Substantive Legal Basis for the Court's Existence

The legal object of the Separation Court's decision-making varied; and no less importantly, the extent to which the court's object was legally-driven at all varied greatly over time. It mostly attempted to govern spouses' approach to the civil authorities regarding their marriage (whether for divorce or for separation), but it also gave some attention to the fact of the parties' separation and the fulfillment of the obligations of marriage toward one another. Toward the end of its existence, the understanding of the Separation Court's mission veered further away from the legal and toward a more nebulous "pastoral" exercise. The claimed legislative basis of the court's mission and authority also varied between the *CIC/17* and the Third Plenary Council of Baltimore, often varying together with the legal object of the court's decisions.

The Court's foundation had been attributed to Cardinal Stritch's "deci[sion] to activate Canon 1131 [*CIC/17*] and reserve to the Ordinary the permission to allow people

to go into Civil Courts to seek either a separate maintenance or divorce."[82] Limitations on the civil power over marriages of Catholics was mentioned but not linked to any specific legislation, such as canon 126 of the Third Plenary Council of Baltimore. However, this latter canon was cited—and often miscited—as its importance to the court proceedings waxed and waned, as the Court itself swung between deciding the right of departure from conjugal living, granting ecclesiastical separation, and granting permission to approach the civil authorities.

The Archdiocese, like all dioceses in the United States, had an obligation to provide the opportunity for consultation with ecclesiastical authority before approaching the civil authorities for separate maintenance, as mandated by canon 126 of the Third Plenary Council of Baltimore. Interpreting this as an obligation for permission, not consultation, or applying it to divorce, went beyond the text of the Plenary Council and therefore was an abuse. No particular legislation from a lower-than-national level (e.g. diocesan or provincial legislation) which might have applied in Chicago, or even mention or claim thereof, has been uncovered or even mentioned in research in this study;[83] the situation

[82] QUINN and ABRAMOWICZ, Memorandum to Members of the Separation Court, 1. Although this memorandum was written two decades after the fact, it is an accurate summary of how the legal existence of the Separation Court was explained in the 1940s. See e.g. CATHOLIC LAWYERS GUILD OF CHICAGO, *Canon Law on Civil Action in Marriage Problems*.

[83] There is no reference to any legislation of the Archdiocese of Chicago or of the Province of Chicago regarding civil divorce or separation in one thorough survey of particular legislation on censures and reserved sins, where other Chicago legislation, and other dioceses' legislation regarding civil separation and/or divorce, is well recorded. See R.J. ANABLE et al., "Diocesan Censures *latae sententiae* and Reserved Sins in the United States," in *Theological Studies*, 8 (1947), esp. 371. Some particular legislation regarding civil separation or divorce could have fallen outside of the categories of "censures *latae sententiae* and reserved sins." However, as noted elsewhere, approach to the civil authorities for civil separation or divorce was treated in Chicago as though it incurred a censure *latae sententiae*, and therefore the absence of particular legislation providing for this is notable.

appears simply to have been a misinterpretation and misapplication of universal and national law, not local particular legislation.

Similarly, the archdiocese rightly provided the opportunity to fulfill the obligations described in *CIC/17* c. 1131, §1; that is, for the local ordinary to decide ecclesiastical separation of spouses. It was an abuse, however, to interpret the right of a spouse more narrowly than the text of the canon; for example, in omitting mention of the fact that separation on one's own authority was permitted in cases of certain adultery and that departure from the home was licit in cases of grave and urgent danger.

Until the mid-1960s, and with some hints thereafter, the Court gave decisions which functioned as instructions to the parties; whether or not they were permitted to separate, and whether (and how) they were permitted to approach the civil authorities. There was some preliminary consideration of whether or not the parties could be reconciled, and sometimes more consideration and effort seems to have been put into this possibility than at other times. The core matter was relatively simple and was judged according to criteria drawn from moral theology and precisely enumerated according to strict classifications in various written guidelines of the Separation Court. The principal criterion was whether the specific civil action was the minimal and necessary step to protect the rights of the parties. This required some awareness of contemporary state domestic relations law. It did not require much knowledge of couples' therapy or psychology or even of the theology of marriage. If the parties gave wildly different accounts of who was responsible for the problems in the marriage, this was not relevant to the Court if, according to both accounts, neither civil divorce nor separate maintenance was necessary for the protection of the rights of the parties or of their children.

Until the mid- or late 1950s, the Court might be very specific regarding the precise details of the civil action to be taken; after this, it was more likely to be categorized simply as permission for divorce or for separate maintenance action. For example, in one case in 1941 the Court informed the parties:

> We are hereby conveying to you the decision in the case which was presented by you for a clarification of your status. The decision is as follows:
>
> A. Both you and your wife are hereby given permission to sue for divorce, provided the bill is filed within the next month and bona fide efforts made to pursue it to the fullest extent. We will be the judges as to whether a bona fide effort has been made to pursue it to the fullest extent. In the event that this petition is not filed within a month from date of this letter, the permission is withdrawn entirely.
>
> B. Should divorce not be indicated we are hereby granting permission for separate maintenance, under the same time conditions, and this permission is again extended both to you and to your wife. If it is not used within a month that permission also is withdrawn.
>
> C. In the event that neither divorce nor separate maintenance are petitioned for within a month we are hereby ordering a resumption of marital life under pain of refusing of the sacraments to the party who disobeys this command.[84]

It is altogether unclear why the permission for civil action was so time-limited. At this time, evidently, the judges believed they had the power to "order a resumption of marital life under pain of refusing the sacraments."

A similarly decisive instruction was given in 1950 in a rather puzzling case. According to the report of the wife's physician,

> Her husband through the 41 years of married life has caused her great anguish. He has indulged in alcohol excessively quite often and more so recently. Her sexual life with him has been very unsatisfactory because of frequent demands by her husband to practice fellatio which she refused to do. On a number of occasions he threatened to kill her because of her refusal. He also attempted to practice anal intercourse with her. These practices to her are very disgusting. I find no evidence of any psychotic manifestations in this patient and presently she is presenting signs and symptoms of anxiety because of her fear of being injured bodily by her husband.[85]

[84] ACA SC S14, letter of November 29, 1941.

[85] ACA SC S9960.

The husband's physician, however, mentions none of these allegations, giving only accusations against the wife's spending habits and her independent income. In a decision letter dated October 25, 1950, the husband is informed:

> After weighing the report of these doctors and considering the discussion you and your wife had with me, I come to the following conclusion. You and your wife are to resume normal married life immediately. If you fail to do so, you will cut yourself off from the sacraments.

The alleged threats to kill the wife, surely an example of *odium capitale*, and the immoral sexual practices surely causing *periculum animae*, are not mentioned (even to be assessed for their credibility); there is no record of how the Court evaluated the competing narratives.

Over time, the firm use of external, legally-based criteria began to soften, first regarding separation and later regarding divorce. As early as 1962, an internal memorandum reported "[i]f, on the other hand, [the judge] feels that it is absolutely impossible for a couple to get together [*sic*], then his attitude should be that he will allow them to separate and go to Civil Court but only with the use of the vehicle of separate maintenance."[86] Already, then, simple refusal to reconcile was treated de facto as a reason to "allow them to separate"—i.e. to allow ecclesiastical separation, or at least permission to suspend conjugal living—and to approach the civil authority, effectively ratifying the parties' own decision(s) without attempting to make a decision based on an external set of criteria, and in particular without ordering spouses to reconcile if one or both did not want this.

[86] QUINN and ABRAMOWICZ, Memorandum to Members of the Separation Court, 3.

The 1963 Quinquennial Report places greater emphasis on reconciliation and less on the legal nature of the Court and its decisions, while noting the limitations of, and conditions under which permission was granted for, civil divorce:

> Civil divorce is also sometimes obtained even by Catholics, namely when, by the authority of the Ordinary, a perpetual separation is sanctioned to safeguard merely civil effects [*auctoritate Ordinarii, separatio perpetua sancitur ad effectum civilem dumtaxat in tuto ponendum*]. […] The Ordinary, through the Chancery and with the support of twenty-two priests outstanding in prudence and learning, has established a court to address domestic relations between spouses and to avoid divorces. The outcome of this court is so successful that there are many marriages where peace has been restored and, in many cases, public scandal has been eliminated. Furthermore, we have an organization commonly known as the "Catholic Family Consultation Service," whose purpose is to provide expert advice and, if necessary, psychiatric assistance for resolving disputes between spouses.[87]

The most extensive explanation surviving of the court's criteria for making decisions is found in a document from 1966; this document seems to have been produced precisely because the authority to grant divorce permission was being extended to all judges (rather than only two judges, as discussed *infra*), and in this context it would have been opportune to clarify the principles by which decisions regarding divorce were to be made. The explanations of this era are consistent with earlier (and sometimes later) accounts of the court's reasoning, and also with then-conventional moral and canonical literature regarding separation and divorce. Since individual cases rarely have decisions with written explanations, for the most part we are unable to assess the extent to which this reasoning was rigorously followed; but in a few cases, we are able to draw some conclusions. The so-called "Interim Report" and its "Temporary Guidelines" (definitive versions do not seem to have been completed) begins with a preamble which would not have been out of place at the time of the court's foundation, and which sternly warns the newly-empowered delegate judges against laxity:

[87] Archdiocese of Chicago Quinquennial Report 1963, ACA HISTQ81002, 60–61.

> The Mind of this Court has been, and still is, to uphold, defend and protect the Sacred Bond of Matrimony. The jurisdiction extended to all judges in divorce cases should in no way be construed as any relaxation on the part of the Tribunal in its condemnation of the growing evil among Catholics of filing for civil divorce without the permission of the Ordinary. The delegate judges of this Court should ever be conscious of the evil and menace of divorce actions, and the inherent danger to the Faith and Salvation of both the innocent and the guilty Catholic parties subsequent to such civil proceedings.[88]

With this warning having been given, the Court lays out its choices in order of preference, displaying a principle of graduality and not granting permission for more than was considered necessary to address the particular problem. The preferred outcome is the reconciliation of the parties, which may be facilitated by a referral to CFCS. Only "if this is neither possible nor advisable," the second option of "temporary separation" may be granted "without [permission for] any civil action."[89] This would seem to be equivalent to ecclesiastical separation, though the description as "temporary" seems to indicate a lack of recognition of the perpetual right to separation stemming from the adultery of the other party. The third option, to be considered "if civil action is deemed necessary," is permission for "Civil Separate Maintenance wherever this would be sufficient to attain the desired goal, viz. to guarantee support for the wife (mother) and children and/or secure custody of the children."

Only when "the 'rights' of the innocent party cannot be adequately protected or guaranteed, except through the vehicle of civil divorce" (i.e. that civil separate maintenance would provide insufficient legal protection) could the fourth and final option of civil divorce permission be granted "for grave and cogent reasons." The two principles behind consideration of the decision to grant divorce permission are explained: "Marital problems

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[88] COMMITTEE OF DELEGATE JUDGES, Interim Report – Restatement of Separation Court Policy and Temporary Guidelines, 2.

[89] Ibid.

are such that any reconciliation (for all practical purposes) is impossible, and the prognosis for remedying the situation in the future appears hopeless";[90] and that "civil divorce is the only adequate means to protect and guarantee the 'rights' of the innocent party."[91] The latter is further clarified: "To prevent any grave injustice or serious financial loss, and/or to prevent an aggravated marital situation that may well endanger or jeopardize the emotional, psychological, mental or physical health and well-being of the innocent party."[92]

The criteria for granting divorce permission demonstrate practical consideration of financial consequences, often prioritizing these over canonical principles, with the distinction being especially clear in cases involving fault and incapacity. Alcoholism and gambling addiction are mentioned as factors in favor of granting divorce permission on the basis that separate maintenance might not—in practice—be sufficient to protect the wives from the legal consequences of the husband's actions.[93] Permission to divorce was canonically distinct from canonical separation;[94] however, this does not appear to have been present in the Separation Court's reasoning, where civil divorce permission is always presented as an escalation and subset of canonical separation. While the issue of blame or fault to be ascribed to one party or the other arises occasionally in the context of who is responsible for ensuring reconciliation, the distinct question of moral and canonical culpability for the party's actions is never addressed by the Chicago Separation Court. This

[90] Ibid., 3. Emphasis in original.

[91] Ibid.

[92] Ibid.

[93] See ibid., 4–5, 7–8.

[94] Prescinding, of course, from whether "permission to divorce" even existed canonically, at least as applied in the Archdiocese of Chicago.

is understandable in light of the Separation Court's original primary function of considering permission to approach the civil authorities, with canonical separation and its moral and canonical criteria being something of an afterthought. Accordingly, the Separation Court seems to view mental or psychological conditions which at least potentially reduce the party's moral culpability and therefore diminish the possibility of true canonical separation (without affecting the right to depart the common life) as a factor *in favor* of granting the permission; while the law considers fault as necessary for separated status, and therefore conditions mitigating fault to be factors *against* canonical separation. The Separation Court guidelines stated that "unless a divorce decree is obtained, [the Charities Act] obligates a husband or wife, even after a Separate Maintenance Decree, to pay support for a spouse who is declared incompetent, and committed to an institution or hospital,"[95] reasoning that divorce was to be permitted in the case of a mentally incapacitated spouse to avoid the civil obligation of paying for the support of the spouse. This seems directly contrary to the principle in canon law that the obligation of mutual support cannot be ended via legal separation when there is no fault.

The guidelines document gives further examples of situations where separate maintenance or civil divorce may be considered necessary to protect the rights of a party. While acknowledging the principle that "Property Settlement of itself (i.e. the mere existence of some property or wealth jointly owned) is not a sufficient reason for granting divorce permission,"[96] the varied example situations would seem to cover a larger proportion of circumstances than might previously not have been admitted as reason for

[95] COMMITTEE OF DELEGATE JUDGES, Interim Report – Restatement of Separation Court Policy and Temporary Guidelines, 5.

[96] Ibid., 4.

divorce. For example, "though the woman is not legally responsible for her husband's indebtedness [if separate maintenance has been decreed by the civil authority], she does frequently suffer harassment from her spouse's creditors,"[97] and therefore, civil divorce could be permitted even though it was not, according to the letter of the civil law, strictly necessary. Similarly, the category of "Threats on Part of Husband"[98] does not include threats of violence, but the threat "to desert and abandon wife and children if the innocent wife (with sufficient legal grounds [for civil divorce]) is refused permission to file for a Civil Divorce"[99]—in which scenario, the judge "must take into consideration the psychological and emotional factors involved: possibility of a nervous breakdown etc. resultant to wife who must live under constant threat of complete desertion, non-support, and mental and physical harassment by the disgruntled husband."[100] This is certainly different from cases in the 1950s and earlier, where permission to divorce was refused according to a strict reading of criteria according to whether separate maintenance was legally a sufficient remedy,[101] irrespective of the gravity of the issues between the parties, and without much consideration of mental and emotional factors. In this way, the changing criteria demonstrate that the judges are adopting more of a personal (if not necessarily yet personalist) model of marriage, in contrast to the more institutional and contractual understanding in the 1940s and 1950s, mirroring a similar shift in society at large.

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[97] Ibid., 5.

[98] Ibid., 6–7.

[99] Ibid., 6.

[100] Ibid.

[101] For example, the case S-4011-A, in which CFCS concluded that the wife was cruel to the parties' daughter and the husband was described as "an immature man with little education" and "an alcoholic with disturbed ideas" (CFCS report, July 22, 1960). "Permission [was] granted […] for separate maintenance and child support. Civil divorce permission is refused at this time" (letter, September 28, 1960).

Some of the categories mentioned in the Interim Report are sex-specific; "situations involving an irresponsible wife" and "threats on part of husband" are treated as categories in their own right, even though the principles behind them are not sex-specific in canon law. For the most part, examples are given which assume that the husband is the offending party; an assumption which may have been based on the judges' practical experience, or perhaps due to differences in the application of state law; "practically speaking, a [civil] separate maintenance decree is never granted to a husband,"[102] reflecting the differences in earning potential (and financial vulnerability) between men and women at that time.

The closer one reads the examples, the more it is possible to see the guidelines as likely to find reason for civil divorce in many situations, as the insufficiency of civil separate maintenance to protect the party is explicitly noted. This appears to have been the brief given to the authors of the report:

> Monsignor Quinn suggested that, after prayerful consideration for the good of the innocent party and the well-being of the children, a more lenient attitude be adopted by the Separation Court in granting permission for divorce.
>
> A committee of five Judges […] was formed to determine a better policy with guidelines in granting permission for divorce. [103]

This "more lenient attitude" is evident in particular attention given to the "right" of the "innocent party," irrespective of the potential consequences, providing an explicit example of the more often implicit shift in emphasis and consideration away from social effects and toward individual rights. Nevertheless, the emphasis exists alongside—indeed,

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[102] COMMITTEE OF DELEGATE JUDGES, Interim Report – Restatement of Separation Court Policy and Temporary Guidelines, 8.

[103] Minutes of Meeting of Separation Court Judges Held on March 21, 1966, 2.

gains strength when considered alongside—traditional strong language condemning the civil power and those who remarry after divorce:

> If one or the other party has no conscience and, after due instruction, takes advantage of the pretension of the civil power, and under its protection marries again—this wickedness should not prevent the innocent party, who has a right to such civil action [which provides the necessary civil protection], from making that right effective through a civil divorce suit.[104]

These themes exist side-by-side in the same document, in tension. The texts could be the result of compromise from different opinions among the judges; while there is no noted disagreement on this subject specifically, at the same meeting there was disagreement regarding whether or not parties must sign promises before receiving permission to separate or divorce.[105] The "more lenient attitude" still exists within a restrictive framework which presumes that permission is needed to approach the civil authorities for separate maintenance and separately for divorce, and furthermore under the principle of permission only being granted in specific circumstances—even as each of those circumstances is being interpreted ever more broadly. If any of the judges was yet of the opinion that the Separation Court ought not to be in the business of granting or denying permission at all, this remained unrecorded.

The hermeneutic generally observed in this chapter is one of longitudinal, even diachronic, progression: that the work and perspectives of the Separation Court developed over time, but that at any one time it was a relatively homogenous institution (at least, this is the impression left in the documentary record, having been filtered both in its creation

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[104] COMMITTEE OF DELEGATE JUDGES, Interim Report – Restatement of Separation Court Policy and Temporary Guidelines, 2. This quotation is, in turn, an uncited close paraphrase from S. WOYWOD and C. SMITH, *A Practical Commentary on the Code of Canon Law*, new and rev. ed., New York, J.F. Wagner, 1952, 821.

[105] See Minutes of Meeting of Separation Court Judges Held on March 21, 1966, 3. "Seven (7) Judges were in favor of signing some type of promise, fifteen (15) Judges were against any promises" (ibid.).

and survival.) Yet the 1966 Interim Report and the March 21 meeting which led to it provide a unique example of synchronous distinction within the Separation Court.[106] This is reflected in the results of the vote regarding the promises. More strikingly, it is reflected in the tone of the Interim Report itself, which uses authoritarian language, anachronistic even if only by a decade, incongruously to describe an increased willingness of the Separation Court to grant permission for divorce.

The reasoning of the Separation Court judges in later years does not depend on any new and detailed set of criteria, but a decline in the very principle of legality and an implicit—and sometimes explicit—choice to affirm the firm choice of a party to separate or to pursue divorce rather than to make a decision for them. By the mid-1970s, a less legal direction is clear:

> There was some discussion of the law, although basically we try to prescind from Baltimore and just determine what might be a practical solution. We got into a discussion of the Canons on Separation and seem to feel that the Separation of the Spouses is in a sense more important than the permission for divorce. This latter seems to spring rather naturally from the first, with the Separation perhaps being the more serious of the two, since this is where the beginning of the breakdown of the marital commitment takes place. Although Canon Law gives some reasons—which can be broad in their interpretation—for separation on one's own, the feeling seems to be that there should be the intervention of the Church at some final point in order to show the interest and involvement of the Church in this most important issue. Exactly what this intervention might be is undecided. It seems to have been decided that the intervention should not be a "granting of permission," but only a confirmation of a decision rightfully reached by the couple or one of the parties.[107]

[106] Of course, many examples of synchronic tension between the Separation Court and others, such as parties to each case, are found and discussed elsewhere.

[107] J. DOLCIAMORE, Memorandum, Dolciamore to Schumacher, ACA ADMNA1350596 Separation Court Committee, 1977, 1.

This admission of "basically […] try[ing] to prescind from Baltimore and just determine what might be a practical solution" is a remarkable acknowledgment.[108] There is a feeling that the Church should somehow be involved in the decision, but a lack of agreement or understanding about what that ought to mean, especially on any legal basis:

> One of your points was discussed at some length, whether the Separation Court is a conciliation court, a counseling court, or something else. The feeling was somewhat divided, but the strong feeling seemed to be it was a "judgment" or "confirmation" court, rather than the other two.[109]

The majority opinion at that time was reported to be in favor of one of two more juridic conceptions of the court in preference to less juridic option, but even the two favored juridic understandings were very different from one another: one making judgments based on the facts of the case in light of the law, not bound by the opinions of the parties; and a second, merely giving some kind of juridic effect to the decision already made by a party.

At the same time, there is a retreat from seeking to influence the civil status of the parties and from seeking conformity between civil and canonical statuses, toward ignoring civil status under the explanation that "the [canonical or de facto] Separation […] being the more serious of the two, since this is where the beginning of the breakdown of the marital commitment takes place."[110]

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[108] The statement of "prescind[ing] from Baltimore [III]" appears to presume that the accurate or original legal basis for the Separation Court was the canons of the Third Plenary Council of Baltimore, and not, say, the canons of the *CIC/17* on separation, or uncodified universal law regarding interactions with the civil power. Furthermore, Baltimore III never mentioned legitimate reasons for separation or divorce, which was the matter under discussion. It seems that the author took the common knowledge (in fact, false) that Baltimore III legislated regarding permission for divorce, and then assumed that the same council also enumerated the substantive reasons for separation—when in fact these were described only in the universal law, pre-codification and in *CIC/17* cc. 1129–1131.

[109] DOLCIAMORE, Memorandum, Dolciamore to Schumacher, 2.

[110] Ibid.

By the 1970s, the judges are operating with a mindset of individual rights and freedoms, and not externally-imposed social and legal obligations. Even the 1966 Interim Report document is hopelessly outdated; the judges are not merely not using this specific text, but it is inconceivable that they could use any such systematic framework to judge cases. The 1940s and 1950s manner of operating, ordering parties to oppose civil divorce petitions and to reconcile, might as well be another world. Only the institution of the Separation Court itself links them.

Throughout its existence, the Separation Court created documents explaining its decision-making criteria: at first, for external publication, then for internal guidance, then as part of internal discussions. These displayed different explanations of the law on which the Separation Court was founded, and different degrees of understanding of the law. Viewed together from a distance, the common theme remains a lack of clarity and agreement regarding what the law was.

4.6. Distinctions regarding Civil Action, Civil Divorce, Civil Separation, De Facto Separation, and Canonical Separation

Pithily summarizing the sometimes-incongruous intersection of disparate civil status, ecclesiastical status and practical reality, one woman pleaded, “I just can’t go on this way indefinitely, being married and not married, separated and yet not separated, and continue the marital relationships besides.”[111] These themes recur in other cases and in the Separation Court’s writings.

[111] ACA SC S9674, letter of October 12, 1953.

4.6.1. Separation on One's Own Authority

The provision in *CIC/17* c. 1131, §1 for departure from the home from conjugal living on one's own authority was rarely, if ever, acknowledged in dealings with the parties, and is absent from the Court's guidance documents. When mentioned in public documents, separation on one's own authority was described only in regard to adultery, not danger, and not mentioning departure from conjugal living on one's own authority as a licit form of separation in circumstances other than adultery. For example, in one typical letter of 1942, the husband is informed, "[…] you are living separate and apart. Under the law of the Catholic Church such separation is not allowed without permission of competent ecclesiastical authority. Such permission is only granted after a hearing on the merits of the problem,"[112] neglecting to mention that "living separate and apart" (that is, including situations of mere departure from the home) was "allowed without permission of competent ecclesiastical authority" both in situations of certain adultery and also when the reasons were certain and there was danger in delay. I have not seen any documentary evidence of specific cases where the right to separation on one's own authority, for any reason, is acknowledged, even in cases where adultery was alleged.

4.6.2. Separate Maintenance and Divorce

Public and private documents regarding the Separation Court repeatedly note the distinction between the permissions to be granted to approach the civil authorities for separation (at that time called "separate maintenance" in Illinois) and for divorce. A standard letter of the Court distinguishing separate maintenance from divorce read: "We

[112] ACA SC S689, letter of October 14, 1942.

wish to advise you that it is the decision of the Court that you may file suit in the civil court for separate maintenance, but not divorce. If a divorce is obtained, we will be forced to deprive the guilty party of the sacraments and Christian burial in the event of death."[113]

The 1953 Archdiocesan-sponsored publication *Marriage Laws of the Catholic Church* gives an accurate account of canons 124 and 126 of the Third Plenary Council of Baltimore,[114] noting that canon 126 prevents only seeking separate maintenance in the civil courts, while canon 124 excommunicates after divorce only those who attempt another marriage. The same document does not, however, make explicitly clear what is between the lines: that one who seeks divorce in the civil courts is not penalized by these canons. It states "divorce: Catholics are directly and positively forbidden to approach courts to seek the dissolution of their marriage bond," without giving a citation for this assertion, which ought to have existed if the prohibition was "direct and positive," not merely derivable from principles. As explained in Chapter Three, there was no "direct and positive" prohibition against civil divorce in universal or US national particular law.

The distinction between separate maintenance and divorce, and even regarding the specific grounds for divorce, was so important that legal aid was conditional on the party observing the decision given by the Separation Court. One wife was offered legal assistance to respond to her husband's divorce suit, and an attorney was hired, paid for by Catholic Charities. This female attorney petitioned for a counter-suit of separate maintenance. However, the wife later sought

> […] the withdrawal of [the] separate maintenance petition [which would permit the divorce to be heard as a noncontested case]. [The Catholic Charities-paid attorney] may need to

[113] ACA SC S4181, letter of August 29, 1946.

[114] See *Marriage Laws of the Catholic Church*, 4.

> ask the withdrawal of her suit but if she does, she will also ask the court leave to withdraw from being the wife's attorney for she will not be a part of this plan for divorce. We will not offer legal aid to Mrs. Morgan again. She has been informed of the religious error her agreeing to a divorce would be […].[115]

Evidence of the reservation of the authority to grant permission for divorce only to a small number of the judges is found in records of individual cases. For example, in a case decided in 1963, there had been financial problems for several years caused by the husband's drinking, leading to threats to the parties' ownership of their home. The wife is instructed to consult with her attorney regarding "what legal steps should be taken to maintain yourself and the children."[116] The attorney then implies that separate maintenance will not be sufficient, since "if a complaint for separate maintenance is instituted, there will be no disposition by the court of any property rights, more particularly any action on the part of the court to resolve the matter of their home," also noting that "she is not desirous of instituting a complaint for divorce, unless same is sanctioned and permitted by her church."[117] Upon receipt of this letter, the judge seems to have been persuaded that divorce may be necessary, since instead of making the decision himself he makes a note for the secretary instructing her to "set up an appointment with <u>divorce</u> judge,"[118] and sends letters to the parties stating "I have scheduled a final hearing for the couple […] with Father Bednarz. The decision as to whether a civil divorce is permissible under the circumstances of this case will be made at that time."[119] The husband was then informed that "the Church has no objection to your wife resorting to civil action,"[120] a curious turn of phrase in a

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[115] ACA SC S10005, note, n.d., 1952.

[116] ACA SC S-1922-A, letter of February 15, 1963.

[117] ACA SC S-1922-A, letter of October 28, 1963.

[118] ACA SC S-1922-A, n.d. Emphasis in original.

[119] ACA SC S-1922-A, letter of November 2, 1963.

[120] ACA SC S-1922-A, letter of November 18, 1963.

decision letter which mentions neither "permission" nor "divorce" as promised in the appointment letter. This case illustrates the system working as described in the Separation Court's internal guidance, and the Archdiocese's published instructions: fine consideration of whether or not divorce was legally necessary compared to mere separate maintenance, and swift referral by the first Separation Court judge to a judge with the reserved power to grant divorce permission.

By 1966, the judges' opposition to divorce was softening. In a meeting conducted on March 21, 1966, "[i]t was pointed out that, as the Civil Courts continue to have more demands, our Separation Court must also extend itself in the granting of permissions to Catholics seeking civil help. Many Catholic lawyers refuse to accept a divorce case involving a Catholic as they will not proceed with the case until the necessary permission is obtained from the Chancery Office. All too often this delay imposes a hardship on the innocent party"[121]—a connection surely unthinkable two decades earlier, when rising divorce rates would have been seen as a reason to *restrict* the granting of permission in order to stem the tide, rather than reason to grant it more freely.

Taking place in 1966, this meeting seems to capture a moment of transition in the purpose of the Separation Court. In the Court's first couple of decades, its purpose was to prevent divorce both in individual cases and in Catholic society in general, using the threat of being cut off from the sacraments against a party who would not follow the Court's direction. After this turning point, the purpose of the Court was more to offer help in

[121] Minutes of Meeting of Separation Court Judges Held on March 21, 1966, 1.

troubled marriages if the parties wanted help, and otherwise to allow and encourage them to continue their life in the Church without obstacles.

Left unsaid is the uncomfortable impression that *the obstacle keeping the parties from the Church was the same "obligation" upon which rested the existence of the Separation Court*. If the gravest problem was separated and divorced persons feeling alienated from the Church, a more direct solution might not have been the reform of the Separation Court but its complete abolition, together with the assertion of the obligation. The transition did not happen at any one single moment, and during its course there were still remnants of the Court's former manner of acting to be found in older form letters still being used to threaten the parties, such as in the O'Malley case noted above.

As the Separation Court had become a solution in search of a problem, "[c]ivil divorce was no longer seen as the enemy but rather as a problem in need of a solution."[122] For example, in a case heard in 1975, permission for divorce was granted even though the factual basis was not at all clear; the wife claimed the husband's adultery, which he denied, and which the CFCS therapist believed was "mostly in the wife's mind."[123] Even allowing for the possibility that the wife's emotional and mental health issues could have made a common life effectively impossible, there is nothing which would justify divorce specifically over separate maintenance as judged by the criteria given in e.g. the 1966 Interim Report. Similarly, in a case decided in 1977,[124] the issues noted in the CFCS report are moderately serious but would largely have been addressed by physical separation; even

[122] ST. LOUIS-SANCHEZ, "Separation of Spouses *propria auctoritate* and the Nature of Ecclesiastical Intervention," 514. St. Louis-Sanchez is summarizing the Fifth Ordinary Session of the Synod of Bishops.

[123] ACA SC S-7273-A.

[124] See ACA SC S7391-A.

separate maintenance would not have been granted according to the former criteria, and civil divorce permission would not even have been considered, yet divorce permission was granted, presumably because by this point the de facto criteria were only that there were subjectively serious problems in the marital relationship and that the party desired divorce. Further evaluation of the need for divorce specifically was no longer taking place.

4.7. The Court's Procedures

The variation over time, and the discrepancies between the Court's published procedures and the actual practice, make impossible a single summary of the Court's procedures. Instead, various procedural aspects are addressed distinctly.

4.7.1. "A Real Ecclesiastical Court"—Judicial or Administrative Power?

There was an awareness, at least in principle, that the Separation Court and its judges exercised authority differently from the judicial forum by which marriage nullity trials took place in the Metropolitan Tribunal; but this distinction was at times contradicted by assertions of quasi-judicial power, both in public and in individual cases. The word "court" was not used with a strictly judicial meaning in Chicago, as with "the Roman Court"[125] being used to describe the section of the Metropolitan Tribunal office which instructed dissolutions of marriage by administrative process. The many references to the Separation Court acting "under the authority of the Ordinary" or similar do not define it as administrative, since both judicial and administrative separation processes occur under the authority of the diocesan bishop.[126] In this context, "court" is better understood not as a

[125] *Marriage Laws of the Catholic Church*, 12.

[126] TRIBUNAL OF THE ROMAN ROTA, *coram* FLORCZAK, 4 February 1925, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 17 (1925), 40-41, no. 2.

misapplication of a translation of "tribunal," but as a translation of "curia." The Separation Court did not operate as a court—or more precisely, as a court was described by Book Four of the *CIC/17*. Some of the language of a court is borrowed, but even then, with key differences. "These cases […] are determined in the Separation Court by an administrative hearing before one or more judge-delegates, who represent the Cardinal-Archbishop and act in his name. The Separation Court is not elaborate in staff or procedure."[127]

The Separation Court judges are always listed distinctly from the judges of the Metropolitan Tribunal which heard cases of nullity of marriage by judicial procedure,[128] categorized as "delegate judges for administrative hearing of separation cases" as a sub-group of the "Tribunal Metropolitanum,"[129] indicating some awareness of the distinction from true judicial cases. The 1978 Quinquennial Report chapter on the Metropolitan Tribunal gives the number of "Separation cases (administrative process),"[130] and the reports to the Apostolic Signatura for the years 1979, 1980 and 1981 (the only such reports to be found for the present study) add the notation "administrative process" to the line item

[127] *Marriage Laws of the Catholic Church*, 6.

[128] See e.g. in "Metropolitan Tribunal," 127–128, where the "Judges" and "Separation Court Judges" are listed separately, and similarly in the 1978 Quinquennial Report (Archdiocese of Chicago Quinquennial Report 1978, ACA HISTQ81006, ch. "Metropolitan Tribunal," 2).

[129] *The Official Catholic Directory for the Year of Our Lord 1945*, complete ed., New York, P.J. Kenedy, 1945, 45. The year 1945 was the first year in which the Separation Court—or more precisely, its judges—appeared in *The Official Catholic Directory*.

[130] Archdiocese of Chicago Quinquennial Report 1978, ch. "Metropolitan Tribunal," 2.

requesting the number of separation cases[131]—such a matter therefore in fact being outside of the competence of the Apostolic Signatura and the annual report to it.[132]

Nevertheless, it was publicly asserted that "if the referral is to the Separation Court, the couple should be made to realize fully that this is a real Ecclesiastical Court, wherein the priests do act as judges, and the decisions rendered must be followed under pain of grave sin"[133]—a claim difficult to understand except by generous interpretation of "court" as "curia," since the overwhelming weight of the judges' self-understanding is of the court as an administrative, not judicial, organ. The assertion that the decisions "must be followed under pain of grave sin" is similarly suspect, since while the judges had the delegated authority to grant permission or separation, it is not indicated that—by either universal or particular law—they had the authority to issue binding instructions to spouses beyond the grant or denial of the rescript; a spouse denied the requested rescript was not ordered *per se* to maintain conjugal living, but remained under the general obligation of spouses to maintain conjugal living, which could *ipso iure* be excused even on one's own authority for the reasons discussed in Chapter One and Chapter Two.

Even as administrative delegates, it is not at all clear that the judges understood the canonical source of their authority. For example, in a meeting of March 21, 1966, it is recorded that "[i]n the past only a few of the Separation Court Judges were able to grant

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[131] See ARCHDIOCESE OF CHICAGO TRIBUNAL, "Relatio annualis de activitate tribunalis" for the Years 1979, 1980 and 1981, ACA EXEC C055016, 151 in each.

[132] Although the Apostolic Signatura had some competence regarding administrative matters, the annual report—as the title "de activitate tribunalis" suggests—covers only the judicial activity of lower tribunals, not other canonical activity taking place in dioceses (SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Circular Letter to the Presidents of Conferences of Bishops on the State and Activity of Ecclesiastical Tribunals *Inter cetera,* December 28, 1970, nos. 8–9, in *AAS*, 63 [1971], 482–483).

[133] "The Parish Priest and Problem Marriages," in *Pastoral Counseling and Problem Marriages*, 32.

permission for a divorce. Fathers Myles McDonnell and Francis Nolan suggested that all Judges should have the authority to grant such permission. A vote was taken; by a unanimous decision it was agreed that all Separation Court Judges now have the authority to grant divorce permission."[134] The use of the word "now," and the fact that there is no record of any request for or grant of additional faculties from the archbishop, suggest that the judges implicitly understood the nature and extent of their authority to be self-appointed.

4.7.2. The Promoter of Justice

The promoter of justice was not involved. The matter of the participation of the promoter of justice in processes of the separation of spouses under the 1917 Code is discussed in Chapter Two; I concluded that the forceful arguments in some of the literature in favor of an obligation are perhaps better understood as arguments in favor of its aptness, but not a strict procedural obligation. Even these authors acknowledge that in practice in the mid-twentieth century, the promoter of justice was in fact rarely involved in processes of the separation of spouses, and this is affirmed in the evidence from Chicago, both in the Court's general documents and in individual cases. I have not found any discussion of the involvement of the promoter of justice in matters concerning only permission to approach the civil authorities, exclusive of the question of ecclesiastical separation. The only reference in Chicago found in this study to the intervention of the promoter of justice in separation cases is a photocopied excerpt from the *Schema de processibus*. A photocopy of canon 360 (*novus*) of the *Schema de processibus*, which mentions the mandatory

[134] Minutes of Meeting of Separation Court Judges Held on March 21, 1966, 1.

involvement of the promoter of justice,[135] is present in the Chancellor's file from the late 1970s or early 1980s, and is underlined by hand and marked with a question mark.[136] However, there does not seem to have been any further action or reflection on this point; perhaps it was believed to be a provision which would come into effect only with the new Code, rather than being statement of extra-codified law already applicable.

4.7.3. The Decision-Making Process

At least at the beginning of the operation of the Separation Court, the decision was made by three judges. In the case S14, the first case for which a record remains,[137] the wife made her petition in summer 1941. References from parish priests supported the wife's account. There seems to have been frequent contact with both parties, both directly and via the wife's attorney. In October 1941, there is a record of a "summary of verdict rendered by judges" stating that "all three judges concur in assigning the major part of the blame to the husband."[138] The summary appears to be a composite of the written opinions of all three judges. It is not clear whether the judges met in person or if the case was decided *per memoralia* with one acting to collate the vota and deliver the verdict. The second case for which records survive—S16—also contains a memorandum of January 30, 1941 from a

[135] "Causae de coniugum separatione ad publicum quoque bonum spectant; ideoque iis interesse semper debet promotor justitiae ad normam c. 32" (PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*, 82).

[136] See ACA EXEC2610302, Rosemeyer Chancellor file.

[137] This was presumably the fourteenth case to come to the attention of the new Separation Court at least broadly defined, though this does not mean that there were thirteen prior separation cases heard by the court and for which the records were subsequently lost. More likely, the first thirteen cases were reports of marital disputes which, for whatever reason, did not make it to the point of being heard as a separation case. See comments *supra* regarding methodological challenges from the existing record, and Cardinal Mundelein's claim that in 1938 four thousand marital problems were brought to the attention of the diocese.

[138] ACA SC S14. As an aside, we might note that the record that the statement that "all three judges concur" would be a violation of the collegial secrecy required by *CIC/17* c. 1871, §2, if a true judicial procedure would have been observed.

judge, summarizing the case. After this time, however, records do not include written decisions with any explanation or reasoning. Perhaps the judges initially experimented with a more formal procedure before abandoning it in the face of an overwhelming number of cases. The single judge acting thereafter does not appear to have been obliged to explain his decision in writing to anyone; the parties are merely informed of the decision by form letter.

Insofar as the object of the decision was, as described above, the relatively simple matter of whether or not civil divorce or separate maintenance would address the problems between the parties, there was often little need for a detailed factual examination of the case. Resolution of a factual dispute between the parties about the state of their marital relationship was not relevant if *neither* of the parties' accounts could justify civil divorce or separate maintenance.

The original creation of the Court was in the practical context of emergency legal assistance to impoverished women and their children. The necessity of permission for civil action was taken for granted as an assumed fact. Beyond this, the immediate practical problem which precipitated the creation of the Separation Court *at that time* was not the problem of disobedience to ecclesiastical authority, but the fact that impoverished mothers needed a quicker way to receive permission for the civil actions necessary to feed their children. A quick decision was therefore necessary, and hence the aim that "[t]he initial hearing is usually held within ten days of the docketing of the case."[139] It may well have been for the same reason that "no fees or Court costs are accepted in the Separation

[139] *Marriage Laws of the Catholic Church*, 7.

Court,"[140] in contrast to fees of $25 for a formal nullity case.[141] Similarly, with this purpose in mind it is understandable that the fact-finding investigation rarely ventured beyond the verbal accounts of the two parties. "The hearing is informal and the testimony is taken according to the discretion of the judge, who may summon additional witnesses. After the judge has all the facts he renders an immediate oral decision in the presence of the parties. The respective pastors of the parties are notified of the decision by mail."[142] Where the Court did investigate further it seems to have asked only professional witnesses: psychologists, physicians, and priests. Among the cases seen in this study there are none with witnesses who knew the parties outside of a professional capacity, such as friends or family members. For the Court's original purposes, this abbreviated procedure was not merely adequate, but in fact necessary for the Court to achieve its ends; additional time taken to increase the chances of making the most accurate decision opposed the goal of facilitating emergency financial assistance.

Nevertheless, if the Court's summary procedures were essential for a necessarily expedient process to receive permission to approach the civil authorities or even for the ordinary's decision to suspend the obligation of conjugal living, the procedures were much less apposite for the requirements of a true case of ecclesiastical separation of spouses. As noted elsewhere, the Chicago Separation Court seems to have vacillated in its emphasis on the relevance of canonical separation as described in *CIC/17* cc. 1128-1132 (in continuity

[140] Ibid.

[141] See ibid., 17. As a point of comparison, the median monthly gross rent in Illinois in 1950 was $47. See UNITED STATES CENSUS BUREAU, Historical Census of Housing Tables, https://www2.census.gov/programs-surveys/decennial/tables/time-series/census-housing-tables/grossrents.pdf (December 13, 2024), 2.

[142] *Marriage Laws of the Catholic Church*, 8.

with precodified law), versus permission to approach the civil authorities (as cited in c. 126 of Baltimore III regarding separate maintenance, and sometimes asserted as necessary *ex natura rei*). However, awareness of the dual nature of the Court was not entirely absent in the more thorough expositions of its business: "In this court […] one spouse petitions the Cardinal-Archbishop, through his judge-delegate, for permission to live apart from the other spouse. In most cases, he also seeks permission to resort to the civil courts to implement this."[143] Literature contemporary to and philosophically consistent with the approach of the Chicago Separation Court universally describes the weightiness of separation of spouses: "separation from bed, board and cohabitation […] is a *res gravis* inasmuch as it is public, it is contrary to the obligations of marriage, and is fraught with dangers to the consorts, especially the danger of incontinence."[144] Even allowing for the fact that the Separation Court followed an administrative rather than judicial procedure, the procedural and factual basis for such a weighty decision as demonstrated in the records of individual cases was surely inadequate to make such a decision.

The change legislated by Meyer in 1960 placing more responsibility on pastors and delaying recourse to the Separation Court is consistent with a diminished need for emergency legal relief, which might have given the Separation Court the opportunity to conduct a less hurried, more thorough examination. However, this change coincided chronologically with a growing lack of appreciation, understanding and belief in the services of the Separation Court at all, and its personnel and procedures never grew to meet the challenge. Its decision-making staff remained composed of priests volunteering one

[143] Ibid., 6.

[144] FORBES, The Canonical Separation of Consorts, 142, quoting TRIBUNAL OF THE ROMAN ROTA, *coram* JULLIEN, 6 August 1930, in *Sacræ Romanæ Rotæ decisiones seu sententiæ*, 22 (1930), 524, no. 2.

day per week as a secondary assignment, apparently without the will or ability to conduct ongoing investigations. Summary justice was dispensed in emergency-style hearings even when there was only rarely a true time-bound emergency. This must be seen in contrast to the rapid growth in infrastructure for marriage nullity,[145] which illustrates what could have been possible for an invigorated Separation Court. Yet the rapid numerical growth of marriage nullity cases perhaps also played its own role in the gradual decline of the Separation Court; the easier it was to have the marriage declared invalid, perhaps the less incentive there was to address the possible illiceity of separation or divorce within that marriage.

The procedures employed by the Separation Court did not seem to evolve as the need for it changed. Over time, as the Separation Court's point of use changed from being an urgent measure prior to filing for emergency civil relief, to a more generalized and "pastoral" encounter facilitating reconciliation with the spouse or with the Church, encouraging careful consideration of the decision to end the common conjugal life, or removing a prohibition on admission to the sacraments following a civil divorce filed perhaps years earlier, these condensed procedures were no longer adequate to meet the new needs.

[145] "In 1954, a new jurisprudence, that is the interpretation of the matrimonial consent and its application to cases, was taught in certain decisions of the Roman Rota […]. This new jurisprudence had a profound effect upon tribunals around the world. The volume of work swelled" ("Metropolitan Tribunal," 126). For our purposes, it is not important whether or not the "new jurisprudence" began objectively and specifically in 1954, but that its effect was felt in Chicago in increasing the number of nullity petitions from that time.

4.7.4. The Promises to Be Made

One recurring item, found across the life of the Separation Court with minor variations, is the promises to be signed by the parties as a necessary condition for receiving any permission. Foundation for this practice may be found in, e.g., the 1906 response from the Holy Office,[146] which stated that a civil divorce could be allowed in that case "provided the woman under oath declares before the bishop or his delegates and two witnesses that she is not seeking to break the true vinculum of the marriage but only intends to be relieved of its civil effects and provided that scandal be averted in whatever way the bishop decides,"[147] a response of which the founding members of the Separation Court were aware.[148]

As early as 1945, a handwritten note from a judge (to another judge or to a notary) states, "[g]ive him permission to sue for divorce on grounds of adultery […]. Be sure promises are signed i.e. no courtship and don't intend to. Won't publicize fact of divorce. Perjury signing makes unworthy to receive sacraments."[149] It seems there was already a concept of a nascent standard set of "promises" echoing the concerns of the Holy Office's 1906 reply, even if the judge found it necessary to remind the recipient of the note of what those promises were to be. On a notecard with chancery office letterhead print, the husband wrote by hand and signed: "I affirm that I will not keep company; that I will not publicize fact of divorce; that perjury in signing makes me unworthy to receive sacraments."[150]

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[146] Not separately published, but cited in GASPARRI, *Tractatus canonicus de matrimonio (1932)*, 337, no. 1324.

[147] English translation in CASEY, "The Practice," 66.

[148] See ibid., 65–66.

[149] ACA SC S4274, undated note, late 1945.

[150] Ibid., undated note card, after November 12, 1945.

Refusal to make these promises would result in denial of the requested permission: in one case "the last annotation we have on our file [circa 1945] is that Father Goldrick refused to give her permission for divorce since she will not sign a promise to refrain from keeping company with the opposite sex, therefore, you may safely presume that she has no permission to proceed in the civil courts for divorce."[151] This situation was resolved when the wife, fourteen years after initially refusing to make the promises, signed the promises.[152]

By the mid-1950s, a further declaration had been added to the three promises (and which would only have been applicable when divorce permission was given): "I realize that, despite civil divorce action, I cannot enter another marriage."[153] At a similar time, the increasingly typical yet handwritten promises were supplanted by preprinted note cards with the text of the promises, ready for the party's signature and date. This kind of preprinted stationery speaks to both the growing institutionalization of the Separation Court as a whole, and the standardization and commonplace use of the promises. These cards are found in almost every case from the mid-1950s to the late 1960s; indeed, for many cases they are the only records remaining.

In a meeting of the Separation Court judges in 1966, it was "suggested that the signing of promises when a party […] is granted permission for divorce, be abolished. It was pointed out that legally the innocent party has the right to defend himself, but because in all honesty and sincerity he cannot sign a promise of never keeping company, he is

[151] ACA SC S2649, letter to pastor, May 13, 1959.

[152] See ibid., note card, July 20, 1959.

[153] ACA SC S9360, handwritten note, February 2, 1954.

denied ecclesiastical permission for a divorce."[154] It was proposed that "the 'Promises' be amended to 'Statements of Conscience,'" taking the substance of the promise and modifying it to a statement of fact to be acknowledged by the party, no longer promising e.g. that the party would not "keep company" or remarry, but acknowledging the consequences if he would do so. These proposals address something of a lacuna in the prior requirements, which imposed an additional condition[155] on divorce permission which was not strictly related to the need for the divorce itself. The proposal seems to have been accepted, since an addendum to the Interim Report mentioned in passing that "the 'Signed Promises' are no longer mandatory in Divorce Cases,"[156] reminding judges "of their serious obligation to inform and instruct both parties to the contemplated civil divorce action," and then listing the substance of the facts of which parties were to be reminded, beginning with the fact that "in spite of any final divorce decree, they are nevertheless still married in the eyes of both God and His Church," and extrapolating from there. This transition from "signed promises" to "inform and instruct" seems to have been haphazard—examples of signed promise cards dated after their supposed abolition can be found[157]—but is consistent with the general trend away from enforcing the Separation Court's decision and toward an idea of encouraging or allowing parties to use their own judgment.

[154] Minutes of Meeting of Separation Court Judges Held on March 21, 1966, 2.

[155] The condition of "not keeping company," refusal of which prevented the petitioner from receiving the requested—and otherwise acceptable—permission for divorce.

[156] COMMITTEE OF DELEGATE JUDGES, Interim Report – Restatement of Separation Court Policy and Temporary Guidelines, 9.

[157] See e.g. ACA SC S-6222-A, cards signed November 19, 1969.

4.7.5. Denial of the Sacraments

From the beginning, parties were faced with the threat of prohibition from receiving the sacraments if they would ignore the Court or disobey its instructions. Denial of Christian burial was routinely added to the threat. In some cases, the denial of the right to receive the sacraments was stated to be directly imposed by the Court itself: "since it is the considered opinion of our court that you are the responsible party for the breakup of your marriage, […] we hereby deny you the right to receive the sacraments, and wish to inform you that in the event of your death you will be denied Christian burial." In other cases it was threatened to be within the power of the court if the party would disobey its decision: "If further civil action is taken without the necessary ecclesiastic permission, we will be forced to deprive the guilty party of the sacraments and Christian burial in the event of death."[158] At times, this deprivation of the sacraments was stated to be imposed as a result of failure to respond to the Court's citation:

> [W]e wish to advise you that it is the decision of our court that since you have been unwilling to cooperate with this office your absence is a confession of your guilt and we are forced to believe that your husband's story is a true one. Because of your disobedience, you have rendered yourself a Catholic in bad standing and are deprived of the sacraments and Christian burial in the event of death.[159]

In yet other cases, the consequences are described not as being imposed directly by the Court, but incurred as a consequence of disobedience to the court, following the Court's denial of permission for civil divorce:

> I regret to inform you that, unless you drop all civil divorce proceedings immediately, you must take the following consequences of your disobedience:
>
> 1. You cannot be considered a Catholic in good standing

[158] ACA SC S4622, letter of October 30, 1946. Identical text in e.g. S4181, letter of August 29, 1946.
[159] ACA SC S4181, letter of August 29, 1946.

> 2. You cannot receive the sacraments
>
> 3. If you die unrepentant you will be refused Christian burial.
>
> If I do not hear from you within a week from the date of this letter, I will be forced to presume that you are unwilling to obey this command of the Church […].[160]

Similarly, Mrs. O'Malley was informed: "We must inform you that because of your disobedience to the ecclesiastical authority in this office you have thereby rendered yourself unworthy to receive the sacraments. Removal of this censure will depend upon your appearing in this office and abiding by the decision rendered."[161] "Censure" does not seem to be used in any canonically meaningful way (cf. *CIC/17* cc. 2241–2414[162]), but is an example of the Separation Court judges' grandiose use of words exaggerating their own power.

In most cases there is no evidence that the common threat to inform the party's pastor was carried out, but sometimes it was. One such example states,

> We wish to advise you that the marital difficulties of Mr. and Mrs. Gorski have been pending in our office for some time. Mrs. Gorski has refused to cooperate with this office. Will you kindly call upon Mrs. Gorski living at [address] to inform her that because of her disobedience, she is deprived of the sacraments and Christian burial in the event of death. I will appreciate receiving a report of your interview.[163]

Sometimes the Court went further than denial of the sacraments and Christian burial, and invoked the concept of "excommunication," as this letter to a husband in regards

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[160] ACA SC S262, letter of May 5, 1942. The same theme of obedience to ecclesiastical authority is evident in e.g. this letter to the husband's mother: "… I will be forced to presume that he is unwilling to obey and I will have to inform his pastor that he is a Catholic in bad standing, he cannot receive the sacraments, and, if he dies unrepentant, he will be refused Christian burial. These, as you can see, are very serious consequences, therefore I hope you can persuade your son to act in obedience to the Church" (ACA SC S262, letter of May 19, 1942).

[161] ACA SC S-6221-A, letter of October 20, 1969. Emphasis added.

[162] The overwhelming majority of those threatened by the Separation Court had not attempted civil remarriage at that time, and therefore were not potentially subject to the excommunication or interdict which could be imposed by the Ordinary in accordance with *CIC/17* c. 2356.

[163] ACA SC S4181, letter of August 29, 1946. No report of the pastor's "interview" with the wife is recorded.

to his wife's actions: if she continues with divorce "she is automatically excommunicated from the Church and refused the right to receive the sacraments."[164] Needless to say, the process prescribed by law for the imposition of the censure of excommunication has not been attempted even in part. Similarly, the Council of Catholic Women reported that a "wife admitted knowing that going through with this action means being excommunicated from the church."[165] At best, these are loose uses of the word "excommunication" as a commonplace synonym for deprivation of the sacraments; at worst, it is a further example of the misappropriation of canonical language and failure to observe due process.

Although examples of different consequences, and for different actions, have been noted above, in general it does not appear that these distinctions had meaningful significance to the judges. There is no pattern to the different usages. The principal purpose is to discourage or punish perceived wrongdoing; canonical details are less important. The Separation Court judges were accustomed to making these threats (likely many times a day in writing), and to wielding this power, and the details (such as the legal nature of the threatened disciplinary measure, and the source of the judge's power to impose it) were of lesser importance to them.

4.7.6. Post Factum Permission

The Court had modified procedures for addressing the situation where the divorce had already occurred, which it called a "post factum" situation. The guideline document for post factum permission given in the late 1950s or early 1960s is perhaps the most detailed surviving exposition of any aspect of the Separation Court's decision-making.

[164] ACA SC S4274A, letter of May 5, 1955.

[165] ACA SC S4272, referral card dated December 7, 1945.

Running onto four pages of single-spaced typed text, the document gives precise criteria for different situations, depending on whether or not the party knew divorce permission was necessary; who was "the guilty party"; whether or not there was adultery; the religion of the other party; and the time elapsed since the divorce; all clearly drawn from a thorough study of contemporary manuals of canon law and moral theology. The criteria acknowledge the unique nature of adultery as a cause for separation (an awareness almost universally absent among the other extant documents and case records) by acknowledging "if there was proven adultery before the divorce, no attempt at reconciliation may be forced,"[166] in contrast to other situations where the party must "make a serious attempt at reconciliation. He (or she) is obliged to approach the party who had been guilty in the marriage […] and offer reconciliation."[167] The author of this memorandum took seriously the obligation to resume a common conjugal life even after civil divorce, and the role of ecclesiastical authority in deciding this:

> If the guilty party […] is willing to reconcile, he is put on a six month probation period (or more) in order to prove his sincerity. The innocent party is obliged to cooperate in this reconciliation, by seeing him occasionally, by permitting him to prove himself, etc. If, after the probation period, the guilty party has proved to our satisfaction that he is sincere and has reformed, the divorce must be set aside and common life resumed.[168]

There is some variation depending on whether the other party has remarried. If he has, that party's letter of citation for reconciliation may be rather nominal: "This letter will be carefully thought out so that there will be no danger of the remarried party accusing the Court of trying to break-up his second marriage"[169]—a reference to the recurring specter of "alienation of affection" lawsuits. Nevertheless, the Separation Court was in fact trying

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[166] Memorandum "Post Factum Divorces," ACA ADMNA135010, n.d., 3. Emphasis in original.

[167] Ibid., 2.

[168] Ibid., 1–2.

[169] Ibid., 2.

(if not always very vigorously) to break up the second marriage: "If the remarried party agrees to give up his second wife and reconcile with his true wife […] he is obliged to civilly divorce his second wife and rejoin his true wife after a new [civil marriage] license has been obtained."[170] I did not encounter any case in which such a "carefully thought out" letter was used, and certainly no post factum case where reconciliation was ordered or attempted.

The judges were warned,

> Matrimonial Judges should not give [the] impression that permission to return to the Sacraments [in a post factum situation after divorce] is granted easily upon signing the required form. It was felt that many would obtain their divorce without permission of Chancery, and then seek permission to return to the Sacraments.[171]

There is no indication whether or not, as feared, parties consciously acted according to the maxim that it is "less difficult to obtain forgiveness for it after it was done, than permission for doing it."[172] Nevertheless, whatever "impression" was given, it does appear in fact "that permission to return to the Sacraments [was] granted easily upon signing the required form." In practice, the procedure for post factum permission was relatively simple. The petitioning party would simply be asked to sign a version of the normal promises card, including (as applicable) the additional stipulation "I did not know it was necessary to secure the permission before continuing to a divorce."[173] If the party made the required

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[170] Ibid.

[171] Minutes of Meeting of Separation Court Judges Held on September 4, 1964, ACA ADMNA1350596 Separation Court Committee, 1964, 4. Emphasis in original.

[172] A. STRICKLAND, *Lives of the Queens of England, from the Norman Conquest*, vol. 9, London, Henry Colburn, 1846, 39. Appropriately, the maxim seems first to have been used regarding the obtaining from the pope of a dispensation for marriage.

[173] Found in e.g. ACA SC S4727, note card dated August 24, 1946.

promises, "permission" seems always to have been granted with no further questions, criteria or process.

The "permission" granted in a post factum case was not generally referred to as retrospective permission for divorce, but permission to receive the sacraments. The criteria used by the court in post factum cases did not evaluate the reasons or decision for separation or divorce according to any criteria remotely analogous to a request for prospective divorce permission. The other spouse was often not cited (sometimes in conformity with the criteria for citation in the Memorandum "Post Factum Divorces"; sometimes not). The response to the petitioning party refers not to divorce but to permission regarding the sacraments: "it is the decision of our court that you may frequent the sacraments."[174] Implicit in this kind of decision is the idea that the party was previously *ipso iure* prohibited from receiving the sacraments, even though civil divorce without permission did not truly create such effect in law and there is no evidence in any of these cases that the party had been expressly prohibited from receipt of the sacraments. For example, one husband told the Separation Court that "Father Capra at Our Lady of Sorrows Church informed me that it is against church laws for divorced persons to receive the sacraments, unless they receive permission from the Chancery office. As I did not know this fact until told by Father Capra, I would like to secure permission to receive the sacraments at this time."[175] The Separation Court did not tell the husband that what he had been told by his pastor—"that it is against church laws for divorced persons to receive the sacraments, unless they receive permission from the Chancery office"—was incorrect, but seemed to accept this as an accurate basis on

[174] ACA SC S4627, letter of October 30, 1946.

[175] ACA SC S3345A, letter of June 1, 1959.

which to consider the petition. In contrast to the practice, the Memorandum "Post Factum Divorces" understands that the court's role was to consider whether "permission for the divorce be granted"[176] in retrospect, albeit according to criteria based primarily on whether reconciliation was possible, and still not according to the usual criteria for considering the necessity of divorce.

4.7.7. "An Indifferent Decision, Made in Haste"—Appeals Against the Court's Decisions

The judges of the Separation Court do not seem to have been accustomed to challenge of their decisions. When challenge occurred, their reaction was often obfuscation, denial, and ignoring the substance of the parties' complaints. Nevertheless, by reading between the lines, at times we can see that those responsible for the Court were prepared to consider the possibility that an incorrect decision had been made.

The only general description of the Chicago Separation Court's appeal[177] procedure (apart from what may be deduced from individual cases) is found in a pamphlet published in cooperation with the Archdiocese in 1953:

> *Rehearing and Appeal.* If either party is dissatisfied, he may request a rehearing or an appeal and this request is never denied. The right to rehearing is never lost by failure to preserve it by procedural steps. On rehearing the case is transferred to another judge for a complete hearing *de novo*. If the decision on re-hearing is contrary to the first decision the case is referred back to the first judge. The two judges then attempt to agree. If they cannot agree a three judge administrative court is specially set up to hear and decide the case. Two concurring decisions normally close the case. However, upon a showing of matter not covered before, it is always possible to secure a new hearing before a new judge. In this respect no case is ever fully closed. Moreover, a party may appeal to the Chancellor

[176] Memorandum "Post Factum Divorces," 2.

[177] The term "appeal," strictly speaking, applies only against the exercise of judicial power; "remonstration" and "recourse" would be the applicable terms to challenges against the exercise of administrative power. As previously discussed, the authority of the Separation Court seems to have been grounded in administrative power, though sometimes clothed in judicial garb. One example of this imprecise appropriation of judicial language is the term "appeal." Although it is inaccurate, it will be used here since it was the word universally used by the Separation Court and its interlocutors.

> of the Archdiocese. In addition every Catholic always has the right to appeal his case directly to the Pope.[178]

Traces of these policies can be found in the individual cases for which appeal was attempted, but they do not seem to have been wholly followed. In particular, the right of appeal to the Holy See was in practice denied by Archdiocesan officials.

In a case heard in 1954, the female petitioner stated that "in order to maintain my teaching certificates which is my means of living and future life, the need for permission of my church for a divorce is most pressing."[179] In a rather drawn out process in which the petitioner's civil attorney was very involved, Monsignor Burke seemed to deny granting permission for divorce on the ground that she had not claimed any reasonable justification for civil action in the civil court itself. Dissatisfied with this decision, the petitioner sought the intervention of the vicar general, Monsignor Casey. She complained that Burke effectively asked her to perjure herself by changing her testimony in the civil court by admitting desertion on her part when according to her account it was the respondent who "deserted me in addition to mental and physical cruelty which caused the death of my unborn child. I am asking your intercession in my behalf for my right as a Catholic to take

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[178] *Marriage Laws of the Catholic Church*, 9. Emphasis in original. This mention of a "three judge administrative court" has echoes of the procedure suggested for a hypothetical appeal or recourse procedure proposed by Forbes and endorsed by King. As Forbes describes it, "[t]he Ordinary, in delegating his power, could limit it thus: 'I delegate you for these cases, but reserve to myself or to a board of three priests the right to review a negative decision before your decree becomes final.' […] In this way the case would be presented to the Ordinary or delegated board for review. Such a step does not strictly constitute the making of a recourse; rather, it is a plea for a rehearing of the facts in the case by the same juridical authority in the person of the Ordinary. This would not be recourse in the proper sense of the word, but merely a petition for a review of the acts of the case, similar to right of "recourse" given to a pastor against the Bishop's decree of removal (Canon 2153, § 1). […] If the Ordinary or his board upholds the previous act of his priest-delegate, then the way for recourse to the Holy See is still open for the aggrieved party" (FORBES, *The Canonical Separation of Consorts*, 198). See KING, *The Canonical Procedure in Separation Cases*, 137.

[179] ACA SC S3158A. It is not at all clear why she required permission to divorce in order to "maintain […] teaching certificates." Perhaps she was employed as a teacher in a Catholic school or was taking classes in a Catholic college.

this to the Holy See." The matter was not referred to the Holy See, but Casey replied briefly that the case had already been reassigned away from Burke. The case was transferred from Burke to two other judges; however, there is no record of the new "panel" or "tribunal" ever meeting, or of a new decision being made.

A rather extensive case from 1961 shows that at times, the Separation Court could reverse its prior decisions and clarify its position, even as it also demonstrates that procedures were generally inadequate to address complex issues and that the judges were often unprepared to consider the thoughtful observations raised by eloquent and knowledgeable parties. The written record begins with a letter to the wife: "It is the decision of this court that you are obligated to return to your husband and resume living a normal married life. This reconciliation must be effected by August 15, 1961. Failure to do so will incur for you the penalty of being denied the right to receive the sacraments."[180] The wife's reply gives detail of the informal and even shambolic nature of the procedures followed in the Separation Court around that time:

> My husband and I have been married since July 17, 1946. Because I found I could no longer live in a situation which had become intolerable for me, I left him on May 19, 1959. After seeing our parish priest immediately, we have been into the Chancery office four times – in July 1959, July 1960, November 1960, and in July 1961. In addition, I have been under the psychiatric care of Dr Maslanka since May 1959.
>
> Subsequent to our interview at the Chancery office in November 1960, my husband and I were referred through the Catholic Family Consultation Service to Father John Kuhlmey, who met with us about once a week, together and separately, from December until May, when we decided we had reached an impasse, and discontinued the sessions.
>
> Since all efforts toward reconciliation have clearly failed, my husband plans to divorce me on grounds of desertion, a decision with which I agree. Because of the impending divorce action, I asked Father Kuhlmey in June to arrange an interview for us at the Chancery office. I hoped that we might be given permission for a civil divorce, or at least that my status as a member of the Church would be preserved.

[180] ACA SC S9677, letter of July 13, 1961.

> On July 13, we were interviewed by Father Edward M. Barron. We entered his office at 11:15, and were out by 11:45. When we arrived, Father Barron thought we were coming into the Chancery office for the first time. He didn't know if we were living together or not, if we had any children, anything of the background of our difficulties, nor anything of our efforts to correct them. With three people present in the room I think I was given about 10 of the 30 minutes to try to review the whole situation, and my husband 10 minutes for a rather opposite story. Father Barron promised to look into the situation, find out what had gone before, contact me, etc., and contact us again in a few weeks.
>
> The next morning in the mail I received the letter from him, which clearly must've been written immediately after we left, informing me that I must either return to my husband by August 15, or be excommunicated.[181] I understand a brief phone call was made to Father Kuhlmey, and I am sure there was no possible time for any further investigation.
>
> Since, under the circumstances, reconciliation by August 15 is impossible, returning to my husband is out of the question, and so I have actually been given no alternative.
>
> I feel that I have made every effort to cooperate with each of the nine priests I have seen in the last two years. If I could feel that this decision has been reached after some review of the facts and circumstances, perhaps it would be easier to bear. This was however an indifferent decision, made in haste, and is in my opinion most unfair.
>
> Whether telling you this will make any difference to me, I cannot know but I wanted to tell you what has happened to me. It seems to me that, in matters of this nature, it would be well if time could be taken for some review of the case before a final decision is reached.[182]

The reply from Monsignor Burke does not explicitly admit to or apologize for the organizational incompetence detailed by the petitioner. Nevertheless, from the fact that it does not deny the petitioner's narrative of events and states "I would be very glad to review the decision given by Father Barron,"[183] it ought to be understood in context as an implicit admission of failure on the part of the Separation Court. Then follows a rather extensive correspondence between the Monsignor Peter Shannon, to whom Burke had reassigned the

[181] In fact, the letter did not mention "excommunication" specifically, but denial of the right to receive the sacraments.

[182] ACA SC S9677, letter of August 4, 1961.

[183] ACA SC S9677, letter of August 18, 1961.

case, and three physicians consulted by the parties.[184] Shannon summarized the object of his consideration as "whether Mrs. Woods should be made to return to her husband or whether permission should be granted for a civil divorce,"[185] as though conjugal living and civil action were two alternatives on the same spectrum rather than related but distinct matters. In a memorandum noting his telephone conversation with one of the physicians, he explained how he weighed the facts of the parties' relationship against the extent to which the civil courts could remedy the problems:

> From the reports and facts of the case, I could not see sufficient reason that permission for a separation should be sufficient to allay the wife's fears. [The psychiatrist] felt as before that forcing a reconciliation would be most damaging to the wife and would have no effect, since she would refuse to return. The doctor holds little hope that a reconciliation can be possible at some future date, both because of the wife's condition and because the husband has not been willing to give an inch i.e. he sees the entire marriage problem as one of the wife's. […]
>
> Permission will therefore be granted for an indefinite separation, with the admonition that the property settlement is to be obtained outside of court and that both should continue with psychiatric treatment. It is my belief that the husband will probably file for divorce; in which case permission to counter-sue should be given to the wife.[186]

The original decision was then reversed by Shannon:

> After much thought and study, aided by reports from Doctors Amaros, Maslanka and Wilson, I have reached the following decision in your case:
>
> Permission for indefinite separation.
>
> The above decision is predicated on two conditions:

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[184] The modern reader, accustomed to the HIPAA (Health Insurance Portability and Accountability Act) era beginning in 1996, may be surprised at the ease with which many physicians, in this case and others, disclosed private information regarding the parties to the Separation Court without any kind of written release. Although "physician-patient privilege, added to Illinois law […] [was] a recent development" (I.S. FRIEDMAN and M. WEINBERG, "Matrimonial Law in Illinois in the '50's," in *DePaul Law Review*, 10 [1961], 453) in 1959, its effect was to shield physicians from the *obligation* to testify in civil court; it did not establish a right to privacy on the part of the patient (see E.W. CLEARY, "Developments in Evidence – 1950-1960," in *DePaul Law Review*, 10 [1961], 432) and therefore would not have prevented physicians from *choosing* to testify to the Separation Court.

[185] ACA SC S9677, letter of October 13, 1961.

[186] ACA SC S9677, memorandum of November 30, 1961.

1. No court action. Therefore, a property settlement should be decided by mutual agreement outside of court, with the aid of a lawyer or lawyers.
2. Both you and Mrs. [/Mr.] Woods should continue with psychiatric treatments, with the hope that through the treatments, together with God's grace, you may eventually reconcile your differences.[187]

The husband, however, was not satisfied with this result, and submitted his own very thorough letter, appealing against the second decision. The husband reported the procedural history of the case, consistent with the account given by the wife. He continues,

> Reasons for appeal:
>
> 1. That Father Barron's decision of July 13, 1961 was based upon adequate knowledge and proper evaluation of the facts relating to our marital difficulties and represented proper application of the Catholic principles of marriage.
>
> The records at the Chancery office will show that my wife has repeatedly stated that such matters as adultery, alcoholism, desertion, nonsupport, physical cruelty, or other actions normally construed as adequate justification for dissolving a marriage were not involved. […]
>
> Such other matters as have been raised by my wife to justify her refusal to resume our marriage are vague but apparently in her eyes amount to incompatibility or mental cruelty. Even under Illinois civil law these are not acceptable reasons for separation or divorce. Because of his extensive discussions, Father Kuhlmey should have been in the best position to determine whether my actions to any extent constituted mental cruelty.
>
> 2. That Father Shannon's reversal of Father Barron's decision and the granting of an indefinite separation was not based on any relevant facts or proper application of Catholic principles on marriage. Again no justification normally considered as adequate was ever alleged. While his reasons are not specified, only three items were disclosed in the interview and presumably constituted the basis.
>
> a. My wife again alleged impotency but after examination by Dr Wilson, this was again withdrawn. It is hoped that further time need not be spent on this matter. It is an accepted principle in common law that impotence as a basis for annulment must be advanced in a reasonable period after the marriage. 13 years is not accepted as a reasonable period and to even investigate the possibility of an annulment after this issue had been disproved as on two previous occasions can only be considered to be grasping at straws to avoid the basic issue.
>
> b. Father Shannon told me that the Church could not force my wife to return against her will. This is obvious since the church has not the power to force any member in any respect. Issues can only be decided on the basis of an applicable dogma and it is then up to the faith and free will of any Catholic to act accordingly or otherwise.
>
> c. Father Shannon also stated that information from Dr. Maslanka indicated in her emotional condition my wife could not return without a nervous breakdown. This matter should be decided by the Chancery on the basis of a religious not psychiatric problem. When asked for a recommendation Dr. Amaros refused, writing that it was

[187] ACA SC S9677, letter of December 2, 1961.

> not in his proper scope. According to my wife, Dr Maslanka also wrote that he was unable to make any recommendation. It is clearly then not the function of Father Shannon to base his decision on psychiatric considerations.
>
> 3. It is my contention that Father Shannon's decision is inconsistent internally.
>
> a. An indefinite separation is granted – this implies a substantive reason; however, court action is not to be taken – this implies that sufficient reason does not exist even in view of a 2½ year separation.
>
> b. Joint property is to be divided yet we are to continue psychiatric treatments in hopes of a reconciliation. The continuance of our separation and the dissolving of joint property – including our home which I have maintained – would only serve to eliminate whatever chance of reconciliation now exists.
>
> 4. It is an improper exercise of Church authority to order a division of property held by a couple whose religious and civil status is not disturbed and may not be changed by the terms of the decision. Such an agreement would constitute a voluntary separation in civil law; my present position in civil law is that my wife has deserted me without justifiable course and the existing situation cannot be considered in any respect voluntary on my part. It is contended that in this respect my legal position and rights cannot be involuntarily altered by the Church. My wife has a good income and is not in any immediate need, if this were the case such needs would be freely met by me.
>
> 5. The result of this decision was evident in a discussion with my wife on December 10. She stated that the indefinite separation constituted a permanent separation thus ending the matter. She also indicated that under no conditions would she be interested in a reconciliation – this attitude has been repeatedly expressed in interviews at the Chancery office and with Father Kuhlmey.
>
> In summary my position is that a valid marriage exists, that my wife has abandoned the marriage relationship, that such desertion was without normally accepted factors of justification, and that she is absolutely unwilling to resume our marriage now or in the future regardless of conditions or circumstances. Consequently, since this situation has existed for 2½ years and considerable attention and consideration has been given by the Catholic Church, it is respectfully requested that Father Shannon's decision be reversed and that the Church direct that the marriage be resumed. In the event that my wife is unwilling to accept such a decision, approval is requested to legally terminate the marriage. My apologies for the great length of this letter but it is hoped that you will carefully consider my appeal.[188]

It is evident that the husband has a clear understanding of the basic reasons in canon law for separation of spouses, and of the criteria for deciding whether or not recourse to the civil authorities is to be permitted—and furthermore, whether for divorce or merely for civil separation. He reasonably explains how the separation permitted by the Church, yet without permission for civil action, would weaken his position and threaten his rights in

[188] ACA SC S9677, letter of December 13, 1961.

civil law. Shannon reacted by explaining his decision not to the husband but in a memorandum to Monsignor Quinn, the judicial vicar:

> A forced reconciliation would be in order, were it not for the mental difficulties of Mrs. Woods. There is not sufficient reason for divorce permission. In no way do I insist on a property settlement. What I stressed under condition number one of my letter of December 2, 1961 was that there should be no court action [emphasis in original]. I believe the records will show that Father Barron reversed his decision of July 13 (many of the records are on file with the Catholic Family Consultation Service). To my mind this is not a case that should be submitted to a board of three judges, since the case had already been heard in the 'appeal' stage by myself and since the decision is based on the psychiatric report from Dr. Maslanka, the only question that you must answer is whether Dr. Maslanka's opinion should have been followed.[189]

The basis for the conversation between Shannon and Quinn seems to be that a further appeal was to "be submitted to a board of three judges" if a second judge disagreed with the decision of a first judge (as stated in the Separation Court's public documentation of its process).[190] Here, however, the second judge argues against the necessity of such a step, on the basis that the second decision was informed by the use of an expert witness. Nevertheless, he is open to the possibility of recourse against the second decision, at least in the circumscribed question regarding the adoption of the expert witness's conclusions. Shannon acknowledges the husband's claims in passing but does not address them in detail. For example, he does not address the husband's points regarding the justification for a separation specifically for an indefinite period, or the threat to the husband's civil law rights by making a private property settlement.

Quinn, as judicial vicar, exercises oversight of Shannon, head of the Separation Court, who in turn supervised Barron who made the first decision on the case. Quinn responded to the husband:

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[189] ACA SC S9677, memorandum from Peter Shannon to John Quinn, n.d. [but must be December 13–19, 1961].

[190] See *Marriage Laws of the Catholic Church*, 9.

> This will acknowledge receipt of your letter of December 13, addressed to Monsignor Burke, in which you ask for an appeal of the decision of December 2 by Father Shannon, of this office. Please be advised that at this time the Separation Court of the Archdiocese of Chicago will not entertain the notion of an appeal. The decision of Father Shannon was that there should be no court action. He did not insist on a property settlement. The decision was based upon the report of the doctor. We cannot, at this time, see the need for reconciliation because of the mental difficulties of Mrs. Woods. Please follow the recommendation given under number two by Shannon.[191]

The appeal to third instance was thereby effectively rejected *in limine*. While some of the husband's concerns are addressed at least obliquely, he does not receive an answer responding in kind to the detailed points he made. There is evidence of an internal process of appeals, and criteria for how they are to be handled; and indeed, the process overturning the first decision is evidence that complaints were not always dismissed out of hand at that time. Overall, however, the impression remains that the court officials did not feel obliged to explain their decisions to the parties even when the parties make relevant and detailed legal arguments (and much less obliged, to apologize for the careless procedures which led to the first decision, now rescinded). Twice, decisions were given and expected to be followed, notwithstanding the fact that neither decision was well-explained to the parties.

As noted in the introduction to this section, Mr. O'Malley in the case S-6221-A asked to appeal to the Holy See in 1969, but was effectively denied in three different ways: being told he could appeal in Chicago, ignoring the request to appeal to the Holy See; saying that "as a courtesy" he should request "permission to appeal" from the author of the decision; and most absurdly of all, saying that an appeal would require both parties to attend the Separation Court again, thereby giving the opposing party veto power over the very possibility of appeal. The last point in particular seems to illustrate the centrality to the process of the priest's personal meeting with the parties, together. Even in the cases for

[191] ACA SC S9677, letter of December 19, 1961.

which considerable documents still survive, the documentation is largely procedural. Except for the very earliest few cases and appealed cases, written documents do not address the substantive issues of whether or why a separation should be granted to the parties in light of the marital relationship between them, which were presumably retained only in the mind of the judge from his meeting with the parties. The number of cases and the resources devoted to the Separation Court did not allow anything more than a summary process without a written record of the evidence or reasons for the decision. In this case it is not at all clear why the first judge went so quickly from chastising the wife for an unjustified separation to granting permission for divorce. Without written acts, it would be difficult for another judge to reconsider the decision in the usual manner; he would need to rely on his own brief meeting with the parties, and possibly verbal comments from the previous judge, which does not seem to provide adequate basis for a complete re-evaluation.

A later case shows some of the same issues regarding appeals, and also some differences. In 1975, a pastor was advised that "Mr. and Mrs. Barrett have been granted permission to file for divorce by the Reverend Matthew McDonald."[192] Part of the evidence came from an interview with the wife alone by CFCS in 1969, six years before she contacted the Separation Court. In a later complaint to Cardinal Cody, the husband accused the Separation Court priest of surprising him with the meeting, of which he did not know the purpose. He wrote that after a ten-minute conversation, he was told "we are granting permission for a civil divorce. […] I did say that I thought we were in fact then engaged in a counseling session, not a divorce hearing. He replied that we can't force people to stay

[192] ACA SC S-7223-A, letter of November 7, 1975.

together or to undertake counseling against their will."[193] Even though it was always true that the Separation Court could not, practically speaking, *force* people to stay together or to receive counseling against their will, this fact did not matter to the Separation Court judges in the 1940s and 1950s, who were comfortable ordering parties to reunite on pain of denial of the sacraments and of Christian burial; and certainly, they would not have granted permission for divorce merely on the basis of one party insisting upon it.

A priest of a neighboring diocese, whose mother lived next door to the parties, then wrote a letter disagreeing with the court's decision, on the basis that the wife's account was false. The judge Father Zawistanowicz wrote to Monsignor Dolciamore, the judicial vicar:

> Mr. Barrett wishes to appeal the divorce permission given to his wife. […] The husband claims that an attorney spoke to Father McDonald first, and that he was given little opportunity to state his side of the story. He claims to have some interesting comments concerning the property involved. He would also like to bring a priest who knows him and his relationship to his children very well. I told him this was an extraordinary procedure. However, in view of the fact that his wife brought an attorney to the first meeting without his knowledge, he felt he should be accorded somewhat a similar opportunity. I agreed. I hope you will not mind listening to the priest a little should he in fact appear, which is uncertain. […] I have written the letter to the wife stating that the permission given is not revoked, but that its use is suspended during the appeal hearing. If she takes action in the meantime, it is her responsibility.[194]

It may have been influential that a priest was prepared to vouch for the husband. The wife was then advised,

> Recently your husband phoned our office to say that he wished to appeal the permission for civil divorce recently given you by the Reverend Matthew McDonald of the Separation Court. Since a marriage case is never officially closed,[195] it is my duty as Officialis or head of the matrimonial tribunal to afford your husband his right to appeal. The appointment has been set for Saturday, December 6 at 11 am with the Reverend Norbert Zawistanowicz. You are kindly requested to be present.[196]

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[193] ACA SC S-7223-A, letter of January 16, 1977.

[194] Memorandum, Dolciamore to Zawistanowicz, November 19, 1975, ACA SC S-7223-A.

[195] Presumably a reference, at least as a parallel place, to *CIC/17* c. 1903: "Cases on the status of persons never pass into an adjudicated matter […]."

[196] ACA SC S-7223-A, letter of November 20, 1975.

In contrast to what another recurrent was advised in 1969 (S-6221-A, *supra*), the respondent is described as having a "right to appeal," and—at the risk of reading the text perhaps more literally than the author intended—perhaps the appeal hearing was to take place with or without the petitioner's presence, as she is merely "requested to be present" for the appointment already set. This would be different from the case previously mentioned where the petitioner, by refusing to be present, could prevent the appeal from being heard.

The husband continues his account of the "appeal" session with Father Zawistanowicz:

> He tried to persuade my wife to consider counseling, but she was resolute in her refusal. […] He summed it up with the words "I see no reason to change McDonald's decision." […] I called Father Dolciamore to tell him how I had once again been deceived. I had been promised no summary decision without a thorough investigation. He said he doubted if we could get my wife into the tribunal third time. […] These priests do not attach great importance to marriage ties.[197]

Most interestingly, the man encloses a photocopy of the entry from the *New Catholic Encyclopedia* on separation in marriage.[198] The article, authored by King and citing other conventional mid-century texts on separation,[199] explains the reasons in law justifying a separation, and the canonical effects of a separation. The husband complains that none of these reasons was alleged to exist in his marriage. It is impossible for us to say at this remove whether or not these conditions were in fact present; what is evident,

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[197] ACA SC S-7223-A, letter of January 16, 1977.

[198] See J.P. KING, "Marriage, Canon Law of (§ Separation)," in *New Catholic Encyclopedia*, vol. 9, New York, McGraw-Hill, 1967, 283–284.

[199] Specifically: W.J. DOHENY, *Canonical Procedure in Matrimonial Cases*, Milwaukee, WI, Bruce, 1938; FORBES, *The Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128-1132*; HINES, *De coniugum separatione ac de civili divortio in iure canonico et in iure civili Statuum Foederatorum Americae Septentrionalis*; LE PICARD, *Communauté de la vie conjugale*.

however, is that the investigation conducted by the Separation Court did not seriously address whether or not the elements prescribed by law were present. King's article was an accurate statement of the legislation in 1967, and indeed in 1977. Yet by 1967, and especially by 1977, the actual text of the law distinguishing licit reasons for separation was a dead letter in the Chicago Separation Court, even as the institution continued its business. The priest responded in a brief letter of January 28, 1977. The matter concludes with another letter from the husband dated February 2, 1977, accurately accusing the priest of writing him an impersonal form letter which answered none of the specific issues raised in his letter to the Cardinal.

It is clear that by 1977, the attitude had changed from previous decades: the common life no longer enjoyed the favor of the law and the resolute will of one party was sufficient to give permission for divorce. The "appeal" does not seem to have been a true reconsideration of facts; or rather, there was only one relevant fact—the will of the petitioning party. Since the brief attempt at "persuading" her to attend counseling was unsuccessful, the result of the "appeal" must be the same.

4.8. Attitudes and Opinions regarding the Separation Court and Its Work

Different constituencies or stakeholders held different opinions and evaluations of the Separation Court and its work. Unfortunately, the extant records predominantly memorialize the thoughts of legal professionals, clergy and (especially) the priest-judges themselves; the opinions of spouses interacting with the court are under-represented, and the opinions of the general public are entirely absent. The scarcity of records of the views of the parties appears to be, in its own way, an indication of the lack of importance the separation court judges placed on this factor.

4.8.1. "A Useful Purpose" or "an Utter Failure"—Opinions of the Separation Court Judges

The judges generally report believing that they were performing a useful ministry, although how that was to be understood or defined is varied and often unclear. By 1968, one record suggests that the idea of giving or refusing permission is no longer held by the judges; they see their role as helping parties to solve their own problems and to live with their own decisions:

> It was the consensus of opinion that [the Separation Court] does have a useful purpose and the judges felt strongly that they do play an important role when helping people solve their marital problems. Most of them seemed to verbalize the idea that you help them come to a better decision as to what the future holds for them. To live comfortably with the decision whether it is separation or divorce or reconciliation.[200]

In a memorandum summarizing the nature and purpose of the Separation Court, one of its judges begins by quoting canons of the *CIC/17* on separation and canons 124 and 126 of Baltimore III. However, immediately departing from a strictly juridical basis for the court's operations, the author states that "the purpose of the Separation Court is to be of help and service to the partners of a Catholic marriage who are experiencing serious marital problems that threaten the community of their conjugal life"[201]—without reference to any obligation to receive permission or similar responses from ecclesiastical authority before taking any particular action in respect of the marriage.

As described *infra*, there is some evidence of a low opinion of the work of the Separation Court among other priests of the archdiocese, although this evidence does not

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[200] R.A. ROSEMEYER, Minutes of Meeting of Separation Judges Held on October 7, 1968, ACA ADMNA1350596 Separation Court Committee, 1968, 1.

[201] R.F. SCHROEDER, Memorandum "The Separation Court of the Archdiocese," ACA EXECE2610385, Chancellor File, 1973, 1.

appear to have been taken seriously to heart in reforming the work of the Court. Protests against the Court's summary decisions made quickly without proper evidence or explanation (described in complaint letters years apart), even when implicitly acknowledged to be true, do not seem to have led to a general reflection on or reform of the procedures employed by the Court in all cases. There is a common human tendency to react negatively to criticism; to blame the one bringing the complaint, rather than to consider the complaint seriously. This may be especially true when the substance of the complaint touches on how things are normally done; when the particular complaint cannot be admitted without facing the "appalling vista"[202] that every case is handled wrongly. In the complained cases there is no dispute as to the facts alleged by the complainant: no separation judge, in a reply to the complainant or in a note to his colleague denies the allegation that he made a decision on the basis of a half-hour meeting with the parties and without having significant knowledge of the history of the case. For this reason, we must assume that the allegations regarding the Court's conduct are substantially true (prescinding from the separate question of whether or not there is any merit to any complainant's argument regarding the viability of conjugal cohabitation). Internal memoranda and other documentation regarding the operation of the Separation Court over many years does not include any exhortation to the judges to be less hasty in their decision making, to gather wider evidence, to consider the law more carefully, to meet with the parties more frequently, or otherwise to do any of the work which might have been thought necessary to make better decisions. While there was considerable attention given prior to

[202] A phrase taken from a notorious judgment of Lord Denning in McIlkenny v Chief Constable of the West Midlands, *2 QB*, 1980, 283.

the mid-1960s to defining precisely how its decisions were to be made, and after the mid-1960s to questioning the nature and purpose of the Court's work, almost no attention seems to have been given to the question of whether and how the judges did their job *well*.

Separation Court Judge A. Barr's count of decisions made in early 1972 is discussed in more detail below. His verdict on the results is downbeat:

> Just looking at the raw statistics leads me to believe that the court is not doing much except granting permission for divorce. Their record on getting people to reconcile or to try to come to some type of counseling or the like is nothing to brag about. Looking at the statistics, the court is an utter failure. It still hasn't hit the idea that part of its job is to be working with helping people, not merely giving them permission for their rights. The rights of the parties in these cases are those of proper support and freedom from harassment. It is a pity that the court is spending so much time giving permissions which we find later on are not observed because remarriages do occur.[203]

Unlike what was claimed by some a decade earlier, Barr is not arguing for a stricter juridical approach *per se*, for fewer permissions to be granted, or under more restrictive conditions. For Barr, the fact that ten "separate maintenance permissions" was given was not seen as an encouraging indication that at least some judges made a distinction between the circumstances which justified divorce in contrast to civil separation; he is arguing that the judges of the Separation Court should do something other than simply make juridical decisions: to invest more time and effort in encouraging reconciliation. Otherwise, "[t]he court has degenerated into a divorce permission mill I think because it hasn't done anything to the contrary in the past."[204]

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[203] A.A. BARR, Memorandum "The Separation Court 1972," Barr to Schmidt, ACA ADMNA1350596, Separation Court Committee, 1972, 1–2. "Permissions which we find later on are not observed" is likely a reference to the fact that permission to divorce was conditional on the promise or instruction, mentioned *supra*, not to "keep company" or remarry, and Barr is noting that many of the parties do "keep company" or remarry.

[204] Ibid., 2.

4.8.2. Attitudes of the Parties

Mrs. O'Malley was not alone in her lack of deference for the court and its decisions. In one letter from 1952, a woman gives a spirited rejoinder to a letter to the Court: "Received your letter of December 3, 1952 in which you state I am unworthy to receive the sacraments because of my failure to keep an appointment with your office. Is anyone ever worthy to receive the sacraments?"[205] No reply is recorded. It may be significant that the writer lived in another state; no letter of such boldness was seen from anyone living within the jurisdiction of the Archdiocese.

In an early case, the wife "admitted knowing that going through with this action means being excommunicated from the church. She may remarry if she has the opportunity."[206] In this case the husband was not Catholic and does not seem to have contacted the Separation Court or any Archdiocesan agency, and the wife was clearly not at all interested in the Church's judgment on the matter. It appears that the case came to the Church's attention via public records of the civil courts.

Yet some faithful showed great respect for the Court, or at least for their practice of the Catholic faith affected by the Court's decisions. After being admonished that he was "the responsible party for the breakup of your marriage, and for the petition of your wife for divorce, we hereby deny you the right to receive the sacraments, and wish to inform you that in the event of your death you will be denied Christian burial,"[207] the husband, apparently chastened and even obsequious, replied:

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[205] Filed with ACA SC S4181, though not related to that case.

[206] ACA SC S4272, referral note card from Council of Catholic Women, December 7, 1945.

[207] ACA SC S14, letter of October 30, 1945.

> This will inform you that I am submitting to the rule of the court and yourself in the matter of my relations with a lady other than my wife (whose name is known to you). I have removed my belongings from her home (I forgot some of them—which I will simply leave there). I have no intention of deliberately seeing or contacting her again. Your job is a tough one. If it will make it easier for you, let me say this: I am not only submitting to your decision in the case of this lady—I believe you're right.[208]

Yet for many parties, the real attitude toward the Separation Court and ecclesiastical authority over the marriage was indifferent or utilitarian; it was a means to a financial end, less important on its own terms than for the leverage it could give in civil court regarding financial matters. In one early case beginning in 1940,[209] the husband had been admitted to the state hospital (for alcoholism, it is hinted), and seeks permission to sue his wife for divorce on the basis of her role in having placed him there. The wife claimed to have had the advice of a priest to commit the husband to the state hospital. Voluminous evidence reveals a wealth of competing allegations, amassing over some time. Yet the wife seeks to defend against the divorce suit and to have the husband discouraged from pursuing it. Considering that it was she who had him committed to a mental institution against his will, perhaps her motive for preventing the divorce was not that she wanted conjugal life with him, but that she had some financial motivation in maintaining the civil bond of marriage. In numerous cases, especially in the 1950s and earlier, it is abundantly clear that the wives sought ecclesiastical intervention prior to, or possibly in lieu of, recourse to the civil authorities with the primary purpose of obtaining financial relief. Conversely, in many other cases, it was the husbands who first had recourse to the Separation Court, apparently as a means of discouraging the wives from pursuing civil financial remedies.

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[208] ACA SC S14, letter of November 2, 1945.

[209] See ACA SC S16.

4.8.3. Opinions of the Clergy of the Archdiocese of Chicago

Opinions of the Archdiocesan presbyterate toward the Separation Court varied. One priest claimed to speak for many others regarding the utility of the Separation Court and its decision-making process by the 1970s:

> I think most priests have become disenchanted with the present set-up of the Separation Court. Once you catch on to the fact that the Judge will do just that you recommend in the Parochial Report, then you simply set this up the way you have decided it ought to go. But then when the realization dawns that the visit here is really a rubber-stamp, there is an easy next step to fielding it yourself at the parish level with no referral at all.
>
> In practice, I think most priests fall into two categories:
>
> - Those who expect real professional handling when they send a case here, and are disappointed when their people do not receive it
> - Those who ignore the procedure entirely.[210]

This rather cynical or disappointed take, indicating a lack of belief on the part of parish priests regarding the authority of the Separation Court, was reframed with a more optimistic perspective by Schmidt the next year: "[i]n general the opinion was that if the parish priest has done his homework, namely, filled out the parochial report and tried to go as far as he could with the couple, in general the Separation Court would follow the recommendation of the parish priest."[211] However it is to be spun, it is clear that the judges of the Separation Court were no longer seen, nor saw themselves, as holding any special expertise or responsibility, and therefore had no reason to make any different decision from the one recommended to them by the parish priests.

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[210] W. SCHUMACHER, Memo, William Schumacher to Ron Schmidt, ACA ADMNA1350596 Separation Court Committee, 1972.

[211] R.T. SCHMIDT, Marriage Study Days, ACA ADMNA1350596, Separation Court Committee, 1973, 2.

"Those who ignore the procedure entirely" were well-represented in a survey taken a few years later. In response to the question "[d]o you refer people seeking a civil divorce or separate maintenance to Separation Court for permission?" the responses were "31%, usually; 22%, occasionally; 40%, never."[212] This is notably poorer than the reported attitude to the tribunal proper: in response to the question "[d]o you refer potential annulment cases to the Archdiocesan Tribunal?" the answers were "90%, usually; 9%, occasionally; 1% never," suggesting that the priests of the Archdiocese had much less confidence in the utility of the Separation Court than they did in the tribunal hearing causes of nullity of marriage.

From Archbishop Stritch's address to the Lawyers Guild at the time of the foundation of the Court[213] until the second-hand report of Cardinal Bernardin's decision to dissolve the Court, punctuated only by Cardinal Meyer's published letter regarding the modification of procedures,[214] there is no record of the attitude of the Archbishops of Chicago to the Separation Court or its work. Occasional letters of complaint to the archbishops were passed back to the Court for reply, without written comment from the archbishops.

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[212] ASSOCIATION OF CHICAGO PRIESTS, Association of Chicago Priests Survey of Pastoral Practice, ACA EXEC2610302, 1977, 3. "The survey tallied 140 priests or approximately 1/4 of the A.C.P. membership of 577. The survey was sent only to members of the A.C.P. and therefore can only predict the attitudes of that group" (ibid., 6). The Archdiocese of Chicago began 1977 with 1,313 diocesan priests and 1,136 religious priests (See *Annuario Pontificio per l'anno 1977*, Tipografia poliglotta Vaticana, 1976). Even though the membership of the ACP was small in comparison to circa 2,500 diocesan and religious priests serving in the Archdiocese, and even though there is no reason to believe that those members who returned the survey were statistically representative of the presbyterate at large, the contrast of reported confidence between the Separation Court and the tribunal handling nullity of marriage cases is significant.

[213] See S.A. STRITCH, "Summation and Exhortation," in *Canon Law on Civil Action in Marriage Problems*, 85–98.

[214] See MEYER, Letter of His Eminence, Cardinal Meyer, to All Archdiocesan Clergy Promulgating New Statute Pertaining to Problem Marriages.

4.8.4. Opinions and Cooperation of Civil Attorneys

It would be wrong to presume that the Separation Court had an antagonistic relationship with attorneys or that attorneys were treated as a uniform block acting monolithically in favor of divorce which the Separation Court was trying to stop. Indeed, "some civil lawyers and judges felt that the Chancery had become too lenient [regarding permission to divorce]. Priests of the matrimonial court doubt that this is so."[215]

In the documents found in the general archives of the Separation Court, civil judges and lawyers decry the evils of divorce rather than asserting parties' civil legal rights over and above ecclesiastical intervention or compliance. In individual cases (especially prior to the mid-1950s), attorneys diligently participate in the Separation Court proceedings with their clients, in some cases even promising to abide by the Separation Court's decision. No doubt this is influenced, at least to a certain extent, by the kinds of lawyers who would choose to associate themselves with the Separation Court. We might consider that those attorneys, Catholic or non-Catholic, who paid no heed to the Separation Court and its decisions and to a Catholic party's need for ecclesiastical permission, would not choose to engage in correspondence with Separation Court personnel, either regarding a specific case or in connection with its general initiatives.

It is both notable that one of the events publicizing the foundation of the Separation Court was the high-profile series of lectures to lawyers.[216] With the exception only of parish priests, it would have been lawyers who had most contact with parties in situations of matrimonial distress and therefore would be best placed in warning them of their ecclesial

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[215] Minutes of Meeting of Separation Court Judges Held on September 4, 1964, 3.

[216] See CATHOLIC LAWYERS GUILD OF CHICAGO, *Canon Law on Civil Action in Marriage Problems*.

obligations (and also consistent with the Court's purpose at its foundation of assisting indigent mothers to receive emergency financial relief). Some Catholic attorneys would also have been influenced by the instructions read at Low Mass, which sometimes explicitly mentioned the moral application to the attorney as to the spouses themselves.[217]

Burke was typically optimistic about the Separation Court's success, and clear about what was to happen in those few cases where it was not:

> After fifteen years of hard labor and strife we have succeeded in getting the cooperation of about 90% of our Catholic lawyers. Cooperation may not come from an hilarious heart but it is cooperation. With the other 10% we have our trouble and we meet it head-on. Our judges have been instructed that the first step in dealing with a stubborn attorney is to phone him and to inquire courteously as to the lawyer's reasons for proceeding in the civil courts without permission. If such action is of no avail and contumacy continues the attorney receives a formal citation to appear before a board of three priests to answer why he should not be declared officially to have deprived himself of the right to receive the sacraments. In most cases this action has proven effective.[218]

Regarding the spouses, the Separation Court had at least some basis for jurisdiction, in *CIC/17* cc. 1128-1132, and in canon 126 of the Third Plenary Council of Baltimore, but regarding attorneys, it is not at all clear that the "board of three priests" could have the authority to declare an attorney "officially to have deprived himself of the right to receive the sacraments."

Internal Court documentation suggests a similar procedure to that described by Burke:

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[217] "Lawyers are bound by the same legislation as are their clients. From the principles of Moral Theology it is evident that we may not participate in the sinful action of another. The lawyer may do lawfully what his client does lawfully. Nor may the lawyer resort to the despicable subterfuge of handing the [divorce] case over to some other lawyer. This action would render him just as guilty as if he handled the case himself" (*Program of Instructions for the Sunday Masses Throughout the Year for the Ecclesiastical Year 1950-1951*, 30).

[218] E.M. BURKE, "The Legal Profession in Regard to Separation and Divorce Cases," 427–428.

> If it comes to our attention that a Catholic lawyer is representing, in a divorce case, a client who is acting without the Court's permission or contrary to its wishes, the lawyer should be contacted immediately by telephone to inform him of his obligations.
>
> If he persists in his action, the Court will formally cite him to appear and show cause why he should not be considered unworthy to receive the Sacraments.
>
> If he fails to heed the citation, or if he informs the Court that he intends to continue this course of action in the future, he is reminded, in writing, that he has deprived himself of the Sacraments and Christian burial. His pastor is also notified.[219]

The procedure being mentioned in two sources increases the probability that it was real and not merely aspirational or theoretical, and Burke must be read to imply that the procedure (at least the *citation* for the board, if not the hearing of the board itself) had been in fact used. In a case in 1950, an attorney agreed to withdraw from representing a party in "divorce proceedings which the Chancery office has forbidden."[220]

However, this example is very much outnumbered by those in which the Separation Court took little interest in the attorneys, even as it reprimanded the parties. Neither general records nor those in individual cases suggest that any attorney was summoned to the "board of three priests," much less, informed of his "depriv[al] of the sacraments." Even the attorney who was acerbically admonished "[y]ou may think you rendered a service to your client, but you mainly succeeded in encouraging a very selfish girl"[221] seems to have escaped disciplinary consequences. This absence seems to suggest that the disciplining of attorneys was not of much interest to the Separation Court, notably in distinction to consequences for the parties. This contrast is all the more surprising in light of the fact that much of the "jurisprudence" regarding divorce came from nineteenth-century responses of the Apostolic See regarding participation in divorce suits by attorneys, and not by the

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[219] Memorandum "To the Judges," ACA ADMNA135010, n.d. [circa late 1950s or early 1960s], 2.

[220] ACA SC S 9832, letter of June 24, 1950.

[221] ACA SC S3158A, letter of May 25, 1954.

spouses themselves, as described in Chapter Three. Furthermore, considering that relatively few of the faithful would be found more than once in the domestic relations courts, while those attorneys who acted in such cases would have scores or hundreds of clients over the years, one cannot help but wonder whether a more active disciplinary approach to attorneys might have had greater effect than punishing the spouses. Indeed, the almost complete failure to pursue and, if necessary, punish attorneys seems to call into question whether and to what extent Archdiocesan leadership, even in the 1940s and 1950s, was seriously interested in discouraging or preventing civil separation and divorce as a social phenomenon.

4.8.5. Relationship with the Catholic Family Consultation Service

In general, extant records do not suggest significant divergence of opinion between CFCS and the Separation Court. For the most part, they seem to have accepted each other's recommendations (or at least, ensured that the written record made it appear so). However, there was discrepancy in opinion at times. CFCS seemed to share the view of the legal profession that permission for divorce was granted too readily:

> Sometimes when CFCS feels separate maintenance should be recommended and makes such a recommendation, the case returns from the Separation Court with a permission for divorce. CFCS does not know the reason for such a decision and would like to know. Often such a permission is given without proper grounds for a divorce.[222]

In a pointed observation perhaps reflecting the very brief nature of the Separation Court judges' contacts with parties before making a decision, Miss Bernadette Michie, a social worker from CFCS, remarked:

> In cases where CFCS has made certain recommendations, the Separation Court judges need not concur with such a recommendation; however, it must be remembered that

[222] Minutes of Meeting of Separation Court Judges Held on September 4, 1964, 2.

> the staff at CFCS probably knows the character and historical background of the case better than the Judges, due to their extensive interviews.[223]

In a case in 1970, CFCS issued a firm opinion effectively instructing the Separation Court not to make a decision:

> [The spouses'] only desire is for some all-powerful person to tell them that each of them is right and that the other must shape up, hence denying any responsibility or involvement in their problems. […] This matter should be referred on to Chancery for consideration of separation. No effort should be made to relieve this couple of the responsibility of making a decision on their own regarding their marriage because lack of taking personal responsibility for this relationship is their problem. To tell them what to do is to feed into their childishness and irresponsibility.[224]

Its reasons for this recommendation seem to veer into the Separation Court's own competence, regarding both its right to make a decision in this case, and its general purpose and competence: the Separation Court claimed competence to make these decisions for spouses from its foundation, and exercised this competence in many cases in the 1940s and 1950s.

Why, then, would CFCS make a referral to the Separation Court while instructing it not to do the very thing over which it claimed exclusive jurisdiction? The answer must be that by this time, CFCS (like, increasingly, the Separation Court judges themselves) no longer accepted the desirability of a judgment made by an external authority rather than by the spouses themselves. Unfortunately, extant records from this case do not contain any indication of the Court's resolution made, which could have told us whether or how the CFCS warning was heeded.

As the Separation Court judges themselves began to lose their beliefs in a legal purpose to their work by the 1970s, their search for another effect or meaning led many of

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[223] Ibid. Emphasis in original.

[224] ACA SC S-6353-A, CFCS report of June 13, 1970. Emphasis in original.

them into theories which had significant overlap with the work of CFCS and other social service agencies. This must be, at least in part, a result of recognition that CFCS counselors were doing effective work. However, in their (unequipped) attempts to mimic a professional role for which they were not trained, the distinctiveness of the Separation Court judges' own role was lost.

4.9. Statistics of the Separation Court

As noted regarding general methodological difficulties, there is no single register or card file of all cases heard by the Separation Court, nor a general annual report or summary of its activities. It is therefore impossible to give precise numbers of the caseload of the Separation Court across its existence. Nevertheless, some numerical records survive.

4.9.1. Numbers of Cases Heard or Decided per Year

Apart from the figure of 4,000 given by Cardinal Mundelein in the 1930s immediately prior to the establishment of the Separation Court,[225] the only data remaining is from four different sources regarding an 8-year span from 1974 to 1981. The clearest fact emerging from this data is the lack of agreement or understanding regarding what constituted a "separation case."

Table 1: Archdiocese of Chicago Separation Court, cases per year by reporting source

	Year							
Source	1974	1975	1976	1977	1978	1979	1980	1981
1978 Quinquennial report[226]	600	391	495	437				
1982 Dix memo[227]				229				
Reports to the Apostolic Signatura[228]						169	50	65
Reports to the Secretariat of State[229]						3	0	0

The 1978 Quinquennial Report gives figures for separation cases heard in each of the years from 1974 to 1977, fluctuating between 600 and 391 cases per year; not intrinsically implausible. However, these figures are considerably higher than those given in other sources. The figure given in the Quinquennial Report for 1977 is almost twice as high as the figure given for 1977 in the otherwise comprehensive Dix memo of 1982.

[225] See MUNDELEIN, Letter to Cardinal Jorio *Maxime stupebam*, described *supra*.

[226] See Archdiocese of Chicago Quinquennial Report 1978, ch. "Metropolitan Tribunal," 2.

[227] See Dix Memo, 5.

[228] See ARCHDIOCESE OF CHICAGO TRIBUNAL, "Relatio annualis de activitate tribunalis" for the Years 1979, 1980 and 1981.

[229] See ARCHDIOCESE OF CHICAGO, Annual Report to the Secretariat of State for the Years 1979, 1980 and 1981, ACA EXEC C055016. The specific figure of three cases in 1979 in the report to the Secretariat of State is especially intriguing; more suggestive of something specific than the zero cases reported in the same manner for the subsequent two years. However, examination of the extant case files for 1979 did not suggest any cases which may have been considered special enough to be recorded and reported in this manner.

Likewise, the reports to the Apostolic Signatura (submitted by the tribunal office) for the years 1979, 1980 and 1981 give figures of 169, 50 and 65 cases per year, respectively, while the reports to the Secretariat of State (submitted by the chancery office) give three, zero, and zero cases for the same years.

There may well be a reasonable explanation for some of these discrepancies; for example, in a distinction between cases initiated and cases decided. It is even possible, at least hypothetically, that there could have been a distinction made between cases where permission to depart or approach the civil authorities was given or was not given, and cases where a true ecclesiastical separation was established; however, the surviving written record of the Separation Court judges and their supervisors does not demonstrate any awareness of such a distinction. The numbers are so wildly disparate that the only possible conclusion to be drawn is that there was considerable confusion within the Archdiocese regarding what the Separation Court was doing and how its activities related to any canonical category.

Table 2: Separation cases introduced and terminated in the United States, 1970–1988, as recorded in the *Annuarium statisticum Ecclesiae*

	Year										
Event	1970		1980	1981	1982	1983	1984	1985	1986	1987	1988
Cases introduced [230]							246	183	80	42	32
Cases terminated [231]	648		343	333	238	326	215	207	86	43	32

[230] See KAMAS, *Separation of the Spouses with the Bond Remaining*, 304. "Statistical data are generally satisfactory only for the years following 1983 when a change was made in the manner of reporting data" (ibid., 301). Kamas's source is the *Annuarium statisticum Ecclesiae*, Typis polyglottis Vaticanis, 1984-1988.

[231] See KAMAS, *Separation of the Spouses with the Bond Remaining*, 302. Again, Kamas's source is the *Annuarium statisticum Ecclesiae*, Typis polyglottis Vaticanis, 1970–1988.

For the same reason, then, the Holy See's published statistics regarding separation cases decided in the United States must be called into question. While those figures do demonstrate an intrinsically plausible scenario of gradual decline across the 1970s and 1980s, these figures evidently do not seem to include—at least for 1979-1981—the great bulk of cases heard in the Separation Court of one of the largest dioceses in the country. It therefore seems possible, even likely, that oddities in the national figures such as the unpredictable fluctuations in the number of cases terminated from the mid-300s to the low 200s from 1980 to 1985, and then the sharp drop from 1985 to 1986, are at least in part the result of reporting confusions rather than being a precise reflection of the actual number of separation cases decided.

4.9.2. Numbers of Differential Decisions Made

Since no complete record of cases survives, it is impossible to say the relative proportions of different decisions made, and how that may have varied over time or by other factors. The only surviving record is a list of decisions rendered in the first three months of 1972, prepared as part of discussions on the nature and relevance of the Separation Court which occurred more-or-less continuously from the late 1960s until its dissolution. Due to the significant changes across the history of the Separation Court, including the attitudes of its judges and the criteria used to decide petitions, there is no reason to believe that the decisions made in 1972 are representative across the period of operation of the Separation Court. Nevertheless, since they are all that has survived, they

are worthy of mention. Father Barr counted the 92 cases disposed between January 1 and March 18, 1972.[232] The results were as follows:

Divorce	46
To see a psychiatrist	2
Post factum[233]	6
Catholic Family Counseling Service	3
Permission for the Sacraments	1
Separate maintenance permission	10
Reconciliation or try for reconciliation	6
Counseling	8
Indefinite separation	3
Separation	1
Annulment court	1
Divorce and annulment court	3
No decision	3

As Barr complained, the majority of cases are decided in favor of divorce, either alone or with some other verdict. A further ten received permission to approach the civil authorities for separate maintenance, and four additional cases received a decision of separation without mention of permission to approach the civil authorities. The decisions the parties were seeking are not recorded, only the results.

The Separation Court had, throughout its existence, in both its published documents and its actions in individual cases, always emphasized the preference for reconciliation where possible; but efforts to this effect often did not go much further than telling the parties to reconcile if their situation did not, in the judge's determination, justify separation of some kind. Even in Barr's sample, nineteen of the 92 cases were decided in favor of some kind of reconciliation or assistance toward that end. Barr's request for "working with

[232] See BARR, Memorandum "The Separation Court 1972," Barr to Schmidt, 1. The categories are as given by Barr.

[233] As explained *supra*, "post factum" cases were those where the parties were already civilly divorced and the petitioner now sought "permission" for readmission to the sacraments, which was granted more-or-less automatically upon the party promising not to "keep company" nor remarry. It would seem likely that all of the cases counted here are "post factum" a divorce, not "post factum" a de facto or civil separation, since for the latter two it would seem likely to be classified according to the specific category of what was being requested.

helping people" and "getting people to reconcile" may have demanded a more involved approach by the Separation Court judges themselves, and not by referral to other professionals. Barr hoped that "if a new emphasis and direction were set to the court, then the results would begin to show other facts and other figures and other trends."[234] Unfortunately, we cannot now know to what extent this new emphasis and direction was ever tried, nor whether the proposed changes were borne out in different decisions and results from the Court's work.

Conclusion

The Separation Court of the Archdiocese of Chicago invoked, and was invoked to meet, different needs over the course of its existence. Some of those needs were canonical, others spiritual. The Separation Court claimed to address two legal objects, the relationship between which varied in emphasis over time and by author: the obligation to receive the Ordinary's decision whether or not to permit departure or to grant ecclesiastical separation in accord with *CIC/17* c. 1131, §1, and the obligation of the faithful to call upon ecclesiastical authority before approaching the civil authorities, especially for divorce (the origin of this obligation being variously attributable to general canonical principles, and to canon 126 of the Third Plenary Council of Baltimore).

Regarding the obligation for ecclesiastical intervention for departure or separation, the Archbishops of Chicago are to be praised for providing a means for the faithful to exercise their rights and obligations according to the *CIC/17*. When the Separation Court focused on this question, it did so—for the most part—in accordance with conventional

[234] BARR, Memorandum "The Separation Court 1972," Barr to Schmidt, 2.

jurisprudence and canonical principles, except for a recurring failure to acknowledge the circumstances in which a spouse was permitted to depart from conjugal living on his own authority.

Regarding an obligation for ecclesiastical intervention prior to approaching the civil authorities, we have discussed this matter at some length in previous chapters. In fact, the only canonical obligation in this regard was to *consult* with ecclesiastical authority prior to approaching the civil authorities *for separate maintenance*, according to the norm of c. 126 of the Third Plenary Council of Baltimore; *permission*, and/or regarding *divorce*, were not canonically relevant. Suspending our disbelief for a moment and supposing (for the sake of argument) that there had been a canonical obligation to receive ecclesiastical permission before approaching the civil authority for separate maintenance or divorce, then the Separation Court would have performed an essential ministry to satisfy this obligation. Especially prior to circa 1970, the Separation Court had clear criteria regarding whether and which civil permission was to be given, in accord with conventional principles of moral theology (if not always canon law), and there is clear evidence that it consistently made its judgments in accord with those principles.

Setting aside the question of how it related to "the law," how well did the Separation Court function? Here, again, we can turn to Helmholz for a succinct summary of the issue: "The answer must depend […] on how one regards the duty of the courts. There are two ways. The first emphasizes the enforcement of principles of Christian law and doctrine on the laity. The second looks at how well the courts settled actual legal quarrels, with less

concern for principle."[235] Regarding the matter of principles, the Separation Court functioned reasonably well as part of a system which reminded parties that civil courts did not have the power to end the bond or obligations of marriage, and that—at least for Catholics—the proper authority for these matters is in the Church (it did less well at acknowledging the circumstances in which some kind of separation could licitly take place even without ecclesiastical intervention). A decline in belief in this principle is evident in the judges from circa 1970s onwards, no less than in ecclesial society in general.

As an actual decision-making body regarding marriage, however, the Separation Court seems to have been something of a curate's egg. Its summary, administrative process and quick decisions were initially necessary in the 1940s and 1950s as it worked alongside CFCS to "allow" indigent mothers to approach the county court to receive urgent financial assistance from their feckless husbands. When the rent was due and children needed feeding, a drawn-out process would have been a failure.

Over time, the need for the Separation Court changed, but some of its operations remained the same. It continued to dispense "justice" in an extremely summary fashion, even when its clients no longer needed an immediate decision. From the late 1960s onwards, the Separation Court judges engaged in almost continuous questioning of the reasons for the Court's continued existence. Many of them did not believe in any specific canonical need for what they were doing, or at least, did not believe that the canonical objective mattered. In its place were various ideas of how they believed they were helping the parties, yet none of which seem—to this outside observer—to have been sufficient to

[235] HELMHOLZ, *Marriage Litigation in Medieval England*, 188.

justify the Court's continued existence as a legal institution; to be performing any service to married couples in distress which could not have been performed at least as well by people trained in other human sciences. Instead, the role was performed by effective amateurs organized around a quasi-legal objective which even the judges no longer recognized.

The decline of the Separation Court cannot be understood solely in terms of canonical developments, but must also be placed in the broader context of the period. The continued spread of divorce in society carried its own momentum, becoming ever more socially acceptable and with less perceived need to obtain "permission" from any other authority. The American Procedural Norms[236] of 1970 and the use of psychological grounds of nullity of marriage made a declaration of nullity of marriage more readily obtainable, no doubt making the offerings of the Separation Court irrelevant for many people. Even though the Second Vatican Council does not seem to have featured explicitly in the Separation Court judges' evaluations of their work, the aftermath of the Council saw profound changes in the attitudes of clergy and lay faithful alike regarding ecclesiastical authority, the role of law, and conscience. For example, the Office of Pastoral Care for Separated and Divorced Catholics was established in Chicago in 1978,[237] serving largely the same group of the faithful as the Separation Court, but via a fundamentally different method. For the Fifth Ordinary Synod of Bishops in 1980, "divorce is simply considered a

[236] See COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, De procedura in causis matrimonialibus concessa Conferentiae Episcopali U.S.A., in *Periodica de re morali canonica liturgica*, 54 (1970), 563–593, English translation in American Procedural Norms, in *CLD*, vol. 7, 950–966.

[237] "Phoenix Ministry," in Caritas Christi urget nos, vol. 1, Archdiocese of Chicago, 1981, 148.

painful reality in the modern world" but "there is no express prohibition."[238] By the 1980s, then, the Separation Court had become something of an anachronism.

The Archdiocese of Chicago was, for most of this period, the largest diocese in the country, with over a thousand diocesan priests; large enough to be insular. Even as it was later recognized that other dioceses did not operate such institutions, it could have been thought that this was due to laziness or lack of resources on the part of those other dioceses[239] rather than an absence of real canonical or pastoral need in the Archdiocese of Chicago. Institutional memory is a difficult thing to abandon entirely, even as fewer and fewer of the lay faithful used the Separation Court. The Court continued to exist due to inertia; it would surely never have been created in the 1970s to do the work it was doing at that time.

Judges were firm in their decisions and statements. Parties were declared to be prohibited from receiving the sacraments or Christian burial for ignoring a citation or disobeying the Court's verdict, even if the legal authority for such a judgment is obscure. Especially prior to circa 1960, judges' letters to parties clearly instructed the spouses what they were to do or not do, including at times the instruction to reunite. Until around the end of the 1960s, some of this tone remained fossilized in form letters, even if not in the personalized letters written by the judges.

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[238] KAMAS, *Separation of the Spouses with the Bond Remaining*, 194.

[239] An attitude which would have echoed Cardinal Mundelein's defense of his tribunal in 1939: "Why then do other tribunals not handle as many formal trials as the Chicago Tribunal? The answer is easy. These other diocesan tribunals, culpably or otherwise, do not hear marriage cases. Surely the Sacred Congregation is not asking us to imitate the laziness and negligence of these other tribunals?" (MUNDELEIN, Letter to Cardinal Jorio *Maxime stupebam*, 4).

One clear point of contrast between published procedures and actual practice is to be found in the handling of appeals (or more accurately in the *CIC/83* terminology, *remonstratio*), where the Separation Court's practice is clearly based on, but varies from, its published description for this procedure. The judges' dismissive attitude to those who disagreed with them and their failure to admit mistakes, speaks more loudly than the question of whether and how they followed the published procedure. Appeals to the Archbishop were referred back to the Separation Court without comment, requests to appeal to the Holy See were ignored, and no other diocese was used as a kind of independent second instance court as for marriage nullity trials; in practice, parties needed to convince the same judge against whom they were appealing, of their right to make the appeal. Even when a prior decision was reversed, this was done without significant due process or explanation to the other party, resulting in understandable confusion and upset. All of this should give us pause before assuming that a published description of any separation court procedure was any more than an ideal.

The most extensive documentation is from the most contentious cases, and most cases have no records beyond standard citations and other form letters. Cases where the judge, in a quick meeting with the spouses, successfully encouraged the parties to reconcile contentedly would not generate written records and therefore these situations remain frustratingly outside of the scope of our study. However, I would surmise that this happy outcome may have been rare. Evidence from where the judges were challenged suggests a rather shallow engagement with the spouses and their motivations. Some parties may have been chastened by the firm instruction not to separate; but there is little evidence that the judges addressed the root causes of a spouse's unhappiness with conjugal living. When

the "stick" of denial of the sacraments (and connected social disapproval) disappeared as tools to make the party return to the marital relationship, the judges had little else to offer.

In its initial task of working quickly with CFCS to "allow" women to petition for financial support, there is no particular reason to believe that it was unsuccessful. If not quite functioning as a "court," it nevertheless seems to have fulfilled the limited legal role it set for itself. But as it maintained the same hasty working methods even as its aims changed, it clearly failed to meet the task. The attitudes of the judges and the time spent with the parties were clearly inadequate to support a credible judgment regarding a marital relationship, much less to affect real improvements in it. This failure in its new environment no doubt contributed to the spiral of the judges increasingly questioning the purpose of their own work, and the lay faithful approaching it in ever smaller numbers.

Although it is perhaps unwise to extrapolate too far or too firmly from a sample of one diocese, this in-depth study of the Separation Court of the Archdiocese of Chicago provides valuable context when reading the contemporary literature of diocesan separation and divorce procedures. The wave of canonical studies on separation and divorce in or regarding the United States in the mid-twentieth century[240] needs to be seen as aspirational,

[240] Among others which could be cited, see e.g.: J. YOUNG, Separation of Married People from the Community of Bed and Board, Rome, Pontifical University of St. Thomas Aquinas in Urbe, 1936; DOHENY, *Canonical Procedure in Matrimonial Cases*; GOLDSMITH, *The Competence of Church and State Over Marriage – Disputed Points*; KELLY, "Separation and Civil Divorce," 187–238; M.L. GIBBONS, *Domicile of Wife Unlawfully Separated from Her Husband: A Historical Synopsis and Canonical Commentary*, Canon Law Studies, no. 249, Washington, DC, The Catholic University of America Press, 1947; FORBES, *The Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128-1132*; HINES, *De coniugum separatione ac de civili divortio in iure canonico et in iure civili Statuum Foederatorum Americae Septentrionalis*; J.P. KELLY, "Divorce – Some Practical Canonical Considerations," in *The Jurist*,

not descriptive. The Separation Court of the Archdiocese of Chicago functioned for decades (perhaps better, and certainly more robustly, than in many other dioceses), but never fully in accordance with the applicable law, or the lofty expectations of its own publications or of the contemporary literature.

9 (1949), 187–204; KING, *The Canonical Procedure in Separation Cases: A Historical Synopsis and a Commentary*; SCHLITZER, "The Catholic Lawyer and Divorce Cases," 37–48; QUINN, "Permission for Separation and Divorce," 239–252; BURKE, "Marriage, the Chancery Court, and the Catholic Church," 202–221; H.P. COSGROVE, De separatione coniugum in textibus Decreti Gratiani: investigatio in fontes cann. 1128-1131 Codicis iuris canonici, Rome, Pontifical Lateran University, 1955; T. HENEGHAN, The Annulment and Invalidity of Marriage in the State of New York, JCD thesis, Pontifical Gregorian University, 1955; E.F. MACKENZIE, "The Catholic Church on Separation and Civil Divorce," in *The Catholic Lawyer*, 1 (1955), 37–43; V. TRACY, A Comparative Study of the Divorce and Separation Laws of the State of Wisconsin and Canon Law, JCD thesis, Pontifical Lateran University, 1955; CLORAN, *Previews and Practical Cases on Marriage*; DAILEY, "The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case," 255–278; MALLOY, "Civil Divorce and Separation," 103–112; P.A. RYAN and D. GRANFIELD, *Domestic Relations: Civil and Canon Law*, Brooklyn, NY, The Foundation Press, 1963; S. SWIERZOWSKI, The Catholic Parties in Civil Divorce and Separation, JCD thesis, Washington, DC, Catholic University of America, 1963; GUMBLETON, *Separation and Divorce*. This list deliberately excludes more pastorally-oriented works and those addressed directly to the lay faithful. It also excludes the distinct sub-genre of doctoral dissertations comparing the marriage laws of the Church *in general* to those of a particular state, many of which gave significant attention to divorce, dissolution and separation.

General Conclusion

It may reasonably be asked whether there is any value in reviving and relitigating debate regarding any canonical institute which has fallen into practical (if not juridical) desuetude. Regarding separation of the spouses with the bond remaining and the related matter of the Church's canonical relationship with spouses approaching the civil authorities, with particular reference to the United States, this thesis has demonstrated two areas of benefit.

First is the contribution to understanding the law as it is today. The fundamental continuity of the institute means that research into the origins of the law in the past helps us to understand the nature of the institute today. The law of separation of spouses with the bond remaining is for the most part a creation of positive ecclesiastical law, and therefore many of its details are historically contingent, not matters of essential doctrine. For example, its origins in property law help us to understand that the canons of the *CIC/83* regarding separation owe as much to the law of temporal goods as they do to the fundamental nature of marriage. Our use of the lens of the law's origins is all the more significant in those instances where many of the older legal texts are accurately explained here as though for the first time, peeling back a century or more of misinterpretation.

The second major contribution is how the story of the development, interpretation and application of the law contributes to the wider story of the role of law in the life of the Church. By considering pre-codification doctrine, American particular legislation, codified law, and concrete diocesan practice each in their own contexts and then together, we see that the Church's canonical responses to separation and divorce existed—and even more so, were described—not in and from a pristine doctrinal vacuum, but in ways that

responded to concrete circumstances. There is a potential bridge to the study of "Lived Catholicism," partially in the lives of the faithful in Chicago and perhaps even more so in the attitudes of the priest-judges.[1]

Separation with the bond remaining was never a single, uniform legal institute in pre-codification canon law. The sources reveal a variety of meanings, forms, and functions attached to separation which were not fully harmonized by medieval or early modern jurisprudence. This plurality led to a variety of different emphases at different points in time, and contributed to later confusion and inconsistent reception.

Commentary from the United States since the aftermath of the Second Vatican Council has often claimed, sometimes almost apologetically, that parties ought to receive ecclesiastical permission to approach the civil authorities for divorce. This thesis demonstrates clearly that there is no positive obligation for this in the universal law nor in national particular law for the United States. The late nineteenth century responses of the Holy See were not general statements of law or doctrine; and the 1906 response of the Holy Office was limited to a particular case and (when read closely) did not mandate episcopal approval for civil divorce. Similarly, the relevant canons of the Third Plenary Council of Baltimore, so widely cited, do not contain a mandate regarding divorce, nor for episcopal permission to approach the civil authorities for separation. The conclusion of this thesis that there is no obligation to receive episcopal permission for divorce seems novel because it swims against the tide of canonical literature in the United States since the early twentieth

[1] "Studying agency and structure within Catholicism lets you see how people influence structure and how structure influences people" (A. BAIGENT et al., "Lived Catholicism: A Roundtable Discussion," in *Ecclesial Practices*, 9 [2022], 18).

century; but it is simply a return to the prevailing doctrine in the United States in the mid-nineteenth century.

Commentators in the United States were relatively uninterested in separation of spouses, especially prior to the 1880s; this may have been both a cause and a consequence of the fact that in practice, there was no functioning matrimonial process as described in the law. To the extent that commentators addressed the issue at all, they adhered to the universal law regarding licit reasons for separation. In comparison to authors of the mid twentieth century, they were not agitated by separation in general, nor by the issue of recourse to the civil authorities, which they treated as essentially irrelevant *per se* if the factual separation was licit.

Responses of the Apostolic See of the late nineteenth and early twentieth centuries are nuanced, and do not textually support the arguments they were later used to buttress. Four of five responses from the Sacred Penitentiary from 1887 to 1892 state that divorce would be sinful in the specified circumstances; one response, the last and where the petitioner had already received ecclesiastical separation, gave a more vague referral to approved authors. Similarly, responses of the Holy Office of 1885 and a follow-up in 1886 state a number of conditions required for public office holders to participate licitly in civil marriage cases. The tone is certainly skeptical, but there is some lack of clarity between the two responses regarding the distinction between civil divorce and civil separation, and the publicity required for the mental reservation regarding the merely civil effects of the contract. Moreover, all of these responses take place in the context of the Church-state conflict regarding the reintroduction of divorce to France. The particularity of these responses to France is illustrated by the fact that they were not considered relevant to

Belgium, which had divorce laws identical to those at issue in France. A 1906 response of the Holy Office, published only in 1932 by Gasparri, gives three conditions for the licit use of divorce: that there be "most grave causes" for the use of divorce; that the spouse declare before the ordinary that she did not intend to break the real bond of marriage; and that the diocesan bishop see to the removal of scandal. Neither the ordinary nor the bishop was obliged to judge the presence of the most grave causes, nor to give permission to approach the civil authority; yet these nuances were not noted by later American authors. Most of these responses gave moral guidance, not canonical interpretation or legislation, and only for the particular cases stated. Nevertheless, later American authors gave an exaggerated "obedience" to these fragmentary, often second-hand reports of *praxis curiae*, ultimately giving them such deference that the content and context of the responses was all but erased. Even when the same response was given in several cases, it is now evident that there was and is an absence of universal legislation from the Apostolic See addressing approach of the civil authorities regarding separation or divorce.

A similar dynamic of misinterpretation can be seen regarding the U.S. national legislation of the Third Plenary Council of Baltimore of 1884. Canon 124 declared the sinfulness of approaching the civil authorities for divorce, and imposed an excommunication on those who, having been civilly divorced, attempted remarriage. Divorce is not prohibited by legislation, nor is any mention made of any role for the diocesan bishop to relax the stricture. Canon 126 states that it is gravely sinful, and with a canonical penalty to be imposed by the diocesan bishop, to approach the civil authorities for separation without consulting ecclesiastical authority. According to the legislation, consultation is required; permission is not mentioned. Dioceses which were present at the

Fourth Provincial Council of Cincinnati of 1882, from which the plenary council took inspiration, were significantly more likely than other U.S. dioceses to have their own diocesan legislation prohibiting recourse to the civil authorities regarding a marriage. The lack of universal, national or widespread local legislation on the subject did not prevent the overwhelming bulk of US literature on the subject from making bold and consistent claims, including most often a supposed obligation to receive the permission of the diocesan bishop before seeking civil divorce. This thesis has demonstrated the claim to be false as a matter of law.

The Archdiocese of Chicago was one such diocese where these claims were made, relying variously on the national and universal legislation. Taking for granted an obligation to receive ecclesiastical permission before approaching the civil authorities, the Separation Court of the Archdiocese of Chicago was established in the early 1940s to deliver rapid decisions to spouses in urgent need of financial assistance obtainable only through the civil courts. The Separation Court rapidly became an institutional presence and operated on legalistic lines, with clear criteria for which permissions could be given in what circumstances, even if the execution of justice remained necessarily erratic due to the lack of knowledge the priest judges could gain regarding each couple. Parties were told directly, and sermons were preached informing the Catholic population at large, that approach to the civil authorities without ecclesiastical permission would result in denial of the sacraments and of Christian burial. By the late 1950s, however, the number of cases being submitted was too great even for the summary justice dispensed after half an hour's meeting between a priest and the parties. From 1960, more of the decision making was placed in the hands of parish priests who were told to make a recommendation to the

Separation Court. By the late 1960s, the Separation Court judges had become more favorable to divorce, and by the 1970s no longer held the permission-based view of their role which was the reason for the Court's creation. The change in 1960 to rely more heavily on the recommendation of the parish priests was an unnoticed harbinger of what was to come: a change in the decision making of the Separation Court over the next ten or fifteen years, away from *telling* the spouses what their status was and what they were obliged to do toward attempting to assist the parties in some way. This assistance was variously defined: reconciling the parties with the Church, helping them to become more comfortable or confident with their own decisions regarding the marriage; encouraging reconciliation if both parties wanted it. However, the Separation Court was never equipped to provide this kind of assistance, and it seems inevitable that interest in its new services declined.

It is not without precedent that a major institute of canonical marriage law has been misunderstood for a long period of time due to the dominance of erroneous accounts of the source materials.[2] Still, each such occurrence must be a cause for questioning the extent to which canon law is practiced as a juridical science. Canon law *is* a juridical science, but is never practiced *only* as a juridical science, and the present example illustrates the influence of political and social factors. The field of canon law as the *ius vigens* would be significantly strengthened by further study of its practice using specific cases, perhaps especially in matrimonial tribunals considering the nullity of marriage, and mirroring the significant work already conducted regarding the same forum in the middle ages.

[2] For the story of a centuries-long misunderstanding of the nature of the *verum semen* necessary for consummation of marriage stemming from a longstanding predominant reliance on Sanchez's commentary rather than the original brief of Sixtus V, see A. MCGRATH, "A Question of Interpretation: The Roman Rota and the Theology of Marriage," in *Ecclesiastical Law Journal*, 8 (2006), 425–437.

Correctly distinguishing departure from the common life from legal separation established by ecclesiastical authority illustrates the proper role of public ecclesiastical authority in regulating the lives of the faithful. Public authority is essential when making temporal goods provisions between persons who cannot agree, but is not always necessary (or, as has been suggested, may not even be possible) regarding the matter of departure from conjugal living. Decisions of public authority in contentious matters depend ultimately on some form of enforcement mechanism. Notwithstanding the nature of the Church as a *societas perfecta*, a complete society endowed with all that is necessary to fulfill her mission, in this vale of tears it is often necessary that adjudication mechanisms be enforced against parties who do not agree with the decisions made, and even those who do not recognize the authority. With the Church's own temporal goods, this power is often inherent. When separation with the bond remaining began to take shape as a canonical institute, the civil authorities enforced the Church's decision. When, following the Reformation and the Enlightenment, many states began to create and enforce their own jurisdictions over marriage, the Church often attempted to maintain its jurisdiction through social means; but this was ultimately only voluntarily received. The Separation Court of the Archdiocese of Chicago existed while the extent of this voluntary jurisdiction markedly declined.

The provision of canon 1692, §2, allowing for civil decisions regarding separation to have ecclesiastical effects is not a radical innovation, but is prefigured in sources as diverse as Gasparri's interpretation of an 1860 decree of the Holy Office and unrealized proposals for inclusion in the *CIC/17*. Similarly, the preference expressed in canon 1692, §3, that the civil authority is to decide legal separation whenever civil effects

are involved is reflected in concordats made both under the *CIC/17* and the *CIC/83*. The benefit of a single, enforceable decision is more important than the Church attempting to retain ineffective jurisdiction as a matter of principle.

A major insight of this thesis is the recognition that many of the reasons for separation and departure recognized prior to codification and enumerated in the *CIC/17* were fundamentally punitive or didactic, and not founded on the nature and obligation of conjugal living. Their removal, largely unnoticed, from *CIC/83*, indicates the impact of a personalist understanding of marriage. In this sense, separation or departure within marriage is more narrowly restricted today than in the past.

Yet the juridical truth of more restricted provision for separation is in tension with the experience of the Church in the United States for the last few decades. It certainly appears that Catholics are separating and divorcing more often, and with less involvement from the Church, as time has progressed. The Separation Court of the Archdiocese of Chicago illustrates this trajectory. At the time of its creation in the 1940s, it expected—and sometimes received—adherence to its orders, as it attempted to "protect" desperate mothers from the perceived dangers of unguided contact with the civil authorities. It began also to resolve marital disputes—if only to the extent of telling the spouses which was right and which was in the wrong. Changes in the civil law and in social adherence to ecclesiastical instructions led to a transition away from these purposes into a search for a new role. Yet a satisfactory new role never really arrived. Even as divorces increased in number, spouses' contact with the Separation Court became ever more voluntary.

Nothing in this thesis undermines the native authority of the Church to judge the marriage cases of the baptized. Nevertheless, the thesis demonstrates that excesses have

occurred in defending this principle—certainly in rhetoric and in practice, and perhaps even in legislation. The rights to sever conjugal living when there is known adultery and to depart from conjugal living when there is danger in delay do not require ecclesiastical intervention, according to the current law and longstanding canonical tradition; these facts have been inadequately emphasized at times.

It may be worthwhile for the universal legislator to consider, in the light of present Church teaching regarding marriage, whether and how ecclesiastical authority may judge the obligation of conjugal living (whether with or without danger in delay in departure). Such a clarification is even more apposite regarding the issue of whether ecclesiastical authority may "order" the resumption of conjugal living. Although this power is not mentioned explicitly in the Code, there is certainly precedent for it in the history of the Church. The canons of the Code leave unanswered the question of the consequence of a decision by the ordinary *against* departure from conjugal living. Renunciation of this power or claim would not abandon the right of the Church to decide legal separation.

The issue of the exercise of the Church's power to judge legal separation may also merit clarification and even reconsideration. When does the judgment of the Church regarding legal separation have effect? Certainly, it has effect in those places where, by concordat or even civil legislation, the ecclesiastical decision is enforced by the civil authorities—though these places are few in number, and other concordats hand over to the state the authority to decide legal separation, which appears to be the Church's preference. The Church is a *societas perfecta*, but she often relies on the more-or-less voluntary obedience of her members. Even when not "enforced" by conventional state power, sometimes social pressure may ensure compliance with instructions out of respect for the

authority, or at least out of fear of the social consequences of being seen to violate community norms. That circumstance could be found, at times, in the Archdiocese of Chicago in the mid-twentieth century, where tight social integration centered on the parochial clergy and deep personal belief in sin and its consequences encouraged many to be obedient to ecclesiastical authority. But with the decline of these social structures, and, perhaps more importantly, with the decline of the belief that the Church (or indeed any other authority external to the spouses) has a proper role in deciding questions of marital commitment, the idea of obeying the Church's decision regarding the fulfillment of marital commitments had become a legal anachronism.

What does it mean to issue "orders" and "decisions" when obedience is voluntary? One response would be that the Church must continue to issue judgments founded on the facts and the law, blind to whether or not those judgments will be heeded by the parties concerned. In this context, those faithful who obey, even if few in number, would be rewarded for their observance of the law and maintenance of ecclesiastical communion, while those who did not would bring judgment upon themselves, even if not immediately enforceable. Certainly there are some aspects of ecclesial life where this approach must be followed; sacramental discipline, for example, especially in those parts founded on divine law, cannot bend to accommodate the noncompliance of the faithful.

But, as this thesis has demonstrated, legal separation of spouses with the bond remaining is *not* largely a matter of sacramental discipline. Its legal foundation is primarily as an institute of temporal goods applied to a married couple. Indeed, if "conjugal living" *per se* is removed from external oversight (as has been suggested), then *all* that remains of legal separation is temporal goods and the apportionment of responsibilities regarding the

offspring. It is unsurprising, then, that the Church has been so willing to hand this responsibility over to the state by concordat.

This thesis does not propose the abolition of the institute of legal separation of spouses with the bond remaining. It suggests that the principle of canon law as the legal system of a *societas perfecta* is seen to be diminished when attempt is made to exercise unenforceable jurisdiction; and that this unfortunate result is something of an unforced error when the matter did not absolutely need to be decided by the Church.

Even outside of places where the ecclesiastical judgment always has civil effects, there are circumstances where the Church may be the best authority to decide separation. In separations involving married clergy when the family's income or housing is provided by the Church, the ability of the ecclesiastical authority to understand and address nuances of the relationship between cleric and ordinary may better provide for a just settlement than the civil authorities could. The same could occur regarding laypersons whose employment by ecclesiastical institutions involves family members. It is common in the United States that health insurance be provided by the employer, not only for the employee but also for the spouse and offspring; in practice, eligibility for these benefits is determined by the definitions of the civil authorities, dependent on the terms of the civil separation and/or civil divorce. It may well be more consistent for ecclesiastical institutions to determine family benefit eligibility according to the Church's own criteria and, where necessary, processes, which could include canonical separation.[3] Even when there is no significant financial relationship between a cleric and the diocese, as is the case for most permanent

[3] Such a change would presumably also include restricting the benefit eligibility of civil consorts of employees where the civil marriage does not enjoy the ecclesiastical presumption of validity.

deacons in the United States, a legal separation may be useful to clarify the cleric's status for the community, and the other relationships which the local church, by law or by practice, has toward his wife and children. Rarely, the same could occur regarding prominent laypersons not employed by public juridic persons, but whose stature in the community demands, for the public benefit, a clarification of marital status. Additionally, in what is perhaps a hypothetical scenario, the spouses could agree to be bound by the ecclesiastical decision regarding legal separation, especially if enforceable in civil law as a kind of arbitration agreement.[4]

If the ecclesiastical authorities in the United States were to resume making decisions of legal separation even in the limited circumstances described in the preceding paragraph, they would assume the obligation to make those decisions well. This would include psychological expert witnesses similar to those used in trials of nullity of marriage (see canon 1678, §3); as well as financial experts including experts in forensic accounting as would often be necessary in complex and disputed cases. The example of the Separation Court of the Archdiocese of Chicago illustrates the dangers of attempting to make these decisions with insufficient process, information and expertise. Parties often struggled to accept decisions which were evidently made in a rushed manner with insufficient evidence and expertise; there is no reason to believe that the faithful today would have lower expectations of the standard of justice they should receive. No doubt the difficulty of

[4] This may not always be possible, especially in regard to the care of the offspring, where the civil authorities are often obliged by law to make a decision which prioritizes the welfare of the children (according to the criteria of civil law), rather than deferring entirely to an agreement between the parties.

exercising this authority justly with limited resources is one of the reasons that concordats have handed this power to the state.

But these examples of situations where ecclesiastical authorities should or could decide legal separation in the present-day United States are exceptions. They do not apply to the great majority of situations of marital distress encountered in the United States; that is, where a private decision is made to discontinue conjugal living, often in situations of certain adultery or with danger in delay, and where the ecclesiastical authorities have no ability to enforce a judgment of legal separation. Notwithstanding the *pastoral* imperative to remind the spouses of their continued obligations toward each other, the idea of an ecclesiastical decision of *legal* separation in such circumstances has few obvious benefits and would seem to make a mockery of the principle of the rule of law in the Church.

Although the law regarding separation of spouses remained in the *CIC/17* and continues into the *CIC/83*, including specified responsibilities of ecclesiastical authority, its juridical existence has been insufficient to maintain it in the lives of the faithful when separated or even divorced from the conditions in which it had been created.

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