

Macfarlane, Bai. “The Current Marriage Crisis in the Light of the Original Creation and the Code of Canon Law.” The Two Shall Become One. www.RomanSymposium.com. *Centro Congressi Cavour*, Rome. 26 September 2015.

Introduction

Arcanum

This paper will examine the current marriage crisis in the light of the original creation and the code of canon law. My focus is on the application of canon law in territories where there is “no-fault” divorce in the civil courts.

In his encyclical *Arcanum* on Holy Marriage in 1880, Pope Leo XIII reminded us how marriage started and who invented it:

The true origin of marriage, venerable brothers, is well known to all . . . We record what is to all known, and cannot be doubted by any, that God, on the sixth day of creation, having made man from the slime of the earth, and having breathed into his face the breath of life, gave him a companion, whom He miraculously took from the side of Adam when he was locked in sleep . . . And this union of man and woman . . . even from the beginning manifested chiefly two most excellent properties . . . namely, unity and perpetuity.¹

Canon 1056 restates that the properties of marriage are unity and indissolubility. By unity, the code means spouses will never make themselves available to a third person for acts befitting to the procreation of children.² By indissolubility, it means marriage is life-long.

In Mathew 19, Jesus explained that Moses allowed for divorce because of the people’s hardness of heart. Jesus said “from the beginning it was not so.” Moreover, we know that with God’s grace, we can be free from the hardness of heart resulting from original sin.

As a community working together to overcome the manifestations of original sin, among other things we have the assistance of our Code of Canon Law. It provides a system for governing ourselves, protecting what is sacred, and promoting justice in our interactions. The current code of canon law was published in 1983.³ In 1917, an earlier code was published. Before that, there were the decisions of popes, pontifical councils,

¹ Pope Leo XIII, *Arcanum* 5

² Bianchi, Paolo. When is the Marriage Null, Guide to the Grounds of Matrimonial Nullity for Pastors, Counselors, and Lay Faithful. San Francisco, CA: Ignatius Press, 2015, p.125

³ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (VaticanCity: Libreria Editrice Vaticana, 1983), trans. Canon Law Society of America (Washington DC: CLSA, 1983)
<http://www.vatican.va/archive/ENG1104/_INDEX.HTM>

the Council of Trent, laws for particular territories, and other authoritative sources that those more knowledgeable than I could easily list.

Canon 1055 through 1057 define what makes a marriage a marriage. Other canons manage cases about separation of spouses and the validity of marriage. These matters were not supposed to be judged by the civil courts, as explained in 1880 by Pope Leo XIII in *Arcanum*:

... Let no one, then, be deceived by the distinction which some civil jurists have so strongly insisted upon - the distinction, namely, by virtue of which they sever the matrimonial contract from the sacrament, with intent to hand over the contract to the power and will of the rulers of the State, while reserving questions concerning the sacrament of the Church. A distinction, or rather severance, of this kind cannot be approved; for certain it is that in Christian marriage the contract is inseparable from the sacrament.⁴

Unfortunately, it seems common today to do just what Pope Leo forbade: to separate the sacrament of marriage from the contract of marriage, and then give the state power over marriage. Furthermore, nowadays, when chancery officials encourage Catholics to file for divorce in the civil forum prior to seeking an annulment, the Church appears to be saying that this is acceptable on the ground that the civil jurists are not trying to judge the validity of the marriage.

Marriage Contracts, *quam in specie et de solutionibus*⁵

To address the current marriage crisis within the Catholic community, we need to distinguish between two kinds of marriage contracts: civil and Catholic. Both contracts are agreements, intended to be enforceable by law, wherein two parties promise to uphold certain obligations toward each other. In both the civil and Catholic legal systems, some contracts are invalid, for example, in cases of fraud or insanity.

In civil marriage contracts, in territories with no-fault divorce, the parties are obligated to keep the status of married until either of them feels like ending the marriage. *Marital* status gives them the rights and obligations of joint property ownership, shared liability for accumulation of debt, certain income tax rates, and health insurance benefits. When either of them feels like ending their *marriage*, upon request from either party, a civil no-fault divorce judge will issue a divorce decree. If the couple hasn't been able to work out all the details on their own, the judge will make decisions about child custody, property division, and support. The judge and the other divorce practitioners (such as

⁴ *Arcanum*, 23

⁵ From canon 1290 “the voiding of contracts”

lawyers, court appointed children’s attorneys, guardians, and psychologists) all earn their income by generating civil divorce decrees.

In Catholic marriage contracts, the parties agree to be permanently married and open to children. They have the obligation and right to mutual help and sexual fidelity. They have the obligation and right to live together unless a morally legitimate reason for separation exists.

Plea

Pope Leo XIII said we could not hand over the matrimonial contract to the power and will of the rulers of the state. However, when Catholics disregard the canon law on separation of spouses and have civil no-fault divorce practitioners adjudicate marital disputes, we are doing just that. On behalf of all the children that want to see their parents stay together, Church leaders ought to insist that canon lawyers devote their energies to applying our own canon law, so that the Church can throw a lifesaver to those in trouble.

Current Practice, Summary of Canon Law

Civil Forum’s no-fault divorce

Under the rulers of the state in territories with civil no-fault divorce, any spouse has the power to force divorce on his family. Divorce practitioners have no interest in the reason for separation. What is more, court events can cost \$900 an hour because three lawyers bill the family: Mom’s, Dad’s, and the court-appointed children’s attorney. To save money, the spouse who does not want a divorce, who did not do anything bad enough to merit separation, feels coerced into signing a divorce agreement to shorten the lawyers’ time. If the innocent spouse does not sign the divorce agreement, the civil judge will still grant the divorce and decide about child custody, property division and support, after the divorce practitioners have spent more time accumulating thousands of dollars of billable hours.

A party who has done nothing bad enough to merit separation of spouses will learn that a civil judge does not expect the party-at-fault to fulfill the obligation to give his or her share of money and time to maintain the marital household. For example, a normal decent husband will be forced to live separate from his wife and children and then be ordered to pay her spousal and child support. Children and innocent spouses can lose their homes because the court will reward abandoners with half or more of the marital property. Furthermore, if the abandoning parent is committing adultery, the court still orders the children to spend overnight visits, or live in a home with the adulterous partner of their mom or dad. For more information about no-fault divorce, I recommend Stephen

Baskerville’s book, “Taken into Custody, the War against Fathers, Marriage and the Family”⁶ and his presentation at the 2009 World Congress of Families.⁷

Orphans of Divorce

Cardinal Müller, Prefect for the Congregation of the Doctrine of the Faith, refers to the children of divorced parents as the ‘orphans of divorce’ in his interview published in 2014, entitled “The Hope of the Family:”

These ‘orphans of divorce’ sometimes surrounded by many belongings and with a lot of money at their disposal, are the poorest of the poor, since they have many material goods but are lacking the most basic thing: the solicitous love of parents who renounce themselves for their sake.⁸

When one parent is willing to renounce himself for the sake of the children and keep the family together, but the other spouse is not, the civil divorce practitioners help the one breaking apart the family. The civil courts do not attempt to make the spouses uphold the obligation to maintain the common conjugal life that is intrinsic to Catholic marriage.

Summary of Canon Law

It will be important at this point to summarize canon law’s approach to the separation of spouses—not temporary separations because of business travel or illness. A more technical presentation of this information can be found in “Mary’s Advocates’ Observations”⁹ which is available on our website and in print form.

Separation, in and of itself, is the factual occurrence of spouses no longer living together. From the civil court’s perspective, a civil divorce decree ends the civil marriage, and the parties will almost always live apart. In contrast, an ecclesiastical separation is a decree from the Church that defines the status of those who are factually living apart, whose marriage has not been proven invalid; it must identify the reason that the separation decree is being issued, and can include other elements.

For parties in a Catholic marriage, the husband and wife must live together, except when one spouse is doing something so bad that the other spouse has a just cause for living apart (c. 1151). Emotionally growing apart and simple annoyances are not a basis

⁶ Baskerville, Stephen. Taken into Custody, the War against Fathers, Marriage and the Family. Nashville, TN: Cumberland House Publishing, 2007

⁷ Baskerville, Stephen. Presentation at World Congress of Families Amsterdam. 11 August 2009. <<https://www.youtube.com/watch?v=bFRBegsm3n4>>

⁸ Müller, Cardinal Gerhard. The Hope of the Family, A Dialogue with Gerhard Cardinal Müller. San Francisco CA: Ignatius Press, 2014, p. 24

⁹ Macfarlane, Bai. Mary’s Advocates Observations: Separation, Divorce, and Annulment, The Pastoral Care Described in the Catechism, and The Canon Law and the Prevalent Pastoral Practice in the United States. Rocky River, OH: Mary’s Advocates, 2014

for separation. Furthermore, all marriages must be presumed valid until proven otherwise (c. 1060).

Adultery by one party gives the other party an acceptable reason to live apart and is the only basis for a permanent separation of spouses. Nevertheless, the innocent party is encouraged to forgive the adulterous partner. If an innocent spouse wants to avail himself of this reason for living apart, he must ask for a separation decree within six months of the adultery. If the innocent spouse does not ask for a separation decree, it is presumed that the adultery is forgiven and that the innocent spouse is willing to continue living together (c. 1152). An ecclesiastical separation decree can either come from a tribunal judge or the local bishop (c. 1692 §1). A civil divorce decree (or civil separation) can only be sought after first getting the bishop's permission to approach the civil forum (c. 1692 §2).

Other marital problems only give reason for temporary separation: causing mental or physical danger, or rendering the common life too difficult. A spouse is not supposed to live apart on his own authority. If a spouse feels there is a morally legitimate reason to separate, the spouse should seek an ecclesiastical investigation and a separation decree. To interpret canon law correctly, one must understand the interpretation in the judgments from the tribunal of the Roman Rota and historical authoritative judgments. Scholars of historical canon law, including decisions from the Roman Rota, list three conditions required to merit separation of spouse: 1) behavior must be dangerous; 2) it must be repeated; and 3) separation must be the only way to solve the problem.¹⁰ In cases of danger in delay, a party can live apart on his own authority and define his marital status with an ecclesiastical decree later (c. 1153).

A separation decree defines the status of the spouses who otherwise have the obligation to live together. Jurisprudence from the Roman Rota shows that, “light injustices from abusive words or the incompatibility of the personalities of the spouses which make cohabitation troublesome cannot be considered as sufficient causes to separate the spouses.” Presence of quarrels, disagreements, and even the use of curse words, did not prove real danger of grave harm either of soul or body.¹¹

If one spouse factually lives apart from the other when the other has done nothing bad enough to give a morally legitimate reason for separation of spouses, the one who left is an abandoner. Historically, malicious abandonment has been considered by the Tribunal of the Roman Rota to be a reason for issuing an ecclesiastical separation decree

¹⁰ Instituto Martin de Azpilcueta. *Exegetical Commentary Code of Canon Law*. Ed. Angel Marzoa, Jorge Miras, Rafael Rodriguez-Ocana. Woodridge, IL: Midwest Theological Forum, 2004, p. 1585

¹¹ Tribunal of the Roman Rota, Coram Floreczak, 30 June 1928, in *Sacrae Romanae Rotae Decisiones*, 20 (1928), pp. 267-272. trans. Mary's Advocates (Rocky River, OH)

for the sake of the abandoned spouse.¹² The decree can also instruct the abandoner to reform his wrongful behavior.

When the spouses live apart, the adequate support and education of children must always be suitably provided (c. 1154). Historical jurisprudence normally gives the care of the children to the innocent party where they are to be reared at the expense of the guilty partner. One Rota case explicitly said that a party at fault in separation is not due support from the innocent party.¹³

Canon law recognizes that marriage is a contract, and canon 1290 says that civil laws about contracts and voiding of contracts shall be observed provided that the civil law is not contrary to divine law. As noted earlier, for Catholics, ecclesiastical separations are to be handled on either the judicial track (decided by a tribunal judge) or on the administrative track (decided by the local bishop) (c. 1692 §1). Procedural canon law on separation contains four important concepts which include guidance on civil decrees: 1) weighing of the particular circumstances; 2) whether a civil decree will be contrary to divine law; 3) whether an ecclesiastical decree will have civil effects; and 4) whether a civil decree will concern *only the merely civil effects* of marriage. When these concepts are not properly understood and applied, civil courts cause great harm and injustice to Catholic families.

A Catholic tribunal judge (who works for the bishop) is authorized to issue an ecclesiastical separation decree. He is allowed to give permission to a party to approach the civil forum from the start if the civil case concerns *only the merely civil effects* of marriage and the local bishop has already given permission to approach the civil forum (c. 1692 §3). However, permission cannot be granted by the local bishop without first weighing the special circumstances of the parties. Furthermore, certain conditions must be satisfied before the bishop can give permission for a party to file for divorce in the civil forum. One condition is that the decree in the civil forum will be in accord with divine law. The other condition is that an ecclesiastical decree of separation will have no civil effects (c. 1692 §2). Interpretations differ as to whether both, or only one, of these conditions must be satisfied. The outcome is significantly different for Catholic families depending on which meaning is intended (see Endnote).

An example of a civil effect would be the loosening of a wife’s obligation to pay for credit card purchases made by her husband. An ecclesiastical separation decree, in and of itself, cannot change this. In a later section, this paper will discuss how an ecclesiastical decree *could* have civil effects. The only situation in which this author can imagine a

¹² Doheny, Msgr. William J. , C.S.C., J.U.D., Canonical Procedure in Matrimonial Cases, Volume II, Informal Procedure. Milwaukee: The Bruce Publishing Company, Copyright 1944. Second Edition 1948. p. 659

¹³ Tribunal of the Roman Rota, coram Parrillo, 04 May 1929, in *Sacrae Romanae Rotae Decisiones*, 21 (1929), pp. 189-193, par. 4. trans. Mary’s Advocates (Rocky River, OH)

decree in the civil forum being in accord with divine law would perhaps have been 50 years ago, when the civil forum respected the indissolubility of marriage, issued fault-based decrees and expected the culpable spouse to repair damage, as much as possible, to the other spouse and children.

Leading Sources and Contrasts

Very few scholarly writings in English exist about the canon laws on separation of spouses. Moreover, the commentary on the code of canon law published in 1985 by the Canon Law Society of America tends to undermine the authority and power of the bishop to help needy families. In “Code of Canon Law: A Text and Commentary,” the section about needing the bishop’s permission before filing for a civil divorce is extremely brief:

[c. 1692-1696] The 1917 Code contained no such chapter; it contained no canons regulating procedures for separation cases; these canons were first introduced in the 1976 schema. When the consulters met in 1979 to discuss this section, it was proposed that section should be suppressed because, worldwide, spouses hardly ever bring such matter to a church court; therefore, in those few localities where such cases do come to the attention of the church court, local legislation would suffice. It was finally decided however, to retain this chapter as a kind of restatement of canon 1671.¹⁴

Canon 1671 says that “marriage cases of the baptized belong to the ecclesiastical judge by proper right.” In their 1985 comments after the canons about the obligation to restore common conjugal life, the Canon Law Society of America included a section on “Penalties and Separation”:

[c. 1155] There are no ecclesiastic penalties for failure to observe the canons on separation. Spouses who separate without ecclesiastical permission may not be deprived of the sacraments unless one or the other enters a subsequent marriage without ecclesiastical approval.¹⁵

This statement is curious, to say the least, because some of those who separate may well be in a state of serious sin even if they do not remarry. For example, one can imagine that an adulterer or a malicious abandoner would be objectively in a state of grave sin. Even if these persons were to confess their sins, they could not be absolved unless they had the resolution not to sin again. For malicious abandonment, stopping the sin would require the restoration of the common conjugal life. In cases of adultery, stopping the sin requires

¹⁴ Coriden, Green, and Heintschel. Code of Canon Law: A Text and Commentary. Washington DC: Canon Law Society of America, 1985, p. 1016

¹⁵ *Ibid*, p. 822

the intention to restore common conjugal life if the *not-at-fault* spouse was willing to reconcile.

Ten years after the Canon Law Society of America Commentary was published, the Catechism of the Catholic Church was published. It clearly says that divorce is immoral, a grave offense against nature, and only allowable in circumstances as defined in canon law.¹⁶ The Catechism uses the words *grave* and *immoral*, and according to canon 915, those who obstinately persevere in grave manifest sin shall not be admitted to Holy Communion.

To gain some historical perspective, an 1885 law in the United States describes the penalty due to one who wrongfully divorces. The Third Plenary Council of Baltimore includes article 126 about petitioning in the civil forum for separation: “Anyone who petitions in the civil forum for separation [including divorce] without the ecclesiastical permission incurs grave guilt and is to be punished through the judgment of the bishop.” This particular law was still binding, even thirty years after the 1917 Code of Canon Law was promulgated, at least according to the imprimatur given by the bishop of Albany, New York, to a paper presented by his tribunal judge to his priests.¹⁷

Just after the 1983 code was published, the Vatican’s publishing company, *Libreria Editrice Vaticana*, published a Spanish work by Diego-Lora, “The Cases of Separation of Spouses in the New Code.”¹⁸ An unofficial translation of this fourteen-page article emphasizes the Church’s role in trying to restore troubled marriages and describes the canonical procedure for handling cases of separation.

In the year 2000, the Canon Law Society of America published “The New Commentary on the Code of Canon Law,” which is more helpful in protecting families from no-fault divorce than their 1985 commentary. The new commentary states that “Marriage cases of the baptized belong to the ecclesiastical judge by proper right.” Further on, the commentary states that “The divine law . . . on the obligations of parents toward their children may not be contradicted by any civil sentence.”¹⁹

Recall that according to canon 1692, a tribunal judge can send a party to the civil forum from the start, if, after the bishop gives permission, it is known that the case concerns only the *merely* civil effects of marriage. About this, the newer Canon Law Society of America’s commentary says, “The civil effects of marriage concern such matters as property division, spousal support, child support, child custody, and the

¹⁶ CCC, par. 2383-2385

¹⁷ Alford, The Rev. Culvar Bernard, S.T.B., M.A., JCD. Cohabitation and Separation of Married Persons. A Paper read at the Conference of Priests of the Diocese of Albany. 3 November 1948. <http://www.marysadvocates.org/terms/Separation_Alban_1948.htm#ParticularLegislation>

¹⁸ Diego-Lora, Carmelo De. “*Las Causas de Separación de Cónyuges Según el Nuevo Código.*” *Diligit iustitiam : Studia in Honorem Aurelii Card. Sabattani. Libreria Editrice Vaticana: Città del Vaticano* (1984) 389-403.

¹⁹ Beal, Coriden, and Green. New Commentary on the Code of Canon Law. Washington DC: Canon Law Society of America, 2000, c. 1692. p. 1791

like.”²⁰ However, it is doubtful that this is an authoritative list of the *merely* civil effects of marriage. It is important to know what constitutes the *merely* civil effects of marriage (appearing in canons 1059, 1672, and 1692) because whatever they are, if a case concerns only them, the case can be handed over to the rulers of state after getting the bishop’s permission. A dissertation by Fr. William Goldsmith published in 1944 defined *merely* civil effects of marriage and reasoned that things of *res mixtae* could not be the *merely* civil effects of marriage.²¹ According to the dissertation, the upbringing of children (i.e. child custody) is not a *merely* civil effect of marriage. Nor is it sensible to hold that the obligations of help and assistance, (i.e. spousal and child support) are *merely* civil effects of marriage. Canon 1013 §1 of the 1917 code lists this *help* as an end of marriage (*mutuum adiutorium*) and it is part of the “well-being of spouses” codified in canon 1055 of the 1983 code.²² By asserting that child custody and support are only the *merely* civil effects of marriage, a tribunal judge—in practice—tells a spouse to petition in the civil forum for divorce. To confuse the situation further, nowadays in most cases the tribunal judge does not even wait for the bishop’s permission before granting permission to a spouse to petition for separation in the civil forum.

Annulment Mentality

Why does one abandon marriage?

The canons on separation and civil divorce exist to help keep families together. Julie Alexander and her husband Greg work to help save marriages in crisis at “The Alexander House.” Of the 1500 (plus) couples that they have worked with, there have been about 30 in which one spouse quit (that is a 98% success rate). Julie concludes that those who withdraw from marriage have two things in common: they reject God; and there is a third party encouraging them to divorce. There are too few Catholics—especially in positions of authority—willing to intervene and adamantly discourage someone from filing for divorce.

Statistics

Those who try to stop another from divorcing are up against a well-funded establishment of tribunals in at least half of the United States. According to statistics provided by the 2012 Official Catholic Directory and the Canon Law Society of America,

²⁰ Ibid

²¹ Goldsmith, J. William. The Competence of Church and State of Marriage - Disputed Points. Washington, DC: Catholic University Press, 1944, p. 22

²² Bianchi, Paolo. When is the Marriage Null. p. 85 & 213 - Also Burke, Raymond. “So Called New Grounds of Nullity.” Canon Law Conference. Shrine of Our Lady of Guadalupe, La Cross, Wisconsin. 10 August 2011.

sixty-two active tribunals granted annulments in the first instance to 98.7 percent of the petitioners on average.²³ These tribunals decided 8,470 cases and 8,358 were decided in favor of invalidity. Half the Catholics in the U.S. reside in these 62 dioceses. To look at this from a different perspective, for every nine marriages that occurred in these dioceses, one marriage was ruled as invalid. In 23 of these dioceses, annulments were granted to 100% of the petitioners. The total annual expenses reported by these tribunals exceeded fifteen million dollars. In one diocese, the bishop fired his judicial vicar because the vicar would not go along with the bishop’s instruction to grant annulments in over 95% of the cases.²⁴

At this point, it will be important to highlight some discrepancies between teachings from U.S. tribunal judges in contrast with those affiliated with the Roman Rota or the Supreme Tribunal of the Apostolic Signatura. This will bring to light the reality that in the United States too much attention is given to immaturity and the supposed requirement for a successful interpersonal relationship.

Problems

Maturity

U.S.A.

In 2013, the Judicial Vicar in Columbus, Ohio, U.S.A., gave an 80-minute YouTube interview. Most annulments, he said, are granted on the ground of grave lack of discretion of judgment on account of immaturity (canon 1095 §2). According to the judge, psychologists tell us that there are people in their late 20’s and early 30’s who have good educations and high-paying jobs but who are not mature enough to conduct their relationships successfully or to choose a partner.²⁵ It is easy to find others teaching this, too, including the Canon Law Society of America in their 1985 commentary on canon 1095 §2.²⁶

Authoritative

This teaching is different from what was taught about canon 1095 §2 by now-Cardinal Raymond Burke. In 1986, not long before he was assigned to be the defender of

²³ Canon Law Society of America, *CLSA Proceedings 2013, 75th Annual Meeting*. Washington DC: Canon Law Society of America, 2013. p 407 – 413 contains first instance U.S. tribunal statistics from 2012. A decree of nullity does not take effect until a second tribunal has confirmed it. The first tribunal is called the tribunal of first instance. The data compiled herein is for first instance only; however, the data for second instance show similar percentages overall.

²⁴ Ponce, Jaimes. *Lack of Internal Freedom on Matrimonial Consent: An Analysis of Rotal Jurisprudence and American Decisions*. Lulu Press. 2012. This incident was reported in the introductory remarks of dissertation at the Pontifical University of the Holy Cross in Rome in 2012.

²⁵ Cody, Msgr. John. “How do I get an annulment?” Columbus Ohio. min. 23 sec. 20
<https://www.youtube.com/watch?v=JGuhFVuJ_eY#t=23m20s>

²⁶ Coriden, Green, and Heintschel. *Code of Canon Law: A Text and Commentary*. 1985, p. 776

the bond at the Supreme Tribunal of the Signatura in Rome, he said that in contemporary times, the late teen years are the presumed age at which discretion suitable for choosing marriage begins to be achieved. Also, he said that a psychic illness or a psychic disturbance must be proved to have been present at the time of consent for a party to be lacking discretion of judgment.²⁷

In the 1987 Papal address to the Roman Rota, Pope St. John Paul II said tribunal judges mistakenly use psychological reports about immaturity and end up being confused about the canonical maturity required for marriage.

In 2012, Roman Rota judge Msgr. Kenneth E. Boccafola listed three primary reasons why cases arriving at the Rota are overturned: “a) the facts are not well grounded and do not support the chapter of nullity; b) there are some flaws in the interpretation of doctrine and jurisprudence, for instance they use the more generic term of immaturity rather than psychological incapacity; and c) there is a violation in procedural norms.”²⁸

Successful, satisfying marriage

U.S.A.

Nowadays, too many Catholics conclude that a marriage must be invalid if a couple does not have a successful interpersonal relationship. Tragically, this line of thinking is supported by the 1985 Commentary by the Canon Law Society of America. When the commentators describe the essential obligations of marriage, they emphasize the interpersonal relationship. It is not possible to restate their argument here, but those interested should read their entire commentary on canon 1095, and compare it to the other works that are cited here.

Authoritative

In 1983 and 1984,²⁹ Edward Egan published articles in the scholarly journal of the Roman Rota, *Effermeridis Iuris Canonici*, about incapacity to consent. Edward Egan was a judge at the Roman Rota, taught canon law at the Gregorian University, and was one of the six canonists who reviewed the new Code of Canon Law with Pope St. John Paul II. While the Canon Law Society of America was emphasizing interpersonal relationships, Egan criticized those who claimed that because of a *new* understanding of the *relationship-part* of marriage, it could now be proven that larger numbers of people were incapable of marriage consent. In his article about lack of due discretion, he wrote:

²⁷ Burke, Raymond. “Canon 1095: Canonical Doctrine and Jurisprudence Part I: Canon 1095, 1° and 2°.” *1986 CLSA Proceedings*. Washington DC: Canon Law Society of America, 1986, p. 98 & 101 <<https://clsa.site-ym.com/store/ViewProduct.aspx?nonssl=1&id=477444>>

²⁸ Ponce, Jaimes. *Lack of Internal Freedom*. Boccafola’s statement was reported in the conclusion, near the end of discussion about the divorce mentality in the United States.

²⁹ Egan, Edward M. “The Nullity of Marriage for Reason of Incapacity to Fulfill the Essential Obligations of Marriage.” *Ephemerides Iuris Canonici*. Vol. 40. No. 1-4 (1984): 9-34

Most people today who live in areas of the world where ecclesiastical marriage tribunals are active are sophisticated enough to know that most marriages are valid because most men and women, however pleasant or unpleasant, however educated or uneducated, are able to marry.³⁰

Both Catholic University of America and Ignatius Press have just published books on marriage. Msgr. Cormac Burke, a prolific writer and former Rota Judge, wrote *The Theology of Marriage*. He criticizes the errors popular in the 1970's and 1980's because of the superficial analyses of *bonum coniugium*, or the well-being of the spouses.³¹ The other book by Fr. Paolo Bianchi, has a foreword by Cardinal Raymond Burke, and is entitled, *When is the Marriage Null? Guide to the Grounds of Matrimonial Nullity for Pastors, Counselors, and Lay Faithful*.³² The author's 1988 doctoral dissertation was an analysis of Rotal Jurisprudence from 1970-1982 on the inability to assume the essential obligations of marriage. Both books have lengthy analyses which seem to oppose the teaching of the Columbus Judicial Vicar and the Canon Law Society of America's 1985 commentary, particularly the assertion that many marriages are invalid due to immaturity, or can be known to be invalid because the couple is not growing together.

Other U.S.A. Judges

Besides confusion about maturity and interpersonal relationships, U.S. tribunal judges have other troublesome practices.

I once heard a tribunal judge say that people who grew up in divorced homes would not have the required knowledge of marriage to give valid consent. In contrast, Cardinal Raymond Burke specifically discussed the possible problem for children of divorce in his 2011 presentation on "The So Called New Grounds for Nullity." He reasoned that growing up in a divorced home can actually help a person to want the permanence of marriage and appreciate it more deeply.

One judge taught that if the tribunal does not have enough proof to grant an annulment, they would stop the process until they can get more proof. The judge gave the example of a party revealing that she had had an abortion before marriage, and "ah-hah" now the tribunal had what they needed to grant an annulment.

Another judge said that fidelity means faithfulness in mind, body and spirit. According to this judge, it does not only mean sexual fidelity, but that spouses must be emotionally present for each other; and fidelity means each party is the other's best

³⁰ Egan, Edward M. "Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgement." *Ephemerides Iuris Canonici*. Vol. 39. No. 1-2 (1983): 9-54, p. 38.

³¹ Burke, Cormac, Msgr. *The Theology of Marriage: Personalism, Doctrine and Canon Law*. Washington D.C.: Catholic University of America Press, 2015, p 87

³² Bianchi, Paolo. *When is the Marriage Null*. The Dean of the Faculty of the Canon Law at Pontifical Gregorian University wrote the foreword to the original Italian edition of the book, and said that Bianchi's dissertation "includes one of the most complete bibliographies on the subject available to date."

friend. This contradicts Bianchi's analysis of fidelity; it has nothing to do with friendship. It has to do with the exclusive right to conjugal acts suitable for the generation of children, with no engaging in sexual relations with other persons besides the spouse.³³

I have listened to a tribunal judge's open conversation with attendees at a presentation in which the judge said, "A lot of times I find accountants, engineers, lawyers—they tend to over-analyze things from an intellectual perspective and lack the emotional perspective, so that definitely has a bearing on your ability to consent to marriage."

Procedure

When Rota Judge, Msgr. Boccafola, said that the Rota overturns cases for flaws in interpretation of incapacity, he also said cases are overturned because of violations of procedural norms. Here are some examples that I have seen.

I know respondents who wanted to defend themselves but had no idea where to start because the tribunal never gave them what the law requires: the petitioner's general description of the facts and proofs that support the claim of invalidity of the marriage. Furthermore, the law allows the parties to review the case records, including witness testimony, correspondence, written proof, and everything the judge would see before making his decision. I know parties who were forbidden to keep their own notes made during their review of the case file.

Some tribunals instruct parties to mandate a procurator, trained by the diocese to facilitate the granting of annulments. Mandating a procurator is similar to giving someone power of attorney. These tribunals never told the party that he has an option of speaking on his own behalf. As a result, procurators have the power to misrepresent the intentions of the parties, while the parties have no idea what is going on.

I have seen tribunals instruct each party to sign pre-printed forms wherein the party "entrusts himself to the knowledge and conscience of the judge." This exact wording has great significance because it relieves the tribunal of their obligation to provide the party with an expert in canon law who will write a brief on the party's behalf before the case is decided (See *Dignitas Connubii* Art. 101 and 245 §2).

For other violations against procedural norms, see Msgr. Cormac Burke's 2012 article, "Justice and Transparency in Matrimonial Decisions" in *Angelicum*, the Journal of the Pontifical University of St. Thomas Aquinas.³⁴ He discusses a case in which the report of an expert psychologist witness was kept secret and respondents were misled about the cost of appealing to the Roman Rota.

³³ Bianchi, Paolo. *When is the Marriage Null*. p. 124-129

³⁴ Burke, Cormac, Msgr. (Judge of the Roman Rota, 1986-1999). "Justice and Transparency in Matrimonial Decisions." *Angelicum* (Rome) vol. 89-1 (2012): pp. 223-244
<<http://www.cormacburke.or.ke/node/1350>>

Petitioner Not Informed During Procedure

One petitioner told me that after being forced through a no-fault divorce, he was persuaded by the deacon who conducted the couple’s marriage preparation to petition for invalidity of his marriage. The petitioner answered a questionnaire and signed a “petition” form that showed grounds of “defect of discretion on the part of the petitioner (c. 1095 §2).” Later, he learned that the first instance tribunal had decided in favor of invalidity, and was sent a notarized copy of the “definitive decree” granting annulment. The short law section in this “definitive decree” was written in Latin and the argument section was six lines long. Years later, he saw the copy of the “definitive decree” sent to the respondent (his *ex-wife*). Her argument section was four pages long, and he was dumbfounded that it was based on his alleged psychological problems primarily attributed to his difficult upbringing. If this story had been included in the original petition, he would never have signed it. Moreover, in this longer decree, the psychic anomaly was unsubstantiated by any expert psychologist witness. The tribunal judge had even quoted a civil forum psychologist who had written: “There is no persuasive evidence that father suffers from any serious mental illness or mood disorder.”

Annulment Reform - Mot Proprio, Mitis Iudex, Dominus Iesus.

The streamlined process for cases of nullity was introduced on September 8. In Article 114 of the *Instrumentum Laboris* for the upcoming bishops’ synod, the bishops expressed an interest in making the procedure in cases of nullity more accessible, less time-consuming and less expensive. The introduction to *Motu Proprio* shows in section VI that the Church should be generous and have minimal fees for processing nullity cases. In most dioceses in the United States the Petitioner pays a fee that does not cover the wages of the workers. However, in dioceses that grant annulments to over 98% of the cases, if a Respondent wants to defend his marriage, there are virtually no gratuitous advocates available who have experience working on cases in which invalidity was not proved. So a Respondent either has to learn how to defend himself, or hire a private canon lawyer. On the appellate level, if the Respondent names the Roman Rota as the tribunal of second instance, even though the law says a gratuitous advocate can be provided, I have heard that some parties are assigned advocates who could barely, or not even, speak English. Finding a Roman Rota advocate who speaks English is very difficult and even if one is found, they are very expensive. Most parties defending the validity of their marriage have been financially ruined after the effects of no-fault divorce. I would hope that the Roman Rota would instruct a local diocese to reimburse a Respondent’s fees paid to a Rotal Advocate if the U.S. decision was overturned.

Cardinal Raymond Burke has emphasized, that if done properly, the ordinary contentious process elaborated in *Dignitas Connubii* is not terribly time consuming. He says that it is not the process that is problematic, but the lack of trained personnel ready

to execute the process.³⁵ This begs the question: are the personnel disregarding the procedural requirements in Canon Law and *Dignitas Connubii*, because they do not know the process, do not want to follow it, or are put in the impossible situation of not having enough staff to follow it?

Mary’s Advocates sent to the eleven members on the commission to reform the annulment process, the bilingual “Proposal: Case Management System for Annulment Process.”³⁶ With a secure international internet-hosted system, parties and witness could participate much more easily, either from their home phone or computer or a nearby parish computer. Subject matter experts on particular grounds for nullity could work on cases for various dioceses. Time and expense for travel and postal service could virtually be eliminated. Uniformity in procedures that ensure the right of defense could be built into the system, and the Holy See could use the system to communicate directly with diocesan staff working on nullity cases. On the appellate level, all the correspondence of the case could be accessible instantly.

Pope Francis’ *Motu Proprio* eliminated the automatic review in second instance before a decree of nullity could take effect. If this review was an incentive for judges to follow the law and interpret grounds for nullity in accord with the jurisprudence from the Roman Rota, then removing the review increases the risk of abuse.

A new streamlined process is available in cases in which proofs could be easily collected, and in which both parties want a decree of invalidity or the Respondent does not object. In dioceses in which the bishop requires that 95% of the petitioners are granted a decree of nullity, as one canonist told Fr. Jaimes Ponce, then the streamlined process will enable the bishop to achieve his goal with fewer diocesan resources. For example, if a bishop believed the claim of simple immaturity in relational matters was a ground for nullity, it could be made known that the petitioner needs to make that claim on a petition and request the streamlined process, and the bishop himself could issue the decree of invalidity quickly.

In the streamlined process, personnel who are not canon lawyers manage the collection of proofs as described by Ed Peters, J.C.D., J.D.:

The new speedy annulment process, however, allows (I would say, pressures) bishops who are not necessarily canon lawyers (Canon 378), to rely heavily on a report drafted by someone who need not be a canon lawyer (*Mitis*, Art. 3), after conferring with an assessor who need not be a canon lawyer (Canon

³⁵ Burke, Cardinal Raymond, Keynote: The Synod on the Family: Addressing the *Instrumentum Laboris*. Franciscan University. September 8, 2015. <https://www.youtube.com/watch?v=R7jxS5-wJ8c#t=44m12s>

³⁶ Macfarlane, Bai. “Proposal: Case Management System for Annulment Process; Simplify, Making it More Streamlined, Safeguarding Indissolubility; Includes interview with Document Management Expert DeWayne Ashcroft.” 8 September, 2015. http://www.marysadvocates.org/syllabus/Proposal_Case_Mgnt_150908.pdf

1424), to rule upon a marriage that, besides enjoying natural (‘intrinsic’) indissolubility, might be sacramentally (‘extrinsically’) indissoluble as well.

... In sum, this general lack of awareness of the inescapably complex legal nature of marriage consent shown in these new rules is disturbing.

...At the pope’s request, a tiny group of experts, most from just one country, developed these new canons and explanations in a very short time. I find, however, the implications of some of these norms for marriage law in general, and for diocesan bishops in particular, stunning.³⁷

The new Canon 1672 removes the Respondent’s right to be consulted before the competency is chosen, so now the case could be judged by the Petitioner’s diocese even if the Respondent objects. Canon 1678 §2 removes the requirement for testimony to be corroborated. Ben Nguyen, who is both a civil and canon lawyer, wrote this:

Currently, the testimony or declaration of one witness is not sufficient to constitute full proof. In other words, a person’s claim must be corroborated in order to count as full, accepted proof. *Mitis Iudex, Dominus Iesus* allows the testimony of one person to be taken as full proof under certain circumstances, such as if the credibility is supported, if there are no other contrary proofs, if the statement was made in one’s official capacity (ex officio), etc.³⁸

The *Motu Proprio* eliminates the judge’s obligation to use pastoral means to try to have the spouses reconcile. In the current 1983 code, canon 1676 says, “Before accepting a case and whenever there is hope of a favorable outcome, a judge is to use pastoral means to induce the spouses if possible to convalidate the marriage and restore conjugal living.” A rough translation of the new canon 1675 reads “The judge, before he accepts a case, needs to be sure that the marriage is irretrievably failed, so that it is impossible to restore conjugal living.” If the marriage has failed because one spouse abandoned the marriage and is unwilling to reconcile, even though the other did nothing bad enough to justify separation, it is sad for the children and for the faithful spouse that the judge is no longer obligated to try to restore conjugal living. The two Latin and Eastern rite versions of the *Motu Proprio* are entitled “The Lord Jesus, the Gentle Judge” and “Jesus, Meek and Merciful.” How is it merciful to leave an innocent spouse and

³⁷ Peters, Ed “A second look at Mitis, especially at the new fast-track annulment process”

<https://canonlawblog.wordpress.com/2015/09/08/a-second-look-at-mitis-especially-at-the-new-fast-track-annulment-process/> Peters was named a Referendary of the Apostolic Signatura by His Holiness Pope Benedict XVI. He has held the Edmund Cdl. Szoka Chair at Sacred Heart Major Seminary in Detroit since 2005.

³⁸ Nguyen, Benedict. “Annulment Reform: 6 Misconceptions and 6 Developments.” National Catholic Register. 9 September 2015 <<http://www.ncregister.com/daily-news/annulment-reform-6-misconceptions-and-6-developments/>>

children with no intact family because the other spouse wants to withdraw from the marriage?

Idea: Nullity accusations can result in separations in accord with Divine Law

My hope is that we will start making honest distinctions between a party who was incapable of marriage consent, a party who chose to renege on his or her marital obligations, and a party who lied (simulated) when making marriage promises. I believe these facts should be uncovered before a party approaches the civil forum for divorce because these distinctions are relevant to determining the parameters of a separation plan that is not contrary to divine law. This determination is part of what the local bishop is supposed to consider before giving permission for anyone to approach the civil forum (as required in canon 1692 §2).

Disregarding Canons on Separation of Spouses

In the Code of Canon Law, shortly after the canon requiring the bishop’s permission for civil divorce, there is another canon about the ecclesiastical judge’s obligations to work toward reconciling the couple. Canon 1695 says, “Before accepting the [separation] case and whenever there is hope of a favorable outcome, the judge is to use pastoral means to reconcile the spouses and persuade them to restore conjugal living.” Let me share with you what I have learned from Catholics who have asked the Church for help when a spouse wanted a no-fault divorce.

Clergy Responses to Pleas from the Faithful

Felix

One husband (I will call him Felix) told me about his experience. Before marriage, both he and his future wife were active Catholics who considered themselves loyal to the Magisterium. They practiced Natural Family Planning and had a daughter after three years of marriage. Within a couple of years, Felix’s wife became unhappy in their marriage and told Felix that she no longer loved him, liked him, or even respected him. According to the wife, the associate pastor told her “If she had done everything she can do, then she should divorce Felix.” Thereafter, Felix met with this associate pastor who asked Felix “if he was being fair to himself by staying in the marriage.” The couple then met with the pastor who told them “it takes two to tango.” When they met with a psychologist that the pastor recommended, he told them they were emotionally divorced anyway. Felix says there is no way he was doing anything bad enough to merit separation—but that did not matter.

Felix’ wife filed for divorce, moved out, and started dating another man. The wife told Felix that the associate pastor said she was free to date. When Felix picked up their daughter one morning, he learned that the new boyfriend was there, showering after having spent the night. The wife had a child with the boyfriend and the boyfriend and Felix’ wife are now no longer together.

Felix wrote to the diocesan offices, describing his concern about the associate pastor encouraging separation and divorce and telling his wife that she was free to date. Felix showed me the diocesan official’s response:

My understanding is that [this priest’s] recommendation to you is that you do all you can to get help for yourself about adjusting to the reality of your wife’s decision and go on with your life.

It is not pastorally wise to force people to stay in marriages that are not happy or good. The very fact that the Church has a Marriage Tribunal indicates that there is a recognition of the reality that some marriages are judged not to be sacramental. While it is our responsibility to encourage and promote marriage as a sacramental, permanent union, sometimes that does not occur.

Felix’ story shows how the ecclesiastical official did not want to *force* his wife to stay in a marriage if the marriage is “not happy or good.” Felix knows that Church officials cannot force his wife to reconcile, but they could at least teach her that in their circumstances divorce is immoral and a grave offense against nature (¶2384-2385). In John Paul II’s 2004 address to the Roman Rota he taught that, “[In] accordance with human experience marked by sin, a valid marriage can fail because of the spouses’ own misuse of freedom.” Felix could find no one to tell his wife that her interest in divorcing Felix could be sinful. He could find no one to tell his wife that their difficulties “could be overcome, were it not for their refusal to struggle and make sacrifices” as taught by Pope St. John Paul II, in his 1988 address to the Roman Rota.

Feelings of good conscience can excuse sin

One abandoned husband told me how his priest-friend reacted after the husband showed the priest the canon laws that require the bishop’s permission before filing for divorce. The priest wrote that he fears what will happen if the Church is not flexible with people who have struggled in pain-filled marriages. This husband also spoke to his diocesan tribunal’s Judicial Vicar. According to the husband, the Judicial Vicar knows the husband has done nothing bad enough to merit separation. Moreover, the Judicial Vicar says the wife’s getting the divorce itself is a sin, but that as long as she confesses that sin, and she feels justified in her own mind remaining separated, then she is in good standing with the Church, can be a Eucharistic minister, lector, or sacristan, and can receive Holy Communion.

Unwilling to decide case on separation of spouses

Another husband I know petitioned his bishop’s office seeking the intervention of the diocese to help reconcile his marriage after his wife had abandoned him. If his wife would not reconcile even after ecclesiastical intervention, the husband requested a decree of separation “in recognition of wife’s unilateral decision to abandon the conjugal life.” He received a two-paragraph reply. The first paragraph described how the couple’s pastor said the wife “has no interest in addressing issues of reconciliation.” In the second paragraph, the husband’s request for a decree of separation was denied because the diocesan official thought that issuing a decree of separation would harm the rights of either party to petition for a decree of nullity in the future.

A formal ecclesiastical decree of separation would establish at least implicitly the validity of their current marriage, and thus exclude any possible petition for a declaration of nullity, should either party wish to do so in the future. I am reluctant to pursue such a course and prejudice the legitimate rights of both parties to possibly petition for a declaration of nullity at some future time.

No Delict, No Crime

In another case, some people who were disappointed about a husband abandoning his wife wrote to the bishop. Citing Canon Law and the Catechism, they said that the husband should be denied Communion if he obstinately perseveres in grave manifest sin (canon 915). They also requested a preliminary investigation and possible penalties, hoping to motivate the abandoning husband to reform (We will call him Jack, and change the quotation below accordingly). The bishop denied their request and referred to a letter he had written Jack earlier:

The letter I wrote to Jack was a pastoral exhortation to encourage him to reconcile with his wife. There is no canonical penalty attached to his failure to respond. [...] Jack could justly argue that he is being singled out for unjust treatment because an investigation of others who separate and divorce without permission from the legitimate Church authority is not done. [...] Jack would not be considered in manifest grave sin unless he was cohabiting with a woman or remarried. Even if he were to cohabit or remarry, neither is a delict. [...] Divorce is a grave matter. Divorce however is not a crime in Church law. [...] I respectfully remind you that no one may unlawfully harm the good reputation of an individual or violate the right to protect his or her privacy (canon 220) which is also an obligation in natural law. Your reference to Jack as “offender” is presumptive, inflammatory and lacking in charity.

I cannot figure out why this bishop says that Jack would not be considered in grave manifest sin unless he was cohabiting. This bishop appears to believe that marital abandonment is not a grave sin. Moreover, the abandonment is manifest to everyone who knows the family closely.

It is true that in canon law, marital abandonment is not specifically listed as a delict (crime). However, both the Promoter of Justice³⁹ of the Supreme Tribunal of the Apostolic Signatura and the Secretary⁴⁰ explained in 2005 how the bishop could proceed fairly easily with an administrative penal process, even if a particular offense is not clearly identified as a delict.

There is some confusion about whether the denial of Communion is a canonical penalty. Archbishop Raymond Burke addressed this confusion in his 2007 article "Canon 915: The Discipline," published by the Pontifical Gregorian University in *Periodica de re Canonica*:

[T]he denial of Holy Communion was repeatedly characterized as the imposition of a canonical penalty, when, in reality, it plainly articulates the responsibility of the minister of Holy Communion, ordinary or extraordinary, to deny Holy Communion to those who obstinately persevere in manifest grave sin. The denial of Holy Communion can be the effect of the imposition or declaration of the canonical penalties of Excommunication and Interdict (cf. cann. 1331 §1, 2°; and 1332), but there are other cases in which Holy Communion must be denied, apart from any imposition or declaration of a canonical penalty.⁴¹

I propose that marital abandonment (where the other spouse has done nothing bad enough to merit separation) may well rise to the level wherein Holy Communion must be denied. Citing Saint John Paul II's Encyclical *Ecclesia Eucharistica* (n. 37), Cardinal Raymond Burke in his 2012 book "Divine Love made Flesh" shows why.

The Holy Father also mentions the case of public conduct which is "seriously, clearly and steadfastly contrary to the moral norm," and before which the Church is obliged to deny Holy Communion. Such action of the Church is

³⁹ Daneels, Frans, O. Praem (Promoter of Justice at Signatura). "The Administrative Imposition of Penalties and the Judicial Review of Their Legitimacy." Dugan 245-255, p.248

Dugan, Patricia M. *The Penal Process and the Protection of Rights in Canon Law*. Montreal: Wilson & Lafleur Ltee, 2005. ISBN 2-89127-664-7

⁴⁰ DePaolis C.S., Velasio (Secretary at Signatura). "Penal Sanctions, Penal Remedies and Penances in Canon Law" Dugan 145-182, p. 153. See Dugan above.

⁴¹ Burke, Raymond. "Canon 915: The Discipline Regarding the Denial of Holy Communion to Those Obstinately Persevering in Manifest Grave Sin." *Periodica De Re Canonica*. vol. 96 (2007) page. 3-58, Introduction. <<http://www.therealpresence.org/eucharst/holycom/denial.htm>>

required in order to respect properly the Holy Eucharist and to avoid confusion and scandal in the community of faith.⁴²

Communion after divorce

Catholic officials often teach that those who are divorced are free to receive Holy Communion, and it is only those who are remarried without an annulment who may not receive Holy Communion. When this statement stands alone without making the distinction between a faithful spouse and an abandoner, the Church appears to condone both parties in all divorces. A distinction must also be made between an innocent party who has a morally legitimate reason for separation and one who does something bad enough to merit separation of spouses.

Regarding divorce, the Church is typically a silent onlooker even when a spouse forces a no-fault divorce because he feels the couple has grown apart or the love is dead. Even in cases when there is a legitimate reason to factually separate, I see the Church doing nothing to protect the innocent spouse and children against the maneuverings of the no-fault divorce practitioners. The Church could at least make attempts to teach more about the parameters of a separation that would be in accord with divine law. The common silence can mislead children into thinking that there is nothing wrong with the present practice of divorce.

Support Programs

After divorces have occurred, there are pressures everywhere encouraging people to give up on marriage, even in the Church. For example, Irene’s husband left her over six years ago and forced her through a no-fault divorce. She remains faithful to him even though others tell her that she should date and find a new spouse.

In diocesan-sponsored programs, she has found virtually no support to remain faithful to her husband. In the U.S.A., two popular programs in fact do the opposite. Throughout the “The Catholic Divorce Survival Guide,” there is the collective assumption that the wrong spouse was chosen in the first marriage. Annulments are described as the pastoral practice that frees viewers to date and seek another spouse, and annulments should be sought after healing from the first relationship disaster. This program includes a DVD series and book co-produced and written by Rose Sweet. She says, “Your Ex is no longer your spouse, and your expectations of him or her need to change; otherwise you will still be emotionally married . . . and that is a miserable place to be” (page 72, video session 6). All of the divorced in the video sessions have gone on to

⁴² Burke, Cardinal Raymond. Divine Love Made Flesh. San Diego, CA: Catholic Action for Faith & Family, 2012, p. 44

date or are remarried. Another program, named “Divorce Care,” produced by Church Initiative, presumes that everyone is free to find a new partner, and only advises that certain emotional steps should be accomplished before dating.

In Irene’s example, her husband’s abandonment causes all sorts of financial problems and emotional anguish. While he is clearly renegeing on his marital obligations, they *are married*, and Irene cannot *stop being married* any more than I can stop being my son’s mother. While she has not found support in popular divorce support programs in the United States, she does feel supported by Cardinal Gerhard Müller, the prefect of the Congregation of the Doctrine of the Faith. In an interview published in 2014, he talked about the Church’s role in healing wounds.

The Church, on the other hand, is called in this world to give the hope that enables us to endure life patiently with the wounds that we accumulate. It is neither lawful nor right, for example, for a layman or a priest to tell someone who is suffering because she has been abandoned by her spouse, ‘Well, now you can marry someone else.’ That does not help, since this person is still wounded by the abandonment that she has suffered, and as we know, a wound is not healed simply by covering it up or even by denying that it exists. One is not healed by merely trying to ‘start over from zero.’ One is healed by offering up to Christ the wound that one has suffered, by fighting the good fight of the faith.⁴³

Fighting the Good Fight

Irene is fighting the good fight of the faith and our secular culture obviously does not understand this—it doesn’t understand the indissolubility of marriage through “good times and bad.” Retired Rota Judge, Msgr. Cormac Burke says it best in his new book, *The Theology of Marriage*:

Undeniably there are many marital situations where a purely human judgment can conclude that the ‘good of the spouses’ has not been or cannot be achieved; the cases, for instance, where one of the spouses, renegeing on his or her conjugal commitment, walks out on the other. Does it make any sense to talk of the *bonum coniugum* as applying to such situations? As regards the renegeing spouse, certainly the marriage would scarcely seem capable of working any longer toward his or her ‘good.’ Yet it can still work powerfully for the good of the other if he or she remains true to the marriage bond. If that fidelity is maintained, moreover, it may in God’s providence act as a call to repentance and as a force of salvation for the unfaithful spouse, perhaps in his or her very last moment on earth—when one’s definitive *bonum* is about to be

⁴³ Müller, Cardinal Gerhard. *The Hope of the Family*. p. 81

decided. That the positive potential of such situations can be grasped only in the light of the Christian challenge of the cross does not in any way weaken the analysis. If it is true that the positive potential may never be actually realized, that simply reflects the risk and mystery of human freedom. As the catechism states (no. 1615):

[CCC] Jesus has not weighed down the spouses with a burden that is impossible to bear, heavier than the Law of Moses. Having come to reestablish the initial order of creation upset by sin, he himself gives the strength and grace to live marriage in the new dimension of the kingdom of God. Following Christ, denying themselves, taking upon themselves their own cross, the spouses can ‘understand’ the original sense of matrimony and live it with the help of Christ. This grace of Christian Matrimony is a fruit of the Cross of Christ, the source of all Christian life.⁴⁴

Conclusion

Implementing Canon Law

In conclusion, I can only guess how challenging it would be to start implementing the canon laws on separation of spouses in a region where no-fault divorce practitioners have been controlling separations for decades. A starting point would be for priests and professed Catholic counselors to stop telling dissatisfied spouses that it is all right to divorce if you feel love is dead or you have grown apart. Pastors could also widely publicize the availability of helps that have a high success rates for reconciling spouses such as *Retrouvaille*, Focus on the Family’s National Institute for Marriage, or The Alexander House. Moreover, before a pastor recommends a marriage counselor, he could check whether the counselor would be willing to keep in mind the canon law on separation for Catholic couples, including the legitimate reasons for separation and the need for the bishop’s permission before filing for civil divorce.

After the recent US Supreme Court ruling giving *homosexual couples* the right to enter civil marriages, Catholic priests might want to stop being *officiants* for state marriages altogether. In the United States, when parties exchange vows in a Catholic Marriage Rite, the priest is simultaneously performing a marriage ceremony for the state. In essence, the state thereafter recognizes that the parties are civilly married, thereby leaving an innocent spouse and children susceptible to the maneuverings of no-fault divorce practitioners. Because the rights and obligations of Catholic marriage are so contradictory to the rights and obligations of civil marriage, it may be time to officially separate the contracts. Parties who are canonically qualified to enter Catholic marriage

⁴⁴ Burke, Cormac, Msgr. *The Theology of Marriage*, p. 97

could exchange vows in the Rite of Catholic marriage, and only if they wanted the health insurance or tax benefits of having a civil marriage, they could afterwards do so through a contract that is completely distinct from entering a Catholic marriage.

Another suggestion from constitutional law expert, Stephen Safranek, is to provide a better framework for Catholics to think about the type of marriage they are entering. During marriage preparation, a couple could be taught about canon law on separation. They could sign an agreement promising to abide by canon law and designating the Church as the arbitrator of any future disputes. In an interview with *Our Sunday Visitor*, Safranek described a benefit of such a signed agreement:

If someone leaves their spouse for unjust reasons, they would lose the legal advantage currently given in civil courts to the person petitioning for the divorce. Such a process could also encourage couples to head to counseling rather than the divorce courts if the bishop denies one partner's request for separation and that partner doesn't want to incur ecclesiastical penalties.⁴⁵

Separation in accord with Divine Law

If we are truly interested in implementing canon law on separation of spouses, experts in Church law and moral theology must explore how justice and natural law should be applied in common cases of separation. There are many questions that need to be addressed carefully.

For example, should a husband who wants to have an adulterous affair still be expected to contribute his full share to the wife and children's home? In no-fault divorce decrees, he may be expected to only pay a small fraction of his income to the wife and children while the majority of his income is spent on his own pursuits with his adulterous partner. When a wife wants to divorce her husband because she feels they have grown apart, should the children keep in every-day contact with their father? Should the wife still be expected to contribute her share to the maintenance of the marital household? In no-fault divorce decrees, the wife has the power to financially devastate her children by forcing the resources of two parents to be split to maintain two households. In addition, she has the power to take the father out of the children's lives for most of the time. If a man simulated his marriage vows, never intending permanence or faithfulness, thus making his vows invalid, should the woman and children be able to keep the marital property that has been accumulated during the course of the *simulated* marriage? Should he be required, as much as possible to repair the damage he caused to the woman by entering into a fraudulent marriage contract? If a woman had grave psychic anomaly and no capacity to consent to marriage, should the innocent man be free of his obligation to

⁴⁵ Stimpson, Emily. “Should couples get bishop's permission to separate?” *Our Sunday Visitor*. 24 May 2009. page 5.

financially support her? Should the innocent man be able to keep up his day-to-day contact with his children? Should the care of the children to be given to the innocent party where they are to be reared at the expense of the guilty partner? When one party is faithful to the marriage and never caused the separation or divorce, should that party be able to have the children live with him? If the party-at-fault (who was either the cause of the separation, or the cause of an invalid marriage) wants to see the children, should he do so in a home where the children reside with the party who was not the cause of the family break-up? Should the party-at-fault see the children in such a way as to not disturb the normal household and community schedule of the children?

In cases of separation of spouses, canon 1692 §2 has the bishop consider whether or not a separation decree would be in accord with divine law, so I hope the Church will start exploring and answering these questions in an authoritative way. When a professed Catholic abandons his or her marriage for no morally legitimate reason, I ask the Church to implement canon law and to do what Pope Leo XIII described in *Arcanum*: “soften the evils of separation by such remedies and helps as are suited to the parties’ condition and never cease to endeavor to bring about reconciliation.”

Endnote: Canon 1692 §2 Conjunction and/or

Canon 1692 §2 lays down two conditions before a bishop would give permission to approach the civil forum. The first condition is that an ecclesiastical decree of separation will have no civil effects. The second condition is that the decree in the civil forum will be in accord with divine law (c. 1692 §2). Of interest is whether both of these conditions must be satisfied, or only one. Before the final 1983 code was promulgated, it went through several revisions that were studied and edited by consultants. In 1971, the consultants working on the draft for canon 1692 §2 showed the two conditions related by the connecting conjunction “and.” However, in the 1979 draft, the “and” was changed to “or” and no discussions are recorded showing the reason for the change. If one reason alone is sufficient, the fact that an ecclesiastical decision has no civil effects could be the sole reason a bishop uses to justify granting permission to approach the civil forum for divorce. This would not take into account the cause of separation and be just like civil no-fault divorce.

Depending on how canon 1692 is interpreted, along with canon 1290, it might be that the bishop is never supposed to give permission to approach the civil forum if the civil decree will be contrary to divine law. Canon 1290 says that the Church is to use the rules of the civil forum for contracts and the voiding of contracts, except when the civil forum is contrary to divine law.

The Exegetical Commentary from the University of Navarre shows the conjunction as “or.” Therefore, even if the civil decree will be contrary to divine law, the bishop can grant permission to approach the civil forum because the ecclesiastical decision of personal separation of the spouses does not produce juridical-civil effects.⁴⁶

In a recent article about separation of spouses by Rev. Phillip J. Brown who became the President of the Canon Law Society of America in 2013, he reiterates canon 1692 §2, and he shows the conjunction “and.”⁴⁷ So the bishop would only grant permission to approach the civil forum if both the ecclesiastical decision would have not civil effects and the civil decree will not be contrary to divine law.

⁴⁶ *Instituto Martin de Azpilcueta. Exegetical Commentary Code of Canon Law.* Ed. Angel Marzoa, Jorge Miras, Rafael Rodriguez-Ocana. Woodridge, IL: Midwest Theological Forum, 2004, p. 1898

⁴⁷ Brown, Rev. Phillip J. JCD. "Canon 1692 (Legal Separation): A Pastoral Option," *Studies in Church Law* IV. Bangalore, India: St. Peter's Institute, 2008. 215-252, p. 246