Marriage, the Chancery Court, and the Catholic Church

Edward M. Burke

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Edward M. Burke, Marriage, the Chancery Court, and the Catholic Church, 4 DePaul L. Rev. 202 (1955)
Available at: https://via.library.depaul.edu/law-review/vol4/iss2/5

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
MARRIAGE, THE CHANCERY COURT, AND
THE CATHOLIC CHURCH

MONSIGNOR EDWARD M. BURKE

A canon lawyer of necessity deals with the laws of the Church. The Church, however, is composed of individuals who possess an immortal soul and who live in society. The scope of the Canon Lawyer's work, therefore, embraces many activities which seem to be merely civil but which in reality are closely bound up with the spiritual. It was for this reason that the writer and the Civil Lawyer met for the first time some years ago. The meeting was not a completely peaceful event. The writer was perhaps too angular in his approach to the Civil Lawyer. The latter on the other hand could not imagine why he was being bothered in his private practice by a Catholic priest. Misunderstandings and wranglings there certainly were. As understanding and experience entered to dispel the dark clouds of battle that enveloped us, peace and harmony began to rule. At the present time we of the Archdiocese of Chicago, priests and lawyers, are working together and much good is being accomplished.

The Catholic Church and the legal profession are working today in a world beset by many dangerous philosophies. These philosophies are taking their toll among countless individuals of varying strata of society. It is our intention to mention here only the more important: (a) Materialism—the name itself suggests the nature of this philosophy. The creature comforts which every day are more attractive, the creature comforts which every day are more attractive,
the wealth of the world granting the fulfillment of man's craving for
power have conspired to place in an abnormal and exaggerated light
the material things that surround man. He is deluged by its propa-
ganda to such an extent that the spiritual values of life lose their force
in his everyday life. He thinks more often of television programs than
he does of things belonging to his soul. His aspirations are towards
becoming more wealthy rather than more holy. The acquisition of a
new car becomes a more pressing necessity than the raising of a fam-
ily. The cocktail hour has supplanted the family hour. This philos-
ophy, of course, is closely akin to a corollary philosophy that is called
(b) Secularism. Even the man steeped in materialism as a general rule
admits the existence of God. He grants that God created this world
he lives in with all its comforts. He thinks it the decent and respect-
able thing to take time out once in a while to bear witness to God's
existence. But he does not want to carry this acknowledgment of
God too far. Sunday is the Lord's Day. There is no reason to think
of Him during the rest of the week. In other words, God does not
belong in the market place and is not to be considered in the every-
day activities and business practices that take place during the week.

The third philosophy has some of the characteristics of both of the
aforementioned philosophies. It is called (c) Individualism. The Prot-
estant reformation introduced the thesis that private interpretation of
the Bible was an acceptable practice. Therefore, man could read the
Bible and cull from it an interpretation; and whatever he decided
was the meaning of the passage was true—for him.

As the years went on this doctrine expanded. At the time of the
French Revolution it was in full bloom; and man was solemnly
assured that he was a law unto himself and therefore was empowered
to make whatever laws he wished to have and only for the period of
time that he wanted them to last. The City of God was overthrown,
and in its place was erected the City of Man.

Before deciding that these philosophies are merely theoretical, pon-
der for a moment over the world condition today. Is not our troubled
and restless and dangerous world the result of these philosophies being
placed in operation? Nations refuse to recognize their respective
sovereignties. Private property is no longer sacrosanct. The marriage
bond is no longer stable. Shady business deals increase and many
times are justified with the observation that “anything goes if you
can get away with it.” It does not take the mind of a genius to trace
logically and relentlessly the devastating effects of philosophies whose venom is not sufficiently appraised.

In the midst of this confusion dwells the Catholic Church, the Spouse of Christ. For nineteen hundred years she has seen nations rise and fall. She has been present to witness the glory and the ignominy of the world’s rulers. She has sought to have Her voice heard in order to establish peace and order in God’s universe. Some have listened and have profited. Others have continued to shout, in effect, “God is in His Heaven; let Him stay there!” The Church relentlessly pursues Her work for the well being of man. It is not the purpose of this article to discuss all her varied activities. It is limited to the Church’s position on marriage.

The intelligent and conscientious lawyer, whatever religion he professes, will want to learn about the teaching of the Catholic Church on marriage. The client whom he wishes to help is a human being composed of body and soul. The good lawyer will try to help his client in every phase of his being. For that reason the lawyer should strive to know as much as he can about the Catholic Church’s teaching on marriage in order to help not only his Catholic clients but also other clients whose paths may cross those of Catholics.

THE POSITION OF THE CATHOLIC CHURCH ON MARRIAGE

The Church teaches that marriage is always a contract. When both parties are baptized the marriage is not only a contract but also a sacrament. The contract of marriage is bilateral in its nature, with rights and obligations on both sides. The essential element of the contract of marriage is the consent exchanged by the parties at the time of entering the contract. The Code of Canon Law has this to say: The consent of parties considered capable by law and legitimately manifested makes the marriage.¹

There are, therefore, three distinct considerations involved: (1) The manner of giving consent; (2) the parties involved in the consent; (3) the subject matter of the consent. We shall treat each of these considerations separately.

1. The manner of giving consent.—Another word can be substituted for the word “manner.” This word is “form.” The Canon Law states that the marriage of a Catholic must be performed before a duly authorized priest and two witnesses under pain of invalidity.²

¹ Codex Juris Canonici (1918) Canon 1081.
² Ibid., Canon 1094.
Therefore if this form is lacking, viz., if a duly authorized priest and two witnesses are not present to witness the consent of the Catholic, the marriage is null and void *ab initio*. This is true even if only one of the two contracting parties is Catholic. Canon Law explicitly excludes non-Catholics from the necessity of the Catholic form of marriage. Therefore non-Catholics contracting between themselves marry validly as far as the form of marriage is concerned.

A marriage null and void *ad initio* must be declared so by competent ecclesiastical authority in order to produce juridical effects. It is prescribed by Church Law that this declaration of nullity requires the judgment of only one ecclesiastical judge. He will demand documentary proof that the person or persons involved were Catholic at the time of entering the contract. Furthermore, proof that the contracting parties did not enter the contract according to juridical form must be adduced. Therefore, affidavits will be requested stating that the parties to this contract never appeared before a duly authorized priest and two witnesses, either at the time mentioned on the license or otherwise.

Many times lawyers will encounter such cases. Our advice to them would be to contact the local Chancery immediately in order to give the client the benefit of both the ecclesiastical and of the civil law. We welcome such interest on the part of the civil lawyers.

2. The parties involved in the consent.—It will not be surprising for the civil lawyer to learn that the Church has forbidden certain persons to marry. The civil law has many such instances. When the Church publishes its list of impediments she is directing her activities at persons. She declares that certain people may not marry because they are impeded either by Divine Law directly, or by ecclesiastical law. Sometimes her prohibition will consider merely the licitness of such a marriage. In other impediments the very validity of the marriage is at stake. The first class of impediment is termed "impedient." The latter category of impediment involving the validity of the contract is called "diriment." We do not intend here to enter a minute discussion of each of these impediments. We shall enumerate the diriment impediments, and then explain a few of the more interesting

---

*The Chancery is that office of the diocese, the local jurisdictional unit of the Catholic Church, which, under the authority of the local Bishop, carries out the administrative and judicial functions of the diocese. In the Chancery Office of the Archdiocese of Chicago are two Matrimonial Courts: the Separation Court and the Annulment Court.*
ones. These are the diriment impediments listed in *The Code of Canon Law*:

<table>
<thead>
<tr>
<th>Want of age</th>
<th>Solemn religious vows</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impotence</td>
<td>Abduction</td>
</tr>
<tr>
<td>Bond of a prior marriage</td>
<td>Crime</td>
</tr>
<tr>
<td>Disparity of cult</td>
<td>Consanguinity</td>
</tr>
<tr>
<td>Sacred Orders</td>
<td>Affinity</td>
</tr>
<tr>
<td>Legal relationship</td>
<td>Public Honesty</td>
</tr>
</tbody>
</table>

Therefore any person or persons affected by one of the above-mentioned impediments could not marry validly as long as the impediment lasted. Sometimes the impediment disappears with the passage of time (e.g., those affected by the impediment of age); or with the change of conditions (e.g., a non-baptized party receiving baptism would eliminate the impediment of disparity of cult). Sometimes a dispensation can be granted by competent ecclesiastical authority. If, however, parties held by such an impediment were to contract marriage, the action would result in an invalid marriage. Mere passage of time or cohabitation would not change this status. Nor would it make any difference if the parties and the priest were in good faith.

Some of the diriment impediments will prove of interest to the civil lawyer. The impediment of *age* for example forbids marriage for a boy who has not reached the age of sixteen and for a girl who has not reached the age of fourteen. This age is computed exactly and no deviation even of a minimum nature is tolerated. *Consanguinity* of course is an impediment dealing with blood relationship. People can be related by blood either in the *direct* line (e.g., grandfather, father, son) or in the *collateral* line (e.g., brother and sister, first cousins, etc.). All marriages between people related in the direct line are forbidden, nor is it possible to obtain a dispensation. In the collateral line marriage is forbidden up to and including the third degree (second cousins). For an extremely weighty reason the Church will grant a dispensation for first and second cousins to marry. It is understood that the parties would have the burden of getting a clearance from the civil law.

*Affinity* is a relationship arising from a *valid* marriage. It binds the husband with the blood relatives of the wife; it likewise binds the wife with the blood relatives of the husband. The relationship is computed in the same way as we would compute consanguinity (i.e. direct and collateral lines). The impediment forbids all marriages of

*Codex Juris Canonici (1918) Canons 1067–1080.*
people related by affinity in the direct line. It forbids such marriages in the collateral line up to and including the second degree. Thus a man may not marry his deceased wife's sister or first cousin without a dispensation. If he attempted such a marriage the resulting contract would be null and void.

_Spiritual relationship_ in general is a relationship arising from the administration and reception of a sacrament. The impediment, however, refers only to the sacrament of baptism and to that bond existing between the person being baptized and 1) the sponsor—and 2) the person conferring the sacrament. These circumstances could easily be verified in the case of a convert at the time of marriage. If the Catholic fiance acted as sponsor for the convert, a spiritual relationship forbidding marriage would emerge.

_The impediment of sacred orders:_ A cleric studying for the sacred priesthood receives minor orders and major orders. The major orders are subdiaconate, diaconate, priesthood and episcopacy. This latter order, of course, is received only by those who are named bishops by the Holy See. The impediment extends to all four of the Sacred Orders and renders any attempted marriage by such a cleric null and void.

The Ecclesiastical Court is continuously busying itself with marriages that were contracted without a dispensation from an existing impediment. In some instances canonical procedure will permit these cases to be tried in an informal or abbreviated trial. Where such latitude is allowed it is required that only one judge hear the case. The services of another officer of the Court are also required—namely, the Defender of the Bond. His function or duty is to protect the Bond of Marriage against all attack. This is in accordance with a fundamental principle that marriage enjoys the presumption of law as to its validity. Therefore, in all cases of doubt the validity of the marriage under attack is to be upheld. The Defender of the Bond is present to defend the validity of that Bond from all attack. Canon Law, however, states that if the judge in these abbreviated processes has certain and authentic documents proving that an impediment had been present and had not been removed by a dispensation, he may issue a decree declaring the marriage under consideration to be null and void. The Defender of the Bond is obliged to be present to examine the evidence. If he finds no reason to object, the process is terminated and _no appeal is necessary_. If he is not satisfied with the findings of the Judge he
may demand that the case be sent to the Appellate Court. This Court of Second Instance will either uphold the verdict of the Judge or order that it be remanded to the Court of First Instance for a trial with all the formalities of law.

A Civil Lawyer would do well to investigate these possibilities when clients approach him for relief in the civil courts. The Chancery Office will always be happy to advise if he contacts the officials there.

3. The subject matter of the consent.—Whenever a question as to validity is raised under this category, a formal trial is the standard process. In such a trial three to five judges must be used, the Defender of the Bond must intervene, and two favorable verdicts must be obtained before the marriage under consideration is deemed to be null and void. Since two verdicts are necessary it is evident that the Appellate Court and possibly the Supreme Court (i.e., the Sacred Rota) will play a role in the completed trial. We will discuss this at further length later.

Who are some of the officers of an Ecclesiastical Court? We have delayed naming them until now because while they figure in the procedures already discussed, they function more prominently in a formal trial.

The Officialis, or Chief Justice, is the representative of the Bishop appointed for all proceedings of a juridical nature. Just as the Vicar General forms one moral person with the Bishop in the work of administration, so also does the Officialis form one moral person with the Bishop in juridical matters. He is to make assignments of trials and in general supervise everything of a juridical nature that appears before the Tribunal.

The Promotor of Justice is an officer appointed to promote the common good. He appears in a trial whenever in the judgment of the Bishop the common good of society is involved. His powers are broad and his right to intervene in a process quite extensive.

The function of the Defender of the Bond has already been explained. His activity in a formal process is most important. Ecclesiastical Judges are priests of mature judgment, well versed in Canon Law, who are selected to preside at processes whether they be informal or formal.

What is the subject matter of the consent? "The matrimonial consent is an act of the will by which each party gives and accepts a
perpetual and exclusive right over the body for acts which are of themselves suitable for the generation of children." Therefore the subject matter of the consent involves three elements—namely, unity or fidelity, indissolubility, and the right to the conjugal act. A consent to be valid must contain all three elements. The contract would be invalid if a person by a positive act of the will were to exclude either the entire consent or any one of the three essential parts mentioned above.

These elements need explanation.

a) Unity or fidelity demands that the union be between one man and one woman to the utter exclusion of all others. Opposed to this unity would be the determination at the time of entering marriage not to accept fidelity as an essential element of the consent. Such a person would implicitly or explicitly be enunciating the liberty to have others after marriage besides the spouse. It is true that such a determination would reveal a deep-seated depravity—but such people do exist, spawned by the so-called liberalism of our day.

b) Indissolubility demands that the marriage bond endure until the death of one of the contracting parties. The opposite determination would be a positive act of the will restricting permanency to a duration to be fixed by the contracting party or parties. It could be couched in these words or similar ones. "I intend in the marriage I am now entering that the bond last as long as things are agreeable. Should they prove otherwise, I will reserve to myself the right to terminate this contract and to feel free to contract another." In this day of proclaimed freedom many people are imbued with the philosophy of a trial marriage. They feel they are doing the enlightened thing when they resolve to "be big" with one another and smooth the path to divorce if the marriage encounters difficulties.

In this regard it might be well to make a necessary distinction between the function of the intellect and that of the will. Outside the Catholic Church there is the almost universal persuasion that marriage can be terminated by divorce. This persuasion resides in the intellect. The same person when marrying may be so enamored of another as to determine with his will that his marriage will last until death. A faulty notion in the intellect does not invalidate a consent. A determination of the will to enter a dissoluble contract would render that consent and contract null and void.

c) **Right to the true marital act:** Catholic theology teaches that man and woman entering marriage give to one another possession over each other's body for those acts of their very nature apt for procreation. The man owns the body of the woman. She, likewise, owns his body. If either party or both parties at the time of entering marriage refused to give this right over their body to the other for these acts apt for procreation, the consent and contract would be null and void. Again we must cite a distinction. A person may give this right to the other person in marriage and yet intend that this right be abused by the practice of birth control. The abuse of a right that is really given is sinful but does not vitiate the consent. The denial of the right itself would nullify the consent. An imperfect example might be the following determination on the part of a man: "I wish to marry this woman, but I want to practice birth control. I hope my wife is agreeable." Or he might say, "I wish to marry and I intend to practice birth control, and I don't care what she thinks." The difference in these two statements is quite evident.

A consent otherwise complete might be rendered null and void because of some force producing fear. The Church is so determined to vindicate freedom to the contracting parties that she brands as null and void a contract induced by a grave, external, unjust fear. The word "grave" seems self-explanatory. It could be synonymous with "serious." An "external" fear is one that is induced by some element outside the person experiencing the fear. For example—a man may decide that he should marry a girl he has violated. The force exerted is from his own conscience, namely, an interior force. This would not nullify a consent. If, however, the girl's father were to exert force in the form of a gun, the force would be considered "external." An "unjust" force is one that leaves no other alternative but marriage. Should the force permit several alternatives of which marriage was one, it would not be construed as "unjust" and would not nullify the consent.

Sometimes a reverential fear might be of such strength as to nullify a consent. This judgment would take into consideration the character of both the person exerting the force and of the person who was the recipient of the force. A typical example would be that of a timid girl closely attached to a mother of a domineering character who wanted to marry off her daughter to a "good catch."

All the formalities of law are employed in a trial involving consent
in marriage. The trial begins with the presentation of a "libellus" or petition on the part of the petitioner stating why the petitioner believes the marriage to be null and void. Then follows the "litis contestatio" in which the state of the question is defined.

The Defender of the Bond, of course, is aware of the nature of the petition that has been offered. It is his duty to prepare a list of questions for the plaintiff, the defendant, and the witnesses. This list of questions is presented unopened to the presiding Judge who uses it as a basis for his interrogation. The Judges, however, are free to ask questions "ex officio" whenever they feel that such questions would bring the truth of the matter into clearer focus.

The Plaintiff, the Defendant, and the witnesses are interrogated separately, and alone. Their testimony is reduced to writing and accurately recorded. In some Tribunals a wire recorder may be used as a double check on the accuracy of the testimony given.

Canon Law permits a wide variety of proof. Especially is this true in a trial involving marriage. The Church is anxious to arrive at the truth. For that reason she will accept not only oral testimony but in addition admits as evidence letters, documents, and in general any and all means of proof.

After all the testimony has been gathered the Judge by decree orders the process to be made public both to the two interested parties and their counsel. If after mature study the interested parties declare they find nothing in the process that must be corrected, amplified, or deleted, the Judge by official decree declares the process closed.

Both counsel and the Defender of the Bond are free to draw up arguments in writing based upon the testimony. In fact the Defender of the Bond is obliged by law to do so. These pleadings are made part of the process and are included in a typewritten copy of the entire process that is given to each Judge for study. The Judge will be expected to study very attentively all the evidence that has been adduced. Customarily he will be allowed about one month to arrive at a decision. On an appointed day he will meet with the other Judges for a discussion of the case and for a determination of the sentence to be rendered. To this meeting he is expected to bring his written verdict containing an explanation in law and in fact why he arrived at his decision. In this discussion ample opportunity is given to explain the logic of the findings of the Judges. At any time during the dis-
discussion a Judge is permitted to change his opinion if the arguments offered by the other Judges seem more persuasive. Final sentence is arrived at by majority vote, and the findings of the individual Judges are incorporated into the process. It is required by law that the Judge have moral certainty in reaching his decision. This is defined as the “removal of all reasonable doubt.”

If the verdict is against invalidity the petitioner may appeal. If the verdict is for nullity, the Defender of the Bond is obliged by law to appeal. Every Tribunal has a Court of Appeal approved by the Holy See. The process is sent to the Appellate Court which again subjects the case to a close study. They notify the parties that they have the case on appeal and invite them to appear if they wish to do so. If they uphold a decision that had been rendered in favor of nullity the petitioner is then free to marry since two favorable verdicts have been rendered. If the Appellate Court reverses a decision that had been rendered in favor of nullity, the petitioner is permitted to appeal to the Court of Third Instance, namely, the Sacred Roman Rota.

In an ordinary formal trial that necessitates the use of two Tribunals, court costs are very nominal. In the Archdiocese of Chicago, twenty-five dollars has been set as a fee. Fifteen dollars remains in the Court of First Instance and ten dollars is sent to the Appellate Court. Gratuitous service is given to those people who plead an inability to pay this sum. This question of fees is mentioned here to explode the calumny that money has much eloquence in seeking a decree of nullity. It is only too true that most of the Tribunals of the Church operate at a very substantial loss.

Many times curiosity has been shown as to the possibility of a civil lawyer practicing before an Ecclesiastical Tribunal. Theoretically it would be possible to permit this. Practically, however, in this country lawyers are not sufficiently versed in Canon Law and therefore their services would be of questionable value. On many occasions we have allowed civil lawyers to do some of the preparatory work, if satisfied as to their integrity. In the very process itself it is customary to employ the services of a priest who has prepared himself not only with the knowledge of Canon Law he acquired in the seminary, but also by special studies and an indoctrination course given by officials of the Tribunal. We repeat, however, that civil lawyers are always welcome to lend whatever help they can give. Their interest in the well being of a client is indeed laudable and is always to be encouraged.
The lawyer and sick marriages: Divorce has become one of the most acute problems of our modern day, especially here in the United States. Unfortunately too many people view this evil with apathy and say that divorce is like the weather in that you cannot do anything about it. The number of divorces granted in the United States annually is frightening. It is big business, and many people have grown rich on the misery of others. Later in this paper I will point out an evil that is not sufficiently and pitilessly publicized, namely, the victimizing of innocent children.

The Catholic Church has always steadfastly defended the stability of the marriage bond. In her legislation she enjoins upon married couples the necessity of living together. Those who violate this law are liable to ecclesiastical punishment. In her Code of Canon Law the Church does not even take cognizance of a civil court that would presume to tamper with the bond of marriage. The Third Council of Baltimore, however, legislating for the United States, decreed that Catholics may not approach the civil courts either for separation or divorce without the consent of the Bishop of the diocese. If they violate this law they are to be punished by the Bishop.

In the Code of Canon Law provisions have been made for the possibility that some people might seek permission for such a separation. With one noteworthy exception all petitions for separation are to be presented to an Ecclesiastical Judge who will decide under what circumstances and for how long a period of time separation can be tolerated. The exception to be noted is the case of proven adultery. Canon Law states that if adultery is certain, never condoned nor compensated for by adultery on the other side, the innocent party may separate forever without seeking ecclesiastical permission. The innocent party, however, in this case may not approach the civil courts without obtaining the permission of the Bishop of the diocese.

The Archdiocese of Chicago has tried to form a Tribunal for the hearing of these petitions which would at the same time uphold the dignity and sanctity of the marriage bond and also help people to establish a Christian way of life. Twenty-five priests who have been selected for extraordinary prudence and patience have after a long course of indoctrination been placed in this all-important work. Each

---

*The Third Council of Baltimore (Nov. 7 to Dec. 7, 1884) was a gathering of the leading Catholic Bishops of the United States. The decrees of such a council are binding upon all American Catholics.

†Codex Juris Canonici (1918) Canons 1128–32.
of these Judges gives one-half day a week to this work. While we have decided to dispense with unnecessary formalities in our hearings, there is a decorum present that clothes the court with dignity. As a general rule we endeavor to have the parties confront each other as soon as possible in order to be sure we have the true state of the question. In those cases where one party appears without the other, we issue a subpoena for the other party. Sometimes the case may be disposed of in one hearing. More often there will be more than one hearing, for obvious reasons. We are trying to re-establish homes, not destroy them. On occasions the Judge will impose conditions to be fulfilled by one or both parties. He may permit a trial separation and fix a date for the return visit of the parties. Sometimes the Judge may advise a visit to the psychiatrist, doctor, financial expert, or members of Alcoholics Anonymous we have attached to our staff for consultation purposes. The Judge's decisions are binding in conscience, and contumacious people are informed that their refusal to cooperate has caused them to lose the right to receive the sacraments.

In some instances the Judge will perceive that he must give permission for the party or parties to approach the civil courts for a decree of separate maintenance. Very rarely and only when separate maintenance proves useless will permission for a divorce be granted. Such divorce permission, of course, does not permit remarriage. In fact, the parties receiving permission for divorce must sign a promise to refrain from company keeping during the lifetime of the other spouse. Divorce is a many-sided evil. One of the evils not too often considered is the psychological reaction that sets in. Divorce has an air of finality. The castle of dreams has come tumbling down. Before the world people confess themselves failures. In the bitterness surrounding divorce too often is seen lurking a desire to enjoy the newly found "liberty." Since the Catholic Church's mission is to save souls, She cannot be a partner to a practice that causes the spiritual ruin of so many otherwise good people. We are talking about facts, not fiction. Among those reading this article there will not be a single person who cannot point to at least a half-dozen good people who succumbed to the false philosophies surrounding them and have married again.

And now we come to the role of a lawyer in the cases of separation and divorce. It is easy for us to state the rules for lawyers, but lawyers do not always find it easy to follow our rules. Briefly, a lawyer
may do licitly whatever his client does licitly. If his client has re-
ceived permission to approach the civil courts, the lawyer may repre-
sent him to the extent of the permission. According to well known
rules of moral theology cooperation in the wrongdoing of another is
forbidden. The closer and more necessary the cooperation, the greater
is the obligation to refrain from cooperation in illicit actions.

There has been a tendency on the part of some Catholic lawyers
to refer cases they are not permitted to handle themselves to other
lawyers who are not Catholic. It seems almost unnecessary to insist
that such referrals are equally wrong.

In the Separation Court no fees are ever accepted. We have deemed
it wise, in order to avoid all possibility of misunderstanding, or suspi-
cion, to absorb the considerable expense that is incurred. We feel that
in so doing we are adding to the contribution that we make to the
good of society in maintaining sane and sound the sacred bond of
family life.

THE ROLE OF THE LAWYER IN SOCIETY

Too often we have heard the complaints of some lawyers to the
effect that we are depriving them of a livelihood in asking them to
forego a fee. They urge that if they do not accept the case “the law-
yer down the hall will.” It is to be regretted that these men have lost
the exalted notion of the position they enjoy in society. They are
public officials. Their main claim to respect is that they are prota-
gonists of the common good. Many times it is necessary to forego
private gain for the public welfare. Let us not lose sight of the fact
that divorce is not an evil because the Catholic Church says so but
because it inflicts an injury to an institution created by God and be-
cause it imperils the very existence of civilized society. The lawyer
described above is too prone to concentrate on the divorce case he
wishes to handle and to lose sight of the undeniable fact that this
divorce is another rent in the fabric of a society we love and wish
to preserve. It has been truly said that if our great land is ever con-
quered it will come from within.

The lawyer’s role in society cannot be a merely passive or negative
one. He has formed a pact with society to promote the common
good. Certainly we can look to the lawyer to use his study and his
efforts towards the strengthening of the family. We have a disgrace-
ful set of divorce laws. Justice in the divorce courts is too often a hit
and miss affair. Is that not in great measure to be laid at the door of the legal profession? We are too prone to accept the present state of affairs as a necessary evil. It would indeed be a sad commentary on our lawyers if they profess themselves impotent to change the tide.

Perhaps the fundamental reason why there has been such an apathy is to be found in the mental approach of the legal profession to the problem of divorce. Our judges and lawyers will say “The statutes are there. I must administer them or I must follow them.” Are not the statutes there because legislators looked upon marriage merely as another contract and forgot completely that it is a sacred contract? Certainly the individual lawyer or judge will consider his own home and family hearth sacred. In that home he will find all his real pleasure. As he watches his family grow there is forced upon him the undeniable conclusion that both he and his wife contributed to character formation in their children. He sees this same persuasion in his friends of the legal profession. A little reflection must persuade him that even nations of pagan persuasions defended in their own way the sacred character of marriage.

It would be worth while for the lawyer or the judge to apply some of his everyday concepts about marriage to his own family. If marriage is only another contract, what safeguards have his children when they marry? There cannot be a multiplicity of standards for marriage. If other marriages are mere contracts, then the contact which he wants his children to have as a safeguard for lasting happiness is of dubious value.

This argument should appeal to every lawyer regardless of religious persuasions. Too often the Catholic Church has been charged with totalitarian practices in insisting that marriage is a sacred contract. The Catholic Church did not create the sacred character of marriage. God is the author; and so ably does He portray His masterpiece to the world that only men of bad will can oppose Him. Every man who enters this world has engraved in his heart at least in a faint manner an appreciation of the exalted position of marriage. Man’s passions and man’s avarice have fought to degrade the contract. It is regrettable that more members of the legal profession have not seen through this deception. If they have seen through it, their guilt is so much the greater if they allow the fraud to continue. Many thinking people have watched with amazement the temerity of many judges and lawyers in daring to treat so lightly something that belongs to
God. It has always been saddening to reflect on the irony of a situation which confronts us every day, viz., men who would shy away sharply if asked to pick up a scalpel and operate on a body in an operating room will rush into a situation infinitely more complex than the human body and render their decision in split second time. The repercussions on generations to come are completely forgotten. There will always be a segment of the legal profession that waxes fat on the carrion of broken marriages. Those are they who would dare to say that agitation against divorce is strictly a move on the part of the Catholic Church. They would have us believe that the view of marriage as a sacred contract is held only by the Church and by those whom the Church can dominate. Alert and courageous members of a truly great profession will be offended by this canard. Boycott of such unscrupulous lawyers seems to be the most reasonable course to pursue.

The study of law and the practice of law would indeed be a very uninteresting pursuit if law were nothing else than a collection of statutes. There is, however, today a very popular concept of law which would have us believe that law is nothing else than the “contingent and variable enactments of political communities.” This theory of law is called positivism and is subscribed to by many of our intelligentsia whose claim to pre-eminence is often more specious than real. They defend it because they want all laws to be merely man-made. It seems to cause little concern that “contingent and variable enactments” rob from law an important factor—stable consistency. Certainly positivism is practiced in our divorce courts. Every day we are astonished at some new and not too brilliant “finding” on the part of our judges. The theory of law opposed to positivism would defend the thesis that there is underlying all good law a fundamental and permanent reasonable substratum. This foundation we call the Natural Law, residing in the heart of every creature of God, telling him in its broadest terms that evil must be avoided and good practiced. It is in this concept of the Natural Law that we find at one and the same time our justification and our defense of democracy. It was the philosophy of positivism that nurtured World War II and resides at the very root of our unrest today. Pope Pius XII in his first Encyclical Letter, “Darkness over the Earth,” wrote:

One mistake we may single out as the fountain, deeply hidden, from which the evils of the Modern State derive their origin. Both in private life and in the State itself and moreover in the mutual relations of race with races, of
country with country, the one universal standard of morality is set aside, by which we mean the Natural Law, now buried away under a mass of criticism and neglect.\footnote{Pius XII, Pope, Darkness over the Earth (1939).}

If we reject the theory of the Natural Law we implicitly bargain for a system that was eagerly grasped by totalitarian states and defended by majority groups possessed of political might. Law for them meant, and means, the will of a dictator, or of a majority, or of an individual crazed with self delusions of power or independence. In the field of marriage the same errors are lurking. The lawyer and the judge must decide which philosophy they want. If they look upon themselves and all others as having come from God and having God as their final destination they will practice a law in conformity with this concept.

Earlier in this article we promised to touch upon a point widely discussed today. We hear on all sides concern over the problem of juvenile delinquency. Our court cases involving youthful lawbreakers are daily on the increase. Many theories have been evolved to explain this disturbing phenomenon. The latest theory presented to the writer laid the blame for juvenile delinquency on the churches. “The Church should speak out and put these youngsters in their place.” Let us examine the picture in the light of cold reason. It is possible to indicate many things that are placed in the path of the child as he grows up to prevent him from being good. The newspaper is available to him with all its filth and suggestive pictures to feed the imagination of an immature mind. He can, if he has the money, buy dirty and pornographic literature on our newsstands or in the corner drug store. Television programs are becoming more and more objectionable; likewise, our movies. It has been the churches that spoke out against these abuses. The Police Department could make arrests, but the punishment for poisoning a child’s mind is laughable. Let us ask a fair question. Has the legal profession taken any serious steps to combat these abuses? No such steps are known to this writer. They are the ones who could enter the field of legislation with courage and drive to clear up a very nasty situation. Because we have had a dearth of lawyers who are not afraid to dare, the Roman holiday continues—and the children are the victims.

There is an even greater way in which the legal profession has been derelict. What are our judges and lawyers doing in our divorce
courts where every day the slaughter of the innocents continues? Every judge or lawyer who has ever assisted at a hearing for divorce or separation has indelibly seared in his soul the conviction that there are too many selfish people in the world. Unfortunately these selfish people have children—and the children are being massacred in our courts of law. This crime must be laid at the door of the legal profession and especially at the door of our judges. Here is the very root of juvenile delinquency. It is an ugly picture and few have the courage to face up to it. Anyone with a modicum of experience knows that selfish parents are using children as tools to accomplish their own selfish purposes. They may do it by being niggardly in support for the children. They may play the child against the other spouse. They may poison the mind of the child against their partner. How heavy and dangerous is the load placed on immature minds by parents seeking their own selfish ends! For one not too blind to see or too cowardly to evaluate, here is the cause of most of our juvenile delinquency.

A lawyer in examining his conscience could ask himself if he has fully discharged his primary duty to the child, even when he must fight his own client. There are so many ways that he could help to turn the tide against these criminal parents. Such a lawyer may not obtain a medal for popularity, but he will have the satisfaction of knowing that he has fought a good fight in a most necessary war. Certainly he could spend sufficient time in emphasizing to his client the extra special obligation he now has in this abnormal situation created by separation. He could impress upon his client that there can be no question of being niggardly in giving support for his children. He could caution him about the obligation of hiding resentment towards a spouse in the presence of children. He could point out his added duty of being extremely kind but also firm in dealing with his children. If a child became seriously ill you would find both estranged parents at the bedside. There are many ill children walking around today—but their illness consists in having a broken heart.

The judge, however, is more derelict, for it is in his hands that the destiny of little ones is placed. When people appear before him with their marital difficulties, we do not expect that the judge will know the parties. But he knows from experience what kind of people they are. He can safely conclude that in most cases at least one of the two parties is an enemy of society. Often both will fall into this category. If these people have children, who will protect these innocent ones
if the judge is too careless or too busy to take over that role? Or are the children to be sacrificed?

One type of procedure in our divorce courts that has always appalled the writer is the interpretation given of an unfit mother. Why is so much latitude given in judging a woman to be unfit? According to present-day practice a woman is not adjudicated unfit unless she is positively immoral. Is such a decision fair to the child who needs close surveillance and positive discipline while growing? Bishop Sheen in a recent telecast stated that every child has an instinct for love. How stark the tragedy of a little one that grows up convinced that no one loves him! Judges could multiply their severity towards unfit mothers a hundred fold and still fall short of their duty to the child. Our sophisticated courts refuse in great measure to punish extramarital goings-on in the presence of a child unless the action becomes notorious. What a welter of confusion there must be in the mind of a child when he sees his mother in the presence of a man who is not his father! The writer has seen countless cases of intoxicated mothers who were allowed to keep their children until outraged neighbors stepped in with vehement protests. Is not this sowing the seed for future delinquency?

It is not the intention of the writer to dwell at great length on all the possible cases that might be presented to a judge. The danger is present in every case of separation where children are involved. Certainly it will be hard work for a judge to be painstaking in his investigation of the future lot of the children. Maybe dockets will become clogged. But where is the necessity of speed when innocent human beings are at stake and where the survival of civilization hangs in the balance? We might just as well face up to the truth. Judges as a rule heartily dislike the work of the divorce court. Too often there is a tendency to rid one's self of unpleasant things by a speedy disposition of a case. That is why our divorce courts today have such a terrible reputation. The selfish people are dictating the decision, and the children are lost. It has always seemed logical to expect that selfish people be brought to a realization of their duties by imposing mortification on them. If the children must suffer the pains of separation—and they surely do—why not bring home forcefully to their selfish parents that their selfishness is going to be costly? A selfish father could be forced to give extra generously for the support of his children, even by imposing on him a Spartan existence. Those who fail
in payments should be dealt with drastically. If it became known that the courts were administering the law severely people might begin to think and act differently. There is a very great and a yet unfulfilled burden on the shoulders of our judges. How bad our courts are really administered has been brought home very strikingly to the writer in a recent conversation with two lawyers who solemnly mentioned how well a certain judge was conducting his court. "Why," they said, "he really takes an interest in the case before him!"

Many times the writer of this article has asked himself a very pertinent question: "Why knock yourself out over such a thankless task?" Certainly such irritating labors are not restful to one's nerves. The parties concerned very seldom express any gratitude. In fact very often both parties declare themselves perfect and allege that the judge is biased. Why then, continue? From a supernatural standpoint the answer is easy. Our Lord and Savior Jesus Christ esteemed the Sacrament of Matrimony so highly that He died on the Cross for it. That is good enough answer for any priest and should also satisfy anyone who bears the name Christian. But over and above the supernatural consideration is the sobering thought that we are striving to save civilization against the onslaught of man's selfishness. In a democracy we must face up to the realization that democracy cannot long survive if the dignity of man is undermined. Divorce is something nasty. It tears down everything that is noble and exalted in man. It brings to the fore his baser instincts. It fights an unrelenting war against innocence as seen in the souls and countenances of little children.

The Church cannot fight this battle alone, for there are many places where the voice of the Church is not allowed to enter. This is a fight for all men of good will. It is especially a fight to be waged by the legal profession in whose hands have been placed so many problems fraught with importance and terrifying consequences. The writer knows the legal profession is capable of doing a good job. Hitherto they have seen the problem but have cried out, "Am I my brother's keeper?" From the voice of a cross high on the hill of Calvary comes the reply, "You are your brother's keeper, for your brother, like you, is dear to me."

The challenge is persistent and formidable. May all of us be equal to our charge.