

## Experts in Church Courts: A Role Not Sacred

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The increasing number of marriage annulments granted by the Catholic Church in recent years is gaining considerable public attention and arousing some controversy.<sup>1</sup> Members of the church's clergy<sup>2</sup> and hierarchy<sup>3</sup> have also expressed concern. This is not surprising in view of the actual data, as shown in Figure 1. Such data give the appearance of a decrease in the emphasis being placed on the permanence of marriage, a well-known church doctrine. Moreover, it is a significant change for some eight million divorced American Catholics that divorce, especially when combined with remarriage, might not mean separation from the church.<sup>4</sup>

Some have attributed the striking increase to the rising divorce rate; others to the renewal in church life associated with the Second Vatican Council in the 1960s.<sup>5</sup> This renewal encouraged an enrichment in understanding of marriage as well as a flourishing ministry to the increasing number of divorced Catholics. In addition, a much earlier and less widely known trend is of more fundamental importance. Shortly after World War II, the Sacred Roman Rota, the church's court of final resort in marriage cases, began to emphasize the psychologic requirements for a valid marriage<sup>6</sup> and to encourage the use of psychiatric experts in the hearing of marriage cases.<sup>7</sup>

The public's increasing attention to the phenomenon of growing annulment rates stands in contrast to the psychiatric literature's virtual silence on the expert's role in this process. Thus, there is a need for this significant use of professional expertise to become both more widely known and more carefully appreciated. Accordingly, we report here on pertinent church law literature and on our study of a church court in the northeast. This study included discussion with its officials and experts, participation in its workshops, and observation of its annulment hearings. Our purpose is to focus forensic psychiatric attention on the work of church courts and the role of their expert consultants, in support of both the quality of this work and the development of this role.

### Canon Law: General Background

Catholic marriage annulment proceedings occur in a court or tribunal functioning within each diocese, a region of variable size under the admin-

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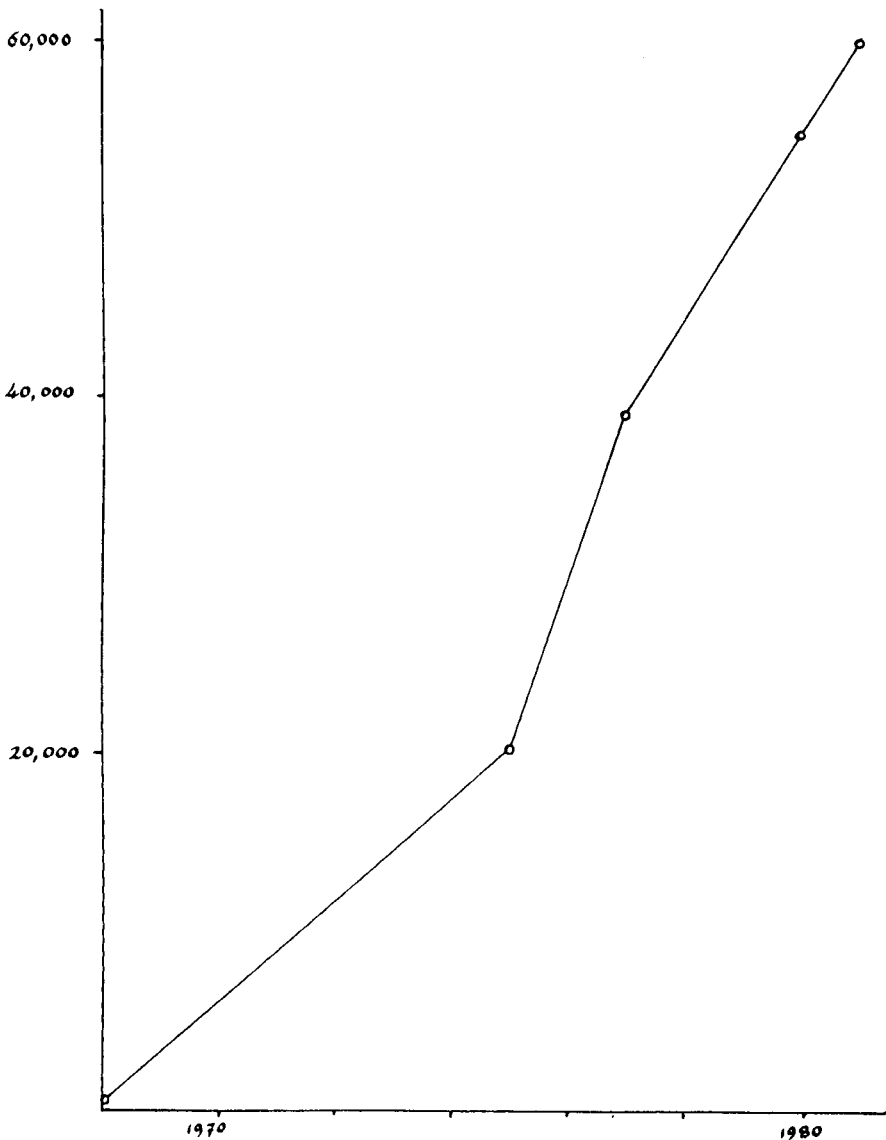


Figure 1. Annulments granted in the U.S., by year, as reported in *Annuarium Statisticum Ecclesiae*, Rome, Typis Polyglottis Vaticanis.

istration of a local bishop. Such courts operate under the legal system known as Canon Law which originated from Roman Law.<sup>8</sup> The intertwining of these two legal systems dates back to the christianization of the Roman Empire. The relationship became formalized in the course of the thirteenth century renaissance in Western Europe which brought about a revival of interest in Roman Law, particularly in universities influenced by the Catholic Church.<sup>9</sup>

An important divergence in the course of legal developments ultimately took place.<sup>10</sup> In England, legal development proceeded on the basis of court

decisions apart from university influences to form the Common Law tradition. Meanwhile in the rest of Europe, under powerful influences such as Thomas Aquinas,<sup>11</sup> Roman Law was reinstated and integrated into the increasingly formal development of the Church's system of Canon Law. A series of compilations and revisions eventually crystallized in 1917 as the Code of Canon Law.<sup>12</sup> A revised code took effect in late 1983.<sup>13,14</sup>

In fact, the bulk of American tribunals' casework is concerned with petitions for marriage annulments. The Roman Catholic Church's tradition recognizes any marriage between two Christians, once consummated, as having a sacramental dimension. This transcendent religious character of the marriage union includes its permanence, whatever may develop during its course, until the death of either party. Resting on a firm biblical basis, this teaching has been consistently expressed in church law. Accordingly, a baptized couple, once validly married, remain so in the eyes of the church, even if they separate and obtain a civil divorce. Within this framework, the only recourse to this religious impasse for such a couple is a finding that, although their marriage was valid under civil law, it never achieved the sacramental dimension which church law contemplates. Such a finding, made by a diocesan tribunal, is commonly called an annulment.

### **Annulment Court Proceedings: A Sample Summary**

Although Canon Law structures and regulates the activities of each diocesan tribunal, it leaves more room for procedural variation than is the case among secular courts. Common to all tribunals, however, is the avoidance of any potential conflict with secular courts by requiring the completion of civil divorce proceedings before considering an application for annulment. The following is a summary of the major procedural steps followed by the court with which we have worked.

The petitioner seeking an annulment submits in writing a personal and marital history, including reasons supporting the view that the marriage should be declared null. He/she also identifies individuals who can corroborate the history and might be willing to join the case as witnesses. If its initial impression is favorable, the tribunal solicits the corroborating information, attempts to contact the former spouse for additional data, and appoints an instructor to meet with the petitioner and the witnesses in order to prepare the case for presentation at the tribunal hearing.

Present at the hearings we observed were a judge, an instructor, a defender of the bond (whose role is what the title suggests), and a psychiatrist-expert. The instructor presented the evidence, then responded to questions from the other three individuals. The psychiatrist then commented on the case and concluded with DSM-III diagnostic formulations and family structural analyses. After his commentary, the expert received questions from the

three officers of the court. They in turn made observations about the material presented and generally discussed the families and the marriage.

In each case, the judge and the defender of the bond later wrote separate reports, the former including the final decision, or sentence. A conclusion in favor of nullity automatically takes the case to a second tribunal for review. If the second decision favors nullity, the case is ordinarily concluded. However, either the defender of the bond or the respondent may appeal. If the reviewing court finds against nullity, the petitioner may appeal. These appeals are to the Roman Rota.

### Foundations of Tribunal Proceedings

Canon Law requires the judge to reach moral certitude in regard to the sentence given, doing so from what is presented to the court as evaluated according to his own conscience. According to a landmark statement<sup>15</sup> of Pope Pius XII, this moral certitude lies between the two extremes of mere probability and an absolute certainty which excludes all possible doubt. The Pope noted that there are times when this moral certainty is based on a series of indications, each one insufficient as a basis for certainty, but together leading to moral certitude. He explained that this was not through the mere accumulation of probabilities, but rather through a convergence back to a common basis in objective reality. The Pope added that such moral certainty was characteristic of annulment proceedings.

**Rules of Evidence** The judge proceeds to the required moral certitude through the accumulation of proofs, which the 1983 code organizes into six types.<sup>16</sup> These are declarations by the parties to the case, documents, testimony of witnesses, experts, direct access and inspection by the judge, and presumptions. Each of these categories can be relevant for the resolution of marriage cases.

Because the public good is at stake, declarations by the parties are subject to corroboration by other evidence, including witnesses to their credibility. Public documents such as civil and church records, properly drawn up, are accepted as proof of what they contain, unless there is clear contrary evidence. Private documents, such as letters, diaries, credit card receipts, and the like, carry more variable weights and generally require corroboration. In view of the need to evaluate the parties' declarations, witnesses play a crucial role. The adage, *Testis unus testis nullus*. ("One witness is no witness."), comes into play here. It is up to the judge to weigh their moral quality, reliability, consistency, and relevance.

**The Expert's Role** Our discussions and observations affirmed the expert's task as the application of specialized knowledge to the facts as presented, in order to assist the judge in concluding whether the evidence presented sufficed to prove nullity of the marriage under review. Canon

1579 of the newly revised code states clearly that the judge must weigh the expert's conclusions with other relevant data and spell out in his decision the reasons for their acceptance or rejection. Moreover, several key decisions by the Roman Rota from the 1950s warn judges against departure from expert testimony in the absence of weighty contrary evidence.<sup>7</sup>

The tribunal judge acts as the *peritus peritorum* or experts' expert,<sup>17</sup> generating the decision on whether the evidence presented and discussed is satisfactory for a declaration of nullity on the basis of one of the proper canonical grounds. Nonetheless, the expert's testimony has its own significant weight. In fact, one influential canon lawyer<sup>18</sup> suggests that it has become difficult to distinguish the roles of judge and medical expert due to the trend toward an interpersonal, rather than a contractual, process of jurisprudence. This is a reference to the collaborative and collegial nature of the proceedings, captured by the Latin phrase from Roman Law, *pro rei veritate*, i.e., for the truth of the matter. This concept is the very cornerstone of the annulment procedure<sup>7</sup> and underlies the wish of the Church to pursue the legal issues in a context shaped by Church dogma and by the participants' spiritual beliefs.

### Grounds for Annulment

The principal requirements for the validity of a marriage are described in Canons 1095–1107.<sup>13,14</sup> This section is entitled *De Consensu Matrimoniali* ("On Matrimonial Consent"), referring to that act of consent by each party which is the essence of marriage. The marriage ceremony expresses this consent, developed by the couple over the course of their courtship. Canon 1095 lists three bases for nullity that in theory could call for a psychiatric opinion. These are a lack of sufficient use of reason, the absence of due discretion about what one is doing in deciding to marry, and the absence of due competence to assume marital obligations. In practice, the latter two of these constitute the basis of most expert attention.

**Due Discretion** The due discretion requirement focuses on the quality of the decision to consent, as it was when given at the time of the marriage ceremony; a concept captured in the Latin phrase, *matrimonium in fieri* (marriage in the process of being made). The notion is a broad one, encompassing the background of each party, developmental aspects of the relationship, and the parties' states of mind during the actual ceremony. Its evaluation involves a perspective primarily on the ceremony itself and backward in time from that point.

Due discretion includes the dual elements of cognition and volition such that one may "deliberately form judgments with his mind and freely choose actions with his will."<sup>19</sup> In turn, the cognitive requirement includes both an elementary knowledge of what marriage involves and a critical capacity to

weigh and evaluate in an existential way the choice of the married state generally and married life with the individual who is one's intended. The individual must be able to appreciate the impact of the particular circumstances surrounding the marriage being undertaken, any significant present or foreseeable difficulties, and the seriousness of the obligations involved.

There are four major obstacles to the achievement of due discretion, all familiar to the mental health expert. First, one's state of mind can be perplexed, confused, or upset by such factors as pregnancy, an intolerable situation at home to be escaped through marriage, or rebound from a recently broken relationship. Second, psychologic freedom might be acutely impaired by intense experiences such as involvement with a religious cult, or more chronically compromised by a psychosexual disorder or personality disorder. Third, there may be a transitory impairment of discretionary judgment due to substance abuse or the like. Fourth, a significant degree of immaturity would in itself involve the lack of due discretion.

**Case Example** Raised in an isolated Latino ethnic community, Emma grew up without gaining fluency in English. Shortly after she entered high school, her father, a rigid man who severely disciplined all his five children to the point of physical abuse, began a prolonged hospitalization due to a chronic medical illness. Emma left school and took up factory work in order to help with the family's financial support. At the factory she met George, a high school dropout whom she began dating as he, in turn, started teaching her English and providing her and her family transportation for various errands, including visits to father at the hospital.

The instructor presented a history of a long courtship, during which the couple dated exclusively. Both completed high school. She furthered her education, in spite of his objections, to the point of securing a nursing job. They were physically intimate, but did not experience intercourse. George preferred to masturbate. Meanwhile, Emma's only sister became the first to leave the family, through a marriage which followed her becoming pregnant. Emma's marriage took place over her mother's objections shortly after George began hearing from his draft board.

The marriage lasted for ten years and produced no children. Emma became increasingly frustrated by George's laziness, fastidiousness, and preoccupation with cars. He was socially very restricted, and continued to discourage her initiative to further her education and progress in her career. The couple's sex life did not improve. After five years, she consulted a marriage counselor, but he attended only one or two sessions, while she continued alone for two years. Separation followed after another three years, and the divorce a few months later, secured by Emma on the grounds of irretrievable breakdown. Emma promptly petitioned for an annulment.

The expert stated that the evidence for the petitioner's lack of due discretion was considerable. He pointed out that her romantic experience was limited to one man, due in some part to the ethnic expectation that the first man actually dated would become the eventual husband. He noted further that Emma's father was severely impaired, domineering to a point far beyond ethnic custom. He was a totally inadequate model for her male relationships and the only one she had experienced. The sister's course was further evidence in support of this formulation. The judge agreed and stated his satisfaction that this marriage had been proven null on the grounds of the petitioner's lack of due discretion.

**Due Competence** The due competence requirement focuses on the ability of one individual or the other to actually carry out the decision to marry, however carefully the decision was made during the courtship and expressed during the ceremony. This competence is required for the validity of the promises made and consented to in the exchange of the marriage vows, since no one can validly promise what he/she is unable to deliver. Thus, the perspective is primarily on the long-term relationship as experienced after the wedding ceremony. This is captured in the Latin phrase, *matrimonium in facto esse* (marriage as it actually is).

The concept can be illustrated by contrasting the ability of a baseball or tennis player to engage in the sport, as opposed to the very different skill of a coach, referee, or announcer who may know the sport very well without in fact being nearly so competent to actually play it. It is also to be distinguished from other areas of functioning such as financial genius or the ability to run an organization.

Competence here refers to the specific capacity to assume the essential procreational and personal obligations of marriage. As Wrenn<sup>19</sup> explains, the first would be absent in the case of impotence and the second in the case of an individual who cannot convey a knowledge of self to his/her spouse, cannot appreciate the feeling and thinking of the spouse as a separate person, and cannot pledge himself/herself to a lifelong communion on the basis of special reverence and affection. Possible psychiatric reasons for lack of due competence cover the full range of psychoses, neuroses, personality disorders, and homosexuality.

**Case Example** Jane and Tom were engaged six years after meeting and married ten months following their engagement. They separated after two years of marriage and divorced six months later. The instructor presented a history of their marriage showing both partners as adolescents when they met. In the beginning, their relationship was good. Jane at first depended on Tom for everything, but she then began to mature and feel more independent. This produced a strain which broke up their courtship. Six months later they reconciled, as Tom learned that Jane was dating another

man. This made Tom very jealous despite his own habit of freely dating other women while he was courting Jane.

Finally, they married. Their struggle for control of Jane's life continued. Tom soon met another young woman, with whom he openly had an affair. Jane's sister also reported to the instructor that Tom had made open advances to her while he was married to Jane. Jane both sought the divorce and became the petitioner in their case.

The psychiatric expert commented that Jane and Tom had an ambivalent and dependent relationship. He further noted that Jane herself was immature, with narcissistic traits. He also saw Tom as aggressive, rigid, and compulsive, acting out his hostilities. The psychiatrist opined that Tom's acting out prevented him from giving free consent to a lifelong partnership with Jane.

The judge concluded that both partners were not ready for marriage and that Tom in particular lacked the competence to assume and fulfill the obligations of marriage. He could not care, understand, or truly share himself. The judge thus found for nullity in this case, on the ground of Tom's lack of due competence.

## Discussion

In order to take up work with a church court, the expert must bring his/her skills to an unfamiliar context and place them at the service of work which is defined in that context. This work is seen as something sacred because it touches profoundly upon the religious status of one or both parties. The role of a court-appointed expert witness is familiar enough to those with secular forensic experience and in itself has no particular religious significance. This role calls for the application of mental health training and experience to assist the thought processes of a judge in search of a certitude labeled as moral. In particular, the psychiatric expert brings to the work ideas about marriage and family which have an origin rather different from those that the judge uses in order to arrive at a sentence.

We did in fact observe the integration of the expert's role with those of the judge and his tribunal colleagues in session. They raised issues with one another in the expert's presence and asked his assessments to help them toward a decision. They identified possible items of evidence both favoring and discounting the particular basis under consideration for nullity, turning to the expert for help in evaluating their significance. The participants shared a working sense of the psychologic criteria for due discretion and due competence.

We also found the ambiance of the tribunal proceedings very much in keeping with the conception of the expert's task as one of collaboration.



## Experts in Church Courts

Questioning of the expert proceeded without pressure, the scrutiny of cross-examination, or the administration of oaths. Rules of evidence governing the expert's contributions were entirely implicit. The participants took their own notes rather than having a verbatim transcript prepared. The officials considered a case resolved when they reached a consensus. Rather than persuading, the expert was cast in the role of instructing in the service of religious reconciliation and, often, of psychologic healing.

It may be that the collegial and affirming ambiance of the tribunal engenders a degree of paternalism toward the parties that encroaches upon due process. Such paternalism could be justifiable in a nonadversarial proceeding. However, this does not alter the seriousness of the possible consequences of declaring nullity, a matter which calls for adequate attention to due process. This point is familiar regarding secular juvenile courts.<sup>20</sup> The challenges of this distinction between the impact and the intent of a judicial procedure have been discussed elsewhere.<sup>21</sup>

Of major significance is the assertion that the psychiatrist-expert's role is essentially antitherapeutic. This is based on the notion that annulments, through their link with the destructive civil divorce process, encourage the dissolution of the family. Some psychiatrists, viewing the dissolution of marriages as a pernicious event, might well worry that their participation in annulment proceedings would further the spread of an annulment mentality.<sup>22</sup> Stone<sup>23</sup> has made parallel assertions about the antitherapeutic impact of the psychiatrist's role in secular courts.

Another issue also merits serious reflection by the psychiatrist who contemplates entering this arena of consultation. Making diagnoses without direct examination, a widespread tribunal practice, is somewhat comparable to giving a psychiatric opinion on a purely hypothetical case, an increasing criminal court practice. In the recent case of *Barefoot v. Estelle*,<sup>24</sup> the American Psychiatric Association's amicus brief questioned the ethics of making statements about individuals not examined. We believe that there are valid uses of the hypothetical case approach. We also note that in contexts related to treatment, supervision, and teaching, psychiatrists routinely give opinions about people whom they have not personally examined, but hopefully to those whose therapeutic skills they trust. Despite its potentially therapeutic dimensions, the annulment proceeding is not a treatment context.

In spite of their valuable involvement with petitioners, there is good reason to question whether the evidence provided by instructors is valid or precise in a psychiatric sense. Mental health training requirements for instructors are not rigorously structured and in many cases the respondent refuses to communicate, which may taint or even invalidate what the instructor can offer about that partner.

Forensic psychiatrists who become involved in tribunal proceedings will enrich their experience through the exercise of their skills in a new context. Their involvement would enhance the annulment process itself by increasing the level of competent attention to this role and to the issues it raises.

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