day there is present the spectacle of a crisis in the administration of justice, a crisis having its immediate causes in juridical positivism and state absolutism and "summarized in the antagonism between the true and false law."[83] This controversy cannot be resolved and a solution cannot be reached unless jurists have the courage to lay aside erroneous concepts of man and law, to get to the bottom of the question and to see the real basic foundations in which all human law is rooted. One simply cannot know what is a just or unjust law unless he knows the norm by which every human law is compared and measured and to which it must conform. The Holy Father says:

> The profoundest or subtlest science of law could not point out a criterion for distinguishing just from unjust laws, simple legal law from true law, other than that which is already perceptible with only the light of reason from the nature of things and by man himself from the law written in man's heart by the Creator and expressly confirmed by revelation.[84]

Truly, if we are to have a solution to the present crisis, it is to be found in the Christian concept of the nature of man and the nature of law. The fact that penetrating jurists have applied themselves with serious interest to the study of the problem is to him, the Holy Father hopefully remarks, a "happy augury for the solution of the crisis."[85]

D. Pope Pius XII's Four Norms to Guide Judges Relative to Unjust Laws

Because of false ideas of the nature of man and law within the last three centuries, many unjust laws have been passed. In lands where Christian moral teaching has been rejected and especially when and where the Church has suffered persecution, cases have multiplied in which Catholic judges

[83] Pope Pius XII, "Address to the Sacred Roman Rota," *AAS*, 41 (Dec. 22, 1949), 605.
[84] *Ibid.*, p. 607.
[85] *Ibid.*

have been faced with the disquieting problem of the application of unjust laws. Catholic judges who are conscientious in their work are often troubled and uncertain as to how to act in their official capacity regarding these laws. It is a current problem. The Holy Father, therefore, in talking to the jurists, took advantage of the opportunity to talk of their problems and to enlighten them by reviewing four fundamental norms about the handling of such cases. The fundamental norms, or principles, the Holy Father laid down are not new. They are but the restatement and application of the Church's customary teaching and can be found in the many manuals of Catholic moral theology.[86]

1. First Norm—Responsibility of Judge

The first principle stated by the Holy Father is as follows:

> For every sentence there is the principle that a judge cannot simply throw responsibility for his decision from his own shoulders, causing it to fall on the law and its authors. Undoubtedly the authors are principally responsible for the effects of such a law. But the judge who applies it to a particular case by his sentence is a joint cause and thus jointly responsible for these effects.[87]

It is seen from the above words of the Holy Father that the first responsibility for an unjust law rests upon the authors of the law, the lawmakers. They have it as their duty to enact just laws. If the lawmakers pass an unjust law they are violating their office and are responsible for whatever evil effects flow from it. The responsibility here is very great both because of the dignity of the office of legislator and the possi-

[86] Noldin-Schmitt, *op. cit.*, II, pp. 667-668, n. 726 and I, pp. 117-121, n. 116-120; Arthur Vermeersch, S.J., *Theologiae Moralis Principia, Responsa, Consilia*, (Romae: Universita Gregoriana), 1924, II, p. 99-101, n. 142; Prümmer, *op. cit.*, II, p. 139, n. 154 and I, pp. 447-449, nn. 617-620; Merkelbach, *op. cit.*, II, p. 672, n. 637d and I, pp. 399-402, nn. 487-491; Genicot-Salsmans, *op. cit.*, II, p. 7, n. 4. and I, pp. 182-184, n. 235. *et alii.*

[87] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 602; *The Catholic Mind*, 48 (Jan. 1950), p. 57.

bility of widespread evil flowing from the unjust law. As the Prophet Isaias says: "Woe to them that make wicked laws: and when they write, write injustice."[88]

But if the author of the law has the first responsibility, he does not have the sole responsibility. The judge who by his judicial sentence puts into effect the unjust law has a share in it. As the Holy Father says, he is a "joint cause and thus jointly responsible." When the judge is faced with the problem of passing judgment according to the unjust law, he cannot merely shrug his shoulders and dismiss responsibility with the idea that the legislator has enacted the law. Nor can he take refuge in the fact that it is "the law." He too is an accessory, a cooperator, and shares the responsibility for the evil done, if he inflicts the law's injustice upon his fellow citizens. In commenting upon this first principle, Father Connell says: "The Pope asserts that the judge may not lay the entire responsibility for the injustice of a sentence which he passes on the law and the lawmakers. In other words, when he passes sentence in accordance with a law he is convinced is unjust he may not salve his conscience by saying that he is merely the mouthpiece of the law. It is true, the principle responsibility rests in those who have passed the law; but he is an accessory."[89]

The judge is the administrator of justice; how can he administer justice if he is asked to apply a law that is filled with injustice? A solemn responsibility he cannot shirk rests upon the shoulders of the judge as soon as he recognizes the injustice of a law he is asked to enforce.

Such a judge is faced with a dilemma. He finds himself caught in the conflict of two different principles. First he knows that as a judge he is a public officer required in the proper conduct of his office to give judgment according to the law of the land.[90] The law he has before him to apply

[88] *Isaias* 10,1.

[89] Francis J. Connell, *The Record*, Nov. 19, 1949, p. 8.

[90] *Corpus Juris Secundum* Vol. 48, p. 1009, note 87; *American Jurisprudence*, Vol. 30, p. 744.

has been duly enacted. It has been passed by the lawmakers as the expression of the voice of the people. It is indeed the law of the land. He realizes he is being asked to give a decision according to it. On the other hand, he realizes it is an unjust law, that it violates in some way the divine law, positive or natural, and that if he applies it, he shares in the moral wrong and arrogant act of setting aside God's law. The judge is forced into the dilemma of either disregarding the law of God and acting according to a practical positivism which gives a legal justice to the unjust law, or of obeying God's law and suffering the positivist's criticism of disloyalty to country and possible loss of office. The truth of the matter is that the unjust law is no law at all. It simply cannot have validity if it is contrary to the law of God from whom all ruling authority comes. The judge therefore does not violate his office if he refuses to apply it. And no government can rightly demand its application. As St. Peter and the apostles declared, God's law is first. It must be obeyed.[91]

All the Holy Father wishes to say in his first principle is that if the judge despite the injustice of the law applies it, he shares responsibility for the evil done. There are instances when a judge may apply and without personal guilt allow an unjust law to take its course, as we shall see later. But in cases when this is not permitted the judge cannot escape responsibility by claiming that the lawmakers are entirely at fault for making the law and he not at all for applying it.

Legal positivists cannot be expected to agree with the above stated principle, nor with its explanation. They know of no immutable objective standard by which laws are judged. They will counter with the thought that the lawmakers, the legislators are the ones to make the laws. The judge's duty is to impose them, to apply them, no matter what the law might demand. If he can't fulfill this duty he

[91] *Acts of the Apostles* 5, 29ff.

is unworthy of his office, ought to step down from the bench and surrender it to someone else who will apply the law.

These very ideas and demands were expressed in the press of the United States in November of 1949, when the Holy Father's talk to the jurists was published. For example the following appeared as part of an editorial in the Washington-Post on November 7.

> Actually, of course, no judge in the United States has any obligation, as a judge to any ecclesiastical authority. Our judges obtain their authority solely from the Constitution and the law of the land... Any man on the bench who is worthy of the trust imposed in him thinks not as a Catholic, Protestant or Jew but as an impartial judge sworn to uphold the laws that the representatives of the people have enacted.[92]

And again on November 14, in an editorial of the same newspaper:

> He the judge is an agent of the Nation (or the State) sworn to uphold its laws. In his function as a judge he owes no obligation to any church or any religious doctrine... we think it is important to remember that his duty as a judge is to apply the law of the land as it has been constitutionally enacted.[93]

In the above quotations no distinction is made between the just and unjust law. It is presumed that in every case the judge must apply whatever is the law, and hence we must concluded that this is so even should the law entail the rankest sort of injustice.

Yet it is interesting to note that the principle the Pope calls to the minds of jurists the world over, that the judge shares responsibility with the lawmaker for the evil done in applying an unjust law, is nothing more than the principle of an objective standard of justice and morality and of the individual responsibility of officials for unjust governmental acts contrary to that standard, which our own gov-

[92] *Washington-Post*, Nov. 7, 1949, Editorial page.
[93] *Washington-Post*, Nov. 14, 1949, Editorial page.

ernment officially expressed in the Charter of the International Military Tribunal and applied in this Tribunal's subsequent war criminal trials. The Charter of this Tribunal provided "for the just and prompt trial and punishment of the major war criminals of the European Axis."[94] It was agreed to and signed by the four powers, the United States, France, Great Britain and Russia, on August 8, 1945, at London, and the trials began November 21 of that same year at Nurnberg, Germany.

Article 6 of the Charter listed the crimes coming within the jurisdiction of the Tribunal, for which crimes, it said, there would be "individual responsibility." It listed three types of crimes: (1) Crimes against peace, such as, the planning, preparation and initiation of a war of aggression in violation of international treaties; (2) War crimes, that is, violations of laws and customs of war, such as, murder, ill-treatment of slave labor and prisoners of war, killing of hostages, etc.; and (3) Crimes against humanity, such as mass murders, extermination, deportation, enslavement and other inhuman acts against civilian population "whether or not in violation of domestic law of the country where perpetrated." After listing these crimes the Charter continued:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
>
> Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.
>
> Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be

[94] Charter of the International Military Tribunal, Article 1, cf. R. H. Jackson, *The Nurnberg Case*, p. 21.

considered in mitigation of punishment if the Tribunal determines that justice so requires.[95]

In clear words the Charter first proclaims the responsibility of the "leaders, organizers and instigators," those who conceived the execution of an iniquitous plan by means of laws and decrees directing criminal acts. Theirs is the greatest responsibility. But the Charter also holds "accomplices" responsible. Neither does it permit one's official position in government, nor the fact that an inferior carried out the order of his government or superior to be used as a claim for freedom from responsibility. Judges of the courts hold official positions. They were needed in the courts to carry into effect the evil laws and decrees and orders of the government. The judges who applied these laws and decrees cannot escape responsibility. They too played their part in the injustices committed.[96]

Placing side by side the words of the Charter and the words of the Holy Father to the jurists on this point clearly shows the identity of the enunciated principle. The Charter said: "The official position of defendants shall not be considered as freeing them from responsibility... The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility."[97] The Holy Father said: "...a judge cannot simply throw responsibility for his decision from his shoulders causing it to fall on the law and its authors... the judge who applies it (an unjust law) ... is a joint cause and thus jointly responsible..."[98]

As Mr. Justice Jackson said in his speech opening the case before the Tribunal, he expected the accused to take refuge in a plea of irresponsibility, since their evil deeds they could not deny in face of documented evidence. "We doubt very much whether it will be seriously denied that the crimes I have outlined took place. The effort will undoubted-

[95] Cf. Jackson, *The Nurnberg Case*, p. 23.
[96] Jackson, *Ibid.* p. 125 and notes on pp. 164-65.
[97] Cf. *supra* note 95.
[98] Cf. *supra* note 87, p. 112.

ly be to mitigate or escape personal responsibility."[99] That this view was correct is shown in Justice Jackson's closing address where he says: "In opening the case I ventured to predict that there would be no serious denial that the crimes charged were committed, and that the issue would concern the responsibility of particular defendants. The defendants have fulfilled that prophecy . . . The argument runs that they all had to obey Hitler's orders, which had the force of law in the German state, and hence obedience cannot be made the basis of a criminal charge. In this way it is explained that while there have been wholesale killings, there have been no murderers. This argument is an effort to evade Article 8 of the Charter. . . . This provision of the Charter corresponds with the justice and the realities of the situation. . . ."[100] "The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state."[101]

It will be noticed too, and this is an important fact for today's jurisprudence, that natural law concepts were used throughout the trial of the war criminals, that the Charter recognized basic objective human rights as an objective measure of the unjustness of laws passed, of decrees and orders issued. There is no offense, no crime committed unless it is against some rule or norm or measure. And the norm used by the Tribunal in its Charter and in the prosecution of the case was the basic human rights of life, liberty and the pursuit of happiness with which God has endowed every human being, which are inherent in man's very nature. Relative to this particular point the natural law is not specifically mentioned, but natural and inalienable rights are mentioned and other words meaning the same thing are used.[102] Witness the following thoughts voiced in the conduct of the Nurnberg Trials.

[99] Jackson, *op. cit.*, p. 91. [100] *Ibid.* pp. 151-2. [101] *Ibid.*, p. 88.
[102] Cf. John P. Kenny, *Moral Aspects of Nuremberg*, (Washington, D.C.: The Thomist Press, 1949), p. 160; Robert H. Jackon, "Nuremberg in Retrospect: Legal Answer to International Lawlessness," 35 *American Bar Association Journal* (Oct. 1949) 885.

> We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law."[103]
>
> Those acts which offended the consciences of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted.[104]
>
> Our people felt that these were the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the "laws of humanity and the dictates of the public conscience."[105]
>
> I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality. We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.[106]
>
> The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and nontechnical.[107]
>
> After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place.[108]

The Charter mentions "Crimes against humanity" and "inhumane acts."[109] It looks upon the rights of humanity as more basic than the domestic law of a country when it

[103] Robert H. Jackon, "Report to the President," *The Nurnberg Case*, p. 8; cf. also "Opening Statement," *op. cit.*, p. 80.
[104] *Ibid.*, "Report to the President," p. 11.
[105] *Ibid.*
[106] *Ibid.*, p. 12.
[107] *Ibid.*, p. 14.
[108] *Ibid.* p. 15.
[109] Charter of the International Military Tribunal, *ibid.* p. 23.

says that such crimes shall be punished "whether or not in violation of domestic law of the country where perpetrated."[110]

> These men created in Germany, under the *Fuhrerprinzip*, a National Socialist despotism equaled only by the dynasties of the ancient East. They took from the German people all those dignities and freedoms that we hold natural and inalienable rights in every human being.[111]
>
> The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine, contrary to the teachings of early Christian and International Law scholars such as Grotius, that all wars are to be regarded as legitimate wars . . . The sum of these two doctrines was to give war-making a complete immunity from accountability to law. This was intolerable for an age that called itself civilized. Plain people, with their earthy common sense, revolted at such fictions and legalisms so contrary to ethical principles and demanded checks on war immunity.[112]
>
> As an International Military Tribunal, it rises above the provincial and transient and seeks guidance from International Law but also from the basic principles of jurisprudence which are assumptions of civilization and which long have found embodiment in the codes of all nations.[113]

Justice Jackson says the Charter and the work of the International Military Tribunal has done a vast service by putting "International Law squarely on the side of peace as against agressive warfare, and on the side of humanity as against persecution."[114] But perhaps it might be said that the principal contribution of this trial and its Charter is its insistence on the individual responsibility of government officials for deeds of office and its recognition of basic human rights as a norm for just government's laws, decrees

[110] *Ibid.*
[111] *Ibid.* p. 32.
[112] *Ibid.* p. 83.
[113] *Ibid.* p. 122.
[114] R. H. Jackson, *The Nurnberg Case*, p. xvii.

and orders in a world and at a time when juristic philosophies which deny God, his law, the natural law and natural rights, still prevail. The condemnation of the accused and the penalties they received as guilty manifest the degradation to which a jurisprudence of legal positivism can lead. According to juridical positivism these men did no wrong. They acted according to the laws they enacted. They should not have been punished—which really doesn't make sense—as if crime were less a crime when performed by men as leaders of nations. Perhaps the only black mark that can be found with the Tribunal is the fact that Soviet Russia had a part in passing judgment. While not questioning the justice and good intentions of the other countries, we can be sure that Russia found the misdeeds of the Nazis illegal, not because these acts were opposed to the natural law, but because they were opposed to Russia's own proletarian revolution. In the trials that country found a conveniently legal democratic way of disposing of persons she would have gotten rid of more deftly if left to her own devices.

In his talk to the Sacred Rota, in November of 1949, the Holy Father said this about the Nurnberg trials:

> This, we are forced to say, was and still is the "legal right" in some places. We all have witnessed how some, who had acted according to this right, were later called to render account before human justice. Those trials have not only brought real criminals to the fate they deserved. They have also shown the intolerable condition to which a law of state completely dominated by juridical positivism can reduce a public official, who otherwise by his nature and left to his own sentiments would have remained an honest man.
>
> According to the principles of juridical positivism, it has been pointed out, those trials should have ended with as many acquittals, even in cases of crimes repugnant to human feeling and filling the world with horror. The accused were, so to speak, covered by the "law in force." Of what were they actually guilty if not of having done what this law prescribed or permitted?

> We certainly do not intend to excuse the truly guilty, but the greater responsibility falls on the prophets, proponents and creators of a culture, a power of state, a legislation which does not recognize God and His sovereign rights. Wherever these prophets were and are still at work, there must rise an renewal and a restoration of true juridical thought.[115]

When Pope Pius XII calls attention to the responsibility that rests on the shoulders of judges should they make application of unjust laws, he is but restating a fundamental principle of Catholic moral theology. Moreover, he is advocating nothing more than the very same principle our own government declared and used at Nurnberg in its condemnation of the War Criminals.

2. Second Norm—Judge May Not Command Action Intrinsically Evil

The second norm or principle laid down by the Holy Father declares the judge may never oblige a person to perform an intrinsically immoral action.

> A judge may never by his decision oblige anyone to commit an act intrinsically immoral, that is to say, an act which is by its very nature contrary to the law of God and the Church.[116]

An intrinsically immoral action is one which is evil in its very nature.[117] It is an action in itself, in its own constitutive elements, in its essential make-up, contrary to the law God has implanted in the nature of things, an action not conformable to right reason and order, and forbidden by God precisely because it is inordinate.[118] The judge, even under the direction of the civil law, can never oblige the performance of any such action, for human legislation and judicial action cannot set aside the natural order established by

[115] Pope Pius XII, "Address to the Sacred Roman Rota," *AAS*, 41 (Dec. 22, 1949), 606-7.

[116] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 602; *The Catholic Mind*, 48 (Jan. 1950), p. 57.

[117] Merkelbach, *op. cit.*, I, n. 122, p. 111.

[118] Slater, *A Manual of Moral Theology*, I, p. 44.

God.[119] And if the law should command an action in itself immoral, the judge cannot apply it. The judge, for example, can never by a decision oblige a person to deny the existence of God, to blaspheme God, or to take the life of an innocent person, or command that eugenic sterilization be inflicted on another.

It will be noticed in this second principle that the Holy Father speaks of an action intrinsically evil as one contrary by its very nature to the law of God and the Church. When he speaks of an intrinsically evil action as one contrary by its very nature to the law of God, he refers to that law God has established in the nature of things, the natural law. He does not refer to actions forbidden by the divine positive law alone for these become evil not because they are intrinsically evil, but because they have been forbidden by the divine will. When the Holy Father speaks of an action intrinsically evil as one contrary to the law of the Church, he is referring to actions forbidden by the Church acting as the teacher of the law God has implanted in nature. He is not referring to actions forbidden by the Church merely through her positive law, for these also are not intrinsically evil, but become forbidden because enacted by rightful ecclesiastical authority. It is also true, as we shall later see in discussing the third norm laid down by the Holy Father, that the judge in most cases may not command actions which are contrary to the positive laws of the Church. But it is not these actions the Holy Father calls intrinsically evil. When the Holy Father speaks of intrinsically evil actions, he is referring to actions which in their intrinsic make-up are opposed to God's naturally established order, or to actions forbidden by the Church officially teaching what is not permitted in that natural order.

The Church has been established by Jesus Christ, true God and true man, as the custodian of divine truth here on earth. It is her right and duty to teach definitively of matters pertaining to correct faith and morals.

[119] Noldin-Schmitt, *Summa Theologiae Moralis*, II, p. 668, n. 726.

Now it has been found true that as men begin to make conclusions from the generally known and common principles of the natural law, or to apply them to more determined and particular instances, there is danger of error. While the general principles are easily understood, their application to concrete cases at times is difficult, and we have the possibility of erroneous teachings. That all men might the more easily come to a true knowledge of what is right and what is wrong, God made known to us his divine positive law, repeating in it the most important requirements of the natural law. Yet, even with divine revelation, man falls into error in his judgments of moral right and wrong. The following are some points in evidence of this. We have from Christian teaching the commands "Thou shalt not kill" and "Blessed are the merciful for they shall obtain mercy" and the lesson of the value of suffering from Christ's example. The difficulty some minds left to themselves find in a reconciliation of these three have lead many to ascribe to the supposedly humanitarian, though intrinsically evil doctrine of euthanasia or mercy killing. Some today find it difficult to understand that birth prevention is contrary to the natural law and hence intrinsically evil. Others favor (and have succeeded in having legislation established calling for) instrinsically evil eugenic sterilization. It is not that these things cannot be understood correctly. Errors are begotten, lived by and handed down because of neglect of education, evil habits and customs, and blinding prejudices, all of which hinder correct reasoning.

Hence there arises the need for an authority to tell us the correct meaning of the natural law. The Catholic Church, established by Jesus Christ and guided by the Holy Spirit, is that authority, that official teacher in matters of faith and morals. It is her duty to keep alive for all time the true meaning and explanation of God's law. As in the past, so today does the Church fulfill her mission in declaring to a world which finds it hard to accept the truth that euthanasia, birth prevention and eugenic sterilization are contrary to the laws of God.

Should a law be passed by the legislators which demands actions intrinsically evil, the judge can never by his sentence enforce it. The judge, therefore, even if he should be forced from his office, is never permitted by his decision to command an action which is in its very nature opposed to the natural order established by God and the Church's teachings as to what is the true meaning, and explanation of that natural order as expressed in her laws, decrees and the common teaching of her theologians.

Should the judge command an intrinsically evil action, he sins against legal justice in not properly fulfilling his office and he also formally cooperates in the resultant evil. He commits a sin of scandal against the virtue of charity in leading another into sin. Even should the judge declare that he has no will to command evil, saying that he merely fulfills the demands of the law, he still formally cooperates in the evil done, since his decision in its very nature is ordered to sin alone in directing the performance of an intrinsically evil action. Needless to say, should a judge command an intrinsically immoral action, his decision is not binding in the least, since he exceeds his authority.

3. Third Norm—Judge Cannot Approve an Unjust Law

The third principle is concerned with the express recognition and approval of an unjust law. Of the judge, the Holy Father says:

> He can in no case expressly recognize and approve an unjust law—which for that matter would never constitute the foundation for a judgment valid in conscience and before God. Therefore, he cannot pronounce a penal judgment which would be equivalent to such approval. His responsibility would be even graver if his judgment were to be a cause of public scandal.[120]

In this third principle the Holy Father makes four points

[120] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 603; *The Catholic Mind*, 48 (Jan. 1950), 57.

or conclusions. First he declares the judge may in no case expressly recognize and approve an unjust law. The words "in no case expressly recognize and approve" mean that the judge can never say or do anything which would indicate his personal approval or favor of the unjust law. For example, the judge could not make a public speech in behalf of such a law. In the Communist dominated countries of our time, laws have been passed forbidding protests against the tenets of Communism. A judge who after punishing a victim according to the Communistic law (permitted in some cases, as we shall see) would then give a speech upholding the Communistic law would offend against this principle. Neither can the judge privately declare his approval of unjust laws. Nor can the judge perform any action which would amount to an express recognition and approval of the law. He could not, for example, attend a meeting if his presence there would be interpreted as lending approval to unjust laws, or if the meeting itself were held for the purpose of furthering such laws.

As a second point, by way of parenthesis, the Holy Father says, and it is clearly seen, that an unjust law is never a valid law and, therefore, never the basis for a valid judgment which would bind in conscience and before the eyes of God.

As a third point, the Holy Father declares that the judge may not pronounce a penal judgment which would be equivalent to an approval of the unjust law. Later, in stating the fourth principle, the Holy Father says that not every application of an unjust law necessarily means its recognition and approval. There are occasions, then, when an unjust law may be applied, and its application by the judge does not necessarily mean that the judge expressly recognizes and approves it. However, if the application of it, or the applying of penal judgments in accordance with it, will be taken as, or amount to, an express recognition and approval of the unjust law, the judge can never apply it or pronounce the penalty. For example, if in a Communistic country the judge

should be faced with the necessity of inflicting a penalty upon a priest who has violated a law making it a crime for him to administer the sacraments to his Catholic people, and if public circumstances are such that the public mind will interpret the infliction of the penalty as the judge's approval of the unjust law which makes such ministration a crime, then, the judge may not inflict the penalty. The law is an unjust one. The judge's recognition and approval of it would make him a formal cooperator in its injustice. In this third point, the Holy Father applies the moral principles of cooperation in the evil act of another. If a judge directly or indirectly approves an unjust law, he sins in associating himself with the evil intention of the lawgiver or with the evil content of the law itself. The judge morally is not permitted to give approval. Should he, nevertheless, give express approval, he sins against his office and shares the responsibility for all the evil and injury done through the application of the law insofar as he is responsible for its application.

Finally, as a fourth point of this third principle, the Pope reminds the judge that if his approval of the unjust law causes public scandal in leading others into sin, in putting a stumbling block in the way of their salvation, his responsibility is greater and his sin increases in gravity.

4. Fourth Norm—Not Every Application of an Unjust Law is Equivalent to Approval

In stating the fourth principle or norm the Holy Father says that not every application of an unjust law to particular cases necessarily means its approval and the judge may, and at times perhaps must, allow the unjust law to take its course as the only means of a greater good or of impeding a much greater evil. The entire fourth principle is stated as follows:

> Nevertheless, not every application of an unjust law is equivalent to its recognition or approval. In this case, a judge may—sometimes, perhaps, must—allow an unjust law to take its course, whenever

> this may be the only means of impeding much greater evil. He may inflict a penalty for transgression of an unjust law if it is of such a kind that a person who is affected by it is reasonably disposed to submit to it in order to avoid that harm or assure a good of very much higher importance and if the judge knows, or can prudently suppose, that such sanction will be willingly accepted by the transgressor for higher motives. In times of persecution, priests and laymen have often allowed themselves, without offering resistance, to be condemned by Catholic judges to pay fines or to be deprived of personal freedom because of a transgression of unjust laws, when in that way it was possible to preserve an honest magistracy and to ward off from the Church and the faithful much more dreadful calamity.
>
> Naturally, when a sentence is of more serious consequences, all the more important and general must be the good that is to be safeguarded or the evil to be averted. There are, however, cases where the idea of compensation by means of the attainment of higher goods or prevention of greater evils cannot be applied, such as in the case of condemnation to death.[121]

In the above quotation the Holy Father makes a distinction between (1) a civil law that is unjust *in content*, that is, a law unjust in the very nature of the action which it commands or forbids (apart from the penalty attached to its violation), and (2) the penalty attached to the law and inflicted when the unjust law is violated. In our discussion of the fourth norm, let us make the same distinction. We shall consider first the application of a law that is unjust *in its content*.

The question arises, when can a judge allow a law unjust *in its content* to take its course in order to impede a much greater evil? In giving answer, consideration must be given to the different types of laws unjust *in content*. There are four classes of civil laws unjust *in content*. To the first class belong those civil laws which in forbidding or com-

[121] *Ibid.*

manding certain actions are opposed to the natural law, or to that portion of the divine positive law reflecting the natural law. Such civil laws are intrinsically evil. According to the Holy Father's second principle the judge may never by his decision command a person to commit an act intrinsically evil. Hence in his court of justice the judge may never permit a law which obliges a person to commit such an act to take its course, that is, he may never allow it to be put into effect in his court through proper court procedure. Therefore, what the Holy Father says in the above quotation about the judge at times allowing a law unjust *in its content* to take its course does not apply to laws commanding what is intrinsically evil, although, as we shall see, the judge may at times levy penalties for the violation of this type of unjust law.

The second class of laws unjust *in content* includes those which in forbidding or commanding actions are opposed to the divine positive law alone, or, in other words, opposed to that portion of the divine positive law which is beyond the natural law. Such civil laws are opposed to divine law and hence are unjust and invalid. Normally, even in the face of the danger of death, the judge is not permitted to allow such a civil law to take its course.[122] Nevertheless, there are some instances in which the judge may, perhaps even must, permit such an unjust law to take its course in order to impede a much greater evil. In order for us to understand under what circumstances the judge may or must permit it to take its course, we must make a distinction between negative and affirmative divine positive laws not contained in the natural law.

A negative law is one that forbids some evil action. We have, for example, the words of Christ, "He who is not with me is against me,"[123] which statement in its negative form forbids us to be against Christ, and which, in turn, forbids the profession of a false religion. Now, a negative divine

[122] Merkelbach, *Summa Theologia Moralis*, I, p. 256, n. 286.
[123] *Matthew*, 12, 30.

positive law of this second class binds "semper, et ad semper," that is, always and for always, at every moment of the time in which it endures.[124] Hence, since it binds in this manner, the judge is never permitted to allow an unjust civil law contrary to it to take its course. If, for example, in times of persecution civil authorities should enact an unjust law demanding that a Catholic perform some external act indicating his disbelief in or denial and repudiation of Christ and his revealed teaching, or the profession of a false religion, the judge would not be allowed to apply such a law. Therefore, what the Holy Father says about at times allowing a civil law unjust *in its content* to take its course in order to impede a much greater evil does not apply to unjust civil laws that are in opposition to a negative divine positive law not contained in the natural law.

An affirmative law is one that commands some good to be done.[125] The same words of Christ quoted above, "He who is not with me is against me," in their affirmative form, plus other precepts such as that of receiving baptism, command the open profession of the true faith.[126] Now, an affirmative divine positive law not contained in the natural law binds, as it is said, "semper, sed non ad semper," that is, always but not for always, or always but not at every moment of the time it endures. This is easily seen in that we are not obliged to make open profession of our faith at every moment. There are moments, then, when affirmative divine positive laws do not bind. Ordinarily they do not bind when very grave harm attends their fulfillment. A more propitious moment for fulfillment may be awaited. Nevertheless, such affirmative commands are obligatory even when very grave harm attends their fulfillment, when, if not fulfilled, graver harm will result to the common good, or when one's neighbor is in extreme spiritual necessity, or when there is question

[124] St. Alphonsus, *Theologia Moralis*, I, 101; Merkelbach, *op. cit.*, I, p. 218, n. 234.

[125] *Ibid.*

[126] Merkelbach, *op. cit.*, I, pp. 553-57, n. 711-715.

of hatred of religion or contempt of the Church.[127] Since an affirmative divine positive law is the law of God, in most instances the judge would not be permitted to let a civil law opposed to it take its course, for man cannot set aside divine arrangements. Since, however, there are times when an affirmative law does not bind, that is, when very grave harm attends its fulfillment, and its non-fulfillment in turn, will not cause graver harm to the common good, or to one's neighbor in extreme spiritual necessity, or to religion and the Church, then there are times when the judge, in view of impeding a much greater evil, may permit an unjust civil law opposed to an affirmative divine law not contained in the natural law to take its course. The judge may do so in order to impede a much greater evil which would result should he refuse to let the unjust civil law take its course. The Divine Lawgiver is thought to cede his rights in such cases.[128] If, for example, civil authorities should enact an unjust law forbidding Catholics openly to profess their faith, and the open profession of faith will result in great harm to Catholic people, and non-profession will not result in grave injury to the common good, to the spiritual good of one's neighbor or to the good of religion and the Church, then the affirmative divine positive law requiring open profession of faith ceases to bind, God is judged to cede His rights, and the judge, in view of impeding a much greater evil, e.g., the loss of his judgeship with the seating of a judge inimical to the cause of Christ or open persecution against the Church, which would result should he refuse to apply the law, is permitted to let the unjust law take its course.[129] He may even be obliged to do so if his refusal will result in the visitation of most serious evils upon the Church.[130]

Another example. In view of a much greater good, a judge in applying an unjust civil law opposed to the divine positive

[127] *Ibid.*

[128] Merkelbach, *op. cit.*, I, p. 256, n. 286.

[129] Merkelbach, *op. cit.*, I, p. 556, n. 715.

[130] *Ibid*, pp. 55-57, n. 713, 715; St. Thomas Aquinas, *Summa Theologica*, II-II, q. 3. a. 3, ad 2.

law of "Go, therefore, and make disciples of all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Spirit," could forbid a nurse to baptize the dying infants of non-Catholics if this is the means of warding off hatred and persecution of the Church. The common good of the Church is to be preferred to the individual good of the child, and Christ's command to baptize is thought not to bind in a particular instance when it will inflict grave harm upon the Church.[131]

Therefore, what the Holy Father says about allowing at times an unjust civil law to take its course in order to impede a much greater evil, is able to be, and at times must be, applied to unjust civil laws apposed to an affirmative divine positive law not contained in the natural law under the conditions indicated above. If confronted with the situation of applying such an unjust civil law, the Catholic judge ought to consult with the Ordinary of his diocese, both as to the question of the injustice of the civil law, and whether or not his application of it will impede a much greater harm.

The third class of civil laws unjust *in content* includes those which in forbidding or commanding actions are opposed to ecclesiastical law. For our purpose here we may make a threefold classification of ecclesiastical laws. First, the Church, through the native and proper power bestowed upon her by Our Lord, has enacted some laws which are a repetition, or an interpretation, determination or application of the divine-natural law, for example, when the Church forbids abortion,[132] birth prevention,[133] blasphemy,[134] and perjury.[135] If the judge is asked to apply an unjust civil law opposed to an ecclesiastical law of this type, he cannot do so, since the civil law is intrinsically evil, being contrary not only to ecclesiastical and divine positive law but the natural law as well.

[131] Merkelbach, *op. cit.*, III, p. 124, n. 150.
[132] Pope Pius XI, *Casti Connubii, Five Great Encyclicals*, p. 94-96.
[133] *Ibid.* pp. 92-94.
[134] *Codex Juris Canonici*, Canon 2323.
[135] *Ibid.*

Second, the Church has enacted some laws repeating, interpreting, determining and applying the divine positive law alone, or that portion of the divine positive law not contained in the natural law, for example, when the Church punishes heresy relative to revealed truth,[136] commands the open profession of the true faith in prescribing the reception of the sacraments,[137] and makes laws for the valid reception of matrimony.[138] Unjust civil laws of this kind are subject to the considerations made in the previous discussion of unjust laws opposed to that portion of the divine positive law not contained in the natural law.[139] If such unjust civil laws are opposed to a negative ecclesiastical law of the type we speak, the judge cannot permit it to take its course; if opposed to an affirmative ecclesiastical law of the type we speak, the judge would be permitted to let it take its course if the conditions mentioned in the previous discussion are fulfilled and in addition the judge obtains the necessary jurisdiction from proper ecclesiastical authorities.[140] The Ordinary of the diocese should be consulted regarding the necessary jurisdiction.

Third, the Church has also enacted some laws called strictly, purely or simply ecclesiastical laws, having a strictly ecclesiastical origin, apart from the natural and divine positive law, for example, the law of taking Holy Communion publicly to the sick[141] and the law of wearing clerical garb.[142] If a civil law unjust *in its content* is opposed to such a strictly ecclesiastical law, the judge has the duty to obtain jurisdiction from the proper Church authorities in order to pass sentence.[143] If time and circumstances in this instance do not permit him to obtain the required jurisdiction and neces-

[136] *Ibid.*, Canon 2315.
[137] *Ibid.*, Cf. Canons 737-770.
[138] *Ibid.*, Canons 1067ff.
[139] Cf. *supra* pp. 137-40.
[140] Noldin-Schmitt, *op. cit.*, II, pp. 667-8, n. 726.
[141] *Codex Juris Canoci*, Canon 847.
[142] *Ibid.*, Canons 136, 1 and 596.
[143] Noldin-Schmitt, *Ibid.*

sity demands, he can permit the unjust law to take its course as a means of avoiding the greater evil of having abuse heaped upon himself and the Church and harm done to the preservation of an honest judiciary by the possible loss of his office. The Church readily grants jurisdiction in such cases when request is made and can reasonably be presumed to grant it when it is impossible to make the required request.[144]

And now we come to a discussion of the fourth class of civil laws *unjust in content*. To this class belongs those laws which in forbidding or commanding actions are opposed to a purely human good in social living; that is, for example, such laws as do not lead to the common good but to the good of individuals, as when the denial of the right of the workers to engage in a just strike or the setting of wages at unjust levels is beneficial to a special group; or laws which exceed the authority of the lawgiver in civil matters, as when in democratic nations legislators enact laws exceeding constitutional limits; or laws which, even though intended for the common good, apportion proportionally unequal burdens on the people, as when tax laws fall too heavily on particular segments in the community. In many cases laws of this class are not easily seen as unjust. For example, it is difficult to say at what point proportionate tax laws become unjust to a special group. The presumption is in favor of the justice of the law in such a case that the order of society might be maintained. When such laws are obviously unjust the judge ought not to apply them, yet he can do so when the good order of the community demands, that is, in order to avoid scandal or disturbance, or when should he refuse to do so the security of his office would be at stake with much greater resultant harm. St. Thomas says that these unjust laws opposed to a human good do not bind in conscience "except perhaps in order to avoid scandal or disturbance, for which cause a man should yield his right."[145]

[144] *Ibid.*, p. 663, n. 720; Cf. *Codex Juris Canonici*, Canon 2205, 2.
[145] *Summa Theologica*, I-II, q. 96, a. 4; Cf. *supra* p. 82.

He envisions, therefore, their binding in conscience at times, in order to avoid "scandal or disturbance." Pius XII further indicates that the Catholic judge may allow them to take their course if this is the only way to avoid a much greater evil which would result if he refused to pass judgment according to them. It is understood, of course, the application of the law is not to give express recognition or approval of it. The judge, nevertheless, ought to do what he can to set aside all unjust laws by seeking their repeal in legislative assemblies, or by initiating proceedings in the courts for a declaration of unconstitutionality.

Not only does the Holy Father say that the judge at times is permitted to apply a law unjust *in content* in the cases mentioned above, he also envisions occasions when the judge's application of it would border on obligation. He says sometimes the judge "perhaps, must" allow a law unjust *in content* to take its course. Where grave harm would result to the Church or to the body of citizens if the evil law is not applied in those cases where application is permitted, it seems the judge would have the obligation to apply it.

We have spoken of laws which *in their content,* that is, in what they forbid or command, are unjust. We have said that if such laws, apart from the penalty involved, are opposed to the natural law or to the divine-positive law or the ecclesiastical law expressing the natural law, the judge can never have a part in their application. If civil laws unjust *in their content* are in opposition to the divine positive law alone or to ecclesiastical law expressing the divine positive law alone negatively expressed, then the judge may never apply them, but if they are in opposition to said laws affirmatively expressed, the judge, in order to impede a much greater evil, may apply them in particular cases, when their non-application would cause grave harm, and the non-fulfillment of the said affirmative law would not cause grave injury to the common good, to one's neighbor, or to the Church, in which case God is thought to cede his rights. In addition the judge would have to obtain jurisdiction in re-

spect to the said affirmative ecclesiastical law. If civil laws unjust *in their content* are opposed to strictly ecclesiastical laws, the judge, lacking jurisdiction, needs to obtain it from proper Church authorities before applying the law in order to obtain a greater good. This jurisdiction, however, the judge may presume if it is impossible to make the required request. If civil laws unjust *in their content* are opposed to a human good in society, the judge may, and perhaps must in some instances, apply them to specific cases when a much greater evil is avoided or a much greater good is obtained. However, in all these instances the judge may never give his express approval to the unjust law.

Now we come to discuss the judge's obligations regarding penalties attached to the violation of these unjust laws. The person who violates an unjust law is strictly speaking not guilty of a true offense, since the law being unjust is really no law at all. May the judge, therefore, punish a person violating the unjust law, who in reality is an innocent person? Now to punish an innocent person is an evil. The Pope in restating the common Catholic moral position, says that in certain cases and circumstances the judge may inflict the penalty. He may inflict a penalty for the transgression of an unjust law if two conditions are fulfilled: (1) if the penalty itself is of such a nature that the transgressor is reasonably disposed to submit to it in order to ward off a much greater evil or in order to insure a much greater good, and (2) if the judge can prudently suppose the penalty will be willingly accepted by the transgressor for higher motives.[146] These conditions apply to the penalties attached to the violation of all four classes of unjust laws, whether opposed to the natural law, divine positive law, ecclesiastical law or to a human good in society. While, as was pointed out before, the judge may never apply a law, which *in its content*, in the act it commands or forbids, is opposed to the natural law, to the divine-positive law or ecclesiastical law expressing the natural law, or to the divine positive law alone negatively

[146] Cf. *supra*, p. 128, note 121.

expressed, or to ecclesiastical law expressing the divine positive law alone negatively stated, it is clear he can impose the penalties attached to the transgression of such laws when the proper conditions are present, that is, when the penalty of its very nature can be deemed as acceptable in view of the good to be obtained or evil avoided, and the victim is willing to accept it.

The Holy Father points out that oftentimes priests and laymen in times of persecution of the Church have willingly accepted such penalties offering no resistance to them in order to preserve an honest judiciary and to prevent evil to the Church and its members. A light penalty bringing a much greater good in its nature could be called acceptable. But the Holy Father declares that if a serious penalty is involved, such as a very heavy fine, or a long imprisonment, then the good obtained and the evil avoided by its acceptance must be of a more important and general nature, if the judge is to be justified in inflicting it. Should the penalty be severe, and the benefit of its acceptance small, the judge may not inflict it, since the penalty is altogether out of proportion to the good obtained. In no case the Pope says, no matter what the good obtained or evil avoided, may the judge condemn the innocent person to death. This penalty is of such a grave nature that the judge may not inflict it, no matter how willing the innocent person to accept it. Rather than levy such a judgment, the judge is held to resign his office.

It is noticed the Holy Father maintains, as a second condition for the infliction of an unjust penalty, the willingness, or the reasonably presumed willingness, of the victim to accept it for a higher motive. Should he be unwilling, or should the judge not be able reasonably to presume his willingness, (or at least the unreasonableness of his unwillingness), it seems the judge may not impose any penalty whatsoever on the innocent person.[147] We venture to say that in most cases involving only a slight penalty with resultant

[147] Noldin-Schmitt, *op. cit.*, I, p. 668, n. 726; Harding, *op. cit.*, p. 3347.

great good, the judge can reasonably presume its willing acceptance by the innocent party, and further, should the innocent party be unreasonably unwilling insofar as he lacks the Christian charity to undergo a slight punishment in view of a much greater good, it seems the judge may inflict the penalty anyway. The judge, however, may not apply any penalty at all if it gives express recognition and approval of the law.

There remains one more point to discuss here. What if the judge is doubtful about the justice of a law he is asked to apply? It is first of all required of him to do what he can to clear up the doubt. This can be done by further study, by consultation with other men learned in the law, and by seeking the point of view of the Church, the official guardian of matters of faith and morals. If doubt still remains, presumption is in favor of the lawgiver that he has acted rightly for the good of society, and the law is to be considered just, according to the principle, "Lex in dubio praesumitur justa,"[148] except in those cases wherein its fulfillment would be exceedingly difficult, or cause grave harm to citizens.[149] In these latter instances the judge will apply the principles applicable to unjust laws.

E. Application of Norms to Unjust Laws in the United States

Having reviewed the fundamental norms stated by Pope Pius XII regarding the judge and unjust laws, it remains now to apply them to existing and possible unjust laws in our own country. Unjust laws have been passed in our land and are now on the statute books of different states—laws which legalize eugenic sterilization, which permit and protect the sale and dissemination of contraceptive devices, divorce laws and some laws which are opposed to the good order of society in apportioning proportionally unequal burdens on special groups. Attempts have also been made and

[148] Cf. St. Alphonsus, *Theologia Moralis*, I, n. 99; II, n. 617.
[149] *Ibid.*

possibly will be made in the future to legalize euthanasia or mercy killing. These laws and the possibility of the enactment of future unjust laws give rise to practical moral problems for the Catholic judge to which he must apply sound Christian moral principles. We shall here discuss eugenic sterilization, euthanasia, cases in which the dissemination of contraceptive devices and information are concerned and some aspects of tax laws, and make application of the norms laid down by the Holy Father. Divorce and divorce laws will be discussed in the next chapter.

1. Sterilization Laws

Sterilization is a term applied to an operation by which a person is rendered incapable of the procreation of offspring. The effect of the operation is to make propagation impossible, which effect is secured by preventing the male and female reproductive elements from approaching one another.[150] This effect of human sterility can be procured in a variety of methods both for the male and for the female.[151] The most common method of sterilization for the male, and the method most favored by eugenists, is that of vasectomy, which consists of ligating and resecting each of the vasa deferentia, thus preventing the spermatazoa, the male fecundating element from flowing from the testes to the seminal vesicles where it is stored for use. Instead the spermatazoa pass into the blood stream. The operation itself is very simple and a minor one to perform. It takes only a few minutes and may be done without anaesthetic. The result, however, is sterility, a major biological defect, a very grave mutilation inasmuch as it deprives man of his natural power of reproduction.[152]

The most common method used in the sterilization of the

[150] Henry Davis, S.J., *Moral and Pastoral Theology,* (London: Sheed and Ward, 1945), II, p. 156.

[151] Joseph B. Lehane, *The Morality of American Civil Legislation Concerning Eugenical Sterilization,* (Washington, D. C.: The Catholic University of America Press, 1944), pp. 2-3.

[152] *Ibid.,* p. 76.

female is called salpingectomy or fallectomy, which consists of a simple cutting or ligation of the fallopian tubes. This prevents the ovum, the periodic female reproductive germ cell, from making its natural way from the ovaries through the fallopian tubes to the uterus, in the course of which transit conception normally takes place. Salpingectomy produces permanent sterility and is a major operation beset with danger to the patient.[153]

According to the reasons advanced for its administration, sterilization may be of three different kinds—therapeutic, if it is administered for its curative effect upon an ill body; punitive, if given as a punishment; and eugenic, if administered as a means to promote the betterment of the race by preventing the propagation of undesirable or defective stock.[154]

Therapeutic sterilization is permissible if it is necessary in order to save the life or the health of an individual. According to true Catholic moral principles, mutilation of the human body without reason is gravely wrong. Man's body is sacred and holy. It is a gift of God. The inviolability of the human body is a basic Christian moral principle, and neither man nor the state is permitted to tamper with the body's integrity or its proper functions without good reason. When, however, the preeminent good or health of the whole body is threatened by a diseased part or member, and a sterilization operation is a necessary provision to ward off that threat, then the operation may be performed. Therapeutic sterilization, therefore, if it is truly a necessary means to promote the good of the whole creature, is morally permissible.

> Furthermore, Christian doctrine establishes, and the light of human reason makes it most clear, that private individuals have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to destroy or mutilate their members, or in any other

[153] *Ibid.*, p. 5.
[154] *Ibid.*, p. vii.

> way to render themselves unfit for their natural functions, except when no other provision can be made for the good of the whole body.[155]

Catholic moral theologians also regard it as probable that the state has the right to use sterilization precisely as a punishment, apart from any eugenic consideration, for serious crime, although some deny the state this right.[156] However, those who admit it seriously question its fittingness and its effectiveness as a punitive measure.[157] Speaking of mutilation as a punishment, St. Thomas says:

> Hence just as public authority licitly can deprive a person of life itself because of certain major, crimes, it can deprive him of a member because of certain lesser crimes.[158]

In his encyclical Casti Connubii, Pope Pius XI seems to permit the state the use of punitive sterilization.

> Public magistrates have no direct power over the bodies of their subjects: therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm or tamper with the integrity of the body either for reasons of eugenics or for any other reason.[159]

There are in these words no positive approval of punitive sterilization. The words "where no crime has taken place and there is no cause present for grave punishment, they can never directly harm ... the integrity of the body" seem to imply, however, that if a crime has taken place and a cause is present for grave punishment, the state can directly harm the integrity of the body and in this instance exact the punishment of sterilization.[160]

In 1940 the question was asked the Holy Office:

> Whether the direct sterilization of man or woman, whether perpetual or temporary, is licit.

[155] Pope Pius XI, *Casti Connubii, Five Great Encyclicals,* (New York: Paulist Press), p. 97.

[156] Noldin-Schmitt, *op. cit.,* II, p. 314, n. 328.

[157] Lehane, *op. cit.,* p. 92; Merkelbach, op. cit., II, p. 373, n. 370.

[158] *Summa Theologica,* II-II, q. 65, a. 1; cf. II-II, q. 64, a. 2.

[159] *Casti Connubii, op. cit.,* pp. 96-97.

[160] Cf. Henry Davis, *op. cit.,* II, p. 160.

> Reply. In the negative; it is forbidden by the law of nature, and, as regards eugenic sterilization, it has already been condemned by the Decree of this Sacred Congregation, of 21 Mar., 1931.
> Approved, confirmed, and ordered to be published by His Holiness, Pius XII in the Audience of 22 Feb., 1940.[161]

Some authors say the above response of the Holy Office forbids punitive sterilization in its disapproval of "direct sterilization" as contrary to the law of nature.[162] Yet if we interpret the words "direct sterilization" strictly, then it seems that the response would also disapprove therapeutic sterilization as well. Now we know from the general teaching of the theologians and from Pius XI's encyclical *Casti connubii* that proper therapeutic sterilization is considered lawful. Some reliable theologians also teach that the state probably has the right to the use of punitive sterilization. It is thought, therefore, the words "direct sterilization" in some way must refer to eugenic sterilization and to those so-called "therapeutic" sterilizing operations which are resorted to by some without reason merely for the purpose of relieving one of the "burden" of having children, operations, which, of course, are unlawful and are forbidden by the law of nature, but not as referring to the proper therapeutic or punitive sterilization.

The state probably has the right of using sterilization precisely as a punishment apart from eugenic considerations for a serious crime, as we have said. But it is neither fitting to human dignity nor is it an effective punitive measure. Some courts have declared it a "cruel and unusual punishment."[163] Legalists join with moralists in questioning its

[161] Bouscaren, *Canon Law Digest*, II, p. 96; *AAS* 32 (March 5, 1940), 73.

[162] Cf. McCarthy, *Irish Ecclesiastical Record*, LXX, (Nov. 1948), 1013-18; Gerald Kelly, S.J., "Notes on Moral Theology," *Theological Studies*, (Jan. 1950), pp. 42-44.

[163] Davis v. Berry, 216 Fed. (June 24, 1914), 413; Mickle v. Henrichs, 262 Fed. (May 25, 1918), 687-91; Cf. also Skinner v. State of Oklahoma, 316 U.S. (June 1, 1942), 535.

effectiveness as is indicated by the following quotation from *American Jurisprudence.*

> Sterilization, viewed solely as to its effectiveness as a punishment, its value as a deterrent, and as a means of reformation may well be questioned. For inasmuch as sterilization does not affect the physical capacity of the individual to perform the sexual act, but merely destroys the ability to procreate, its only effect would be to lessen the danger of detection . . .[164]

While proper therapeutic and punitive sterilization is permitted, eugenic sterilization, effected for the purpose of bettering the race by preventing the propagation of unfit offspring, is contrary to the natural rights of man and therefore an intrinsic evil. As such it is an immoral operation and is never permitted. Pope Pius XI condemns eugenic sterilization.

> Finally, that pernicious practice must be condemned which closely touches upon the natural right of man to enter matrimony but affects also in a real way the welfare of the offspring. For there are some who ever-solicitous for the cause of eugenics, not only give salutary counsel for more certainly procuring the strength and health of the future child—which indeed, is not contrary to right reason—but put eugenics before aims of a higher order, and by public authority wish to prevent from marrying all those whom, even though naturally fit for marriage, they consider, according to the norms and conjectures of their investigations, would, through hereditary transmission, bring forth defective offspring. And more, they wish to legislate to deprive these of that natural faculty by medical action despite their unwillingness; and this they do not propose as an infliction of grave punishment under the authority of the State for a crime committed, nor to prevent future crimes by guilty persons, but against every right and good they wish the civil authority to arrogate to itself a power over a faculty which it never had and can never legitimately possess.

[164] *American Jurisprudence,* Vol. 15, p. 180.

> Public magistrates have no direct power over the bodies of their subjects; therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm, or tamper with the integrity of the body, either for reasons of eugenics or for any other reason. St. Thomas teaches this when, inquiring whether human judges for the sake of preventing future evils can inflict punishment, he admits that the power indeed exists as regards certain other forms of evil, but justly and properly denies it as regards the maiming of the body. "No one who is guiltless may be punished by a human tribunal either by flogging to death, or mutilation, or by beating."[165]

The Holy Office also condemned eugenic sterilization in a decree dated March 19, 1931. The question was asked:

> What is to be thought of the so-called "Eugenic" theory, whether "positive" or "negative," and of the means which it proposes for the improvement of human progeny, in disregard of the laws, natural, divine, or ecclesiastical, pertaining to marriage and the rights of individuals? Reply. That theory is to be absolutely disapproved and condemned, as is declared in the Encyclical on Christian Marriage, *Casti Connubii*, of 31 Dec., 1930.
>
> The above reply was entirely approved and confirmed by His Holiness, Pius XI, in the audience of 19 March, 1931.[166]

As was mentioned before, in 1940 the Holy Office condemned direct sterilization as illicit and contrary to the law of nature. It is certain that eugenic sterilization is included in this condemnation.[167]

Father Joseph B. Lehane in writing a conclusion to his dissertation on *The Morality of Eugenical Sterilization* sums up very well the Catholic position and reasoning regarding eugenical sterilization. After showing that an aura of doubt surrounds the scientific findings, theories and conclu-

[165] Pope Pius XI, *Casti Connubii*, *op. cit.*, p. 96-97.

[166] Bouscaren, *Canon Law Digest*, I, p. 677-678; *AAS* 23 (April 1931), 118.

[167] Cf. *supra*, note 161.

sions of natural science upon which the arguments for sterilization rest, Father Lehane goes on to insist that the moral law must be used as a criterion to give final judgment on the eugenic sterilization principle. He says and we quote at length:

> For Catholics the question has been decided by the consensus of the opinion of theologians speaking with the Church as well as the statements of the Supreme Pontiff and the decisions of the Holy Office. These have concluded that the State has not the power to impose sterilization on its subjects for eugenic reasons and that there is no place under the moral law for such usurpation of authority on the part of civil legislators.
>
> The arguments put forward by theologians in arriving at a conclusion denying to the State the power to sterilize may be summarized in the following fashion: The power of the State over the particular rights and actions of its individual subjects has the purpose of maintaining a ruling and governing authority within the State itself and the safeguarding of the existence and well-being of society as a whole; and hence this power is of such a nature that it can be exercised under all circumstances and at all times.
>
> But the maintenance of a ruling and governing authority within the State as well as the safeguarding of the existence and well-being of society as a whole are compatible with the presence of unsterilized mental defectives and degenerate criminals within the State; while, on the other hand, that good which may possibly be obtained by vasectomy is limited and, if necessary, is only accidentally so. The rights, moreover, of non-criminal citizens are not subject to State interference in the manner implied in legal eugenical sterilization. It has been seen that their right to bodily integrity may not be violated by the State except in the case of the implied renunciation of human dignity by persons guilty of serious crime. The person exists logically before the State and, in the absence of fault, cannot be declared to have forfeited his personal rights and privileges. The function of just law in its rela-

> tion to nonculpable groups of persons in the community is to protect the personal rights they enjoy, not to take steps toward their abolition. Hence the State in sanctioning the sterilization of citizens for eugenical reasons has exceeded the limits of its authority. State sterilization of the unfit is thus unlawful.[168]

At this present time twenty-eight states of the Union have either compulsory or voluntary sterilization laws on their statute books.[169] These laws in general provide for the sterilization of the insane, idiots, imbeciles, feebleminded, epileptics, habitual criminals, moral degenerates, etc., who are inmates of state institutions, and some who are not, upon the medical findings and recommendation of certain public authorities. These laws stand condemned both because of the doubtful scientific basis upon which they rest[170] and because they offend against the natural rights of man. The state never has the right to punish an innocent person or to take away his natural human rights. These laws are an usurpation of power on the part of the state. Laws permitting or commanding either voluntary or compulsory eugenical sterilization are opposed to the natural law and are intrinsically evil. They are unjust laws.

Applying to these laws the principles laid down by the Holy Father, we see first of all that they are unjust laws, intrinsically evil because opposed to the law of God and the Church. They are opposed to the positive law of God "Thou shalt not kill" under which as a corollary comes unnecessary mutilation. They are in opposition to God's law expressed

[168] Lehane, *op. cit.*, pp. 101-102.

[169] *Ibid.*, p. 28; also Rev. Edgar Schmiedeler, O.S.B. *Sterilization in the United States*, (Washington, D.C.: National Catholic Welfare Conference), 1943, introduction. The state of Washington repealed its sterilization law on March 17, 1947. Cf. Washington Statutes, 1947. § 167.

[170] Cf. Abraham Myerson, "Certain Medical and Legal Phases of Eugenic Sterilization," 52 *Yale Law Journal* (1943) 618-32; Walter W. Cook, "Eugenics or Euthenics," 37 *Illinois Law Review* 287-332; *Report of Commission of American Medical Association for Investigation of Eugenical Sterilization* (1936), pp. 177-83.

in man's natural rights and the inviolability of the human person. They contravene the judgment of the Church interpreting the divine law.

In some of the states provision is made for bringing sterilization cases before the court for a compulsory hearing when permission for the operation cannot be gotten.[171] There is always too the possibility of a case coming before the court testing the constitutionality of such a sterilization law. The judge in such cases cannot throw responsibility from his shoulders, nor can he render a decision obliging a person to commit an act intrinsically evil. Therefore, the Catholic judge can never in his judicial action render a decision putting the law of eugenical sterilization into effect. Rather than do so he would be obliged to give up his office. As Father Connell puts it:

> . . . In those states which now prescribe or permit eugenic sterilization for certain types of defectives and criminals, no circumstances can justify a judge in giving a decision that the law should be put into operation. Such acts, even when performed under the direction of civil legislation, contain formal cooperation in a grave transgression of the law of God. But a judge could commit a person to an institution, even though he foresees that sterilization will there be inflicted, if no other course is legally available—for example, if the person has committed a crime for which the law prescribes commitment to this institution.[172]

Should a Catholic judge, therefore, apply such a law and command that eugenic sterilization be performed, he becomes a formal cooperator in commanding an intrinsically evil action. He sins gravely against legal justice in not properly fulfilling his office and against the virtue of commutative justice and the fifth commandment in inflicting harm upon the person affected by the operation.

According to the last part of the above quotation the judge may by his decision, if the law so requires and no

[171] E.g., Oregon and Idaho. Cf. Lehane, *op. cit.*, pp. 22 and 25.
[172] Connell, *op. cit.*, p. 33.

other legal course of action is available, commit a person to an institution even though he foresees that sterilization will there be inflicted. The judge is permitted thus to act according to the principle of the double effect and mediate material cooperation. Committing the person to an institution is a licit action in itself and has the good effect of fulfilling the law, but the bad effect of exposing the person to a sterilizing operation. If the judge intends only the good effect, merely permits the bad effect, and has a proportionally grave reason for allowing the evil effect to follow, then the commitment is permissible. In this case the judge is only a mediate material cooperator in the evil done. He does not by his decision command the intrinsically evil act of eugenic sterilization. He commands according to the law that the person involved enter an institution. The evil, it is clearly seen, is only permitted, and the judge is considered to have a sufficiently grave reason for so acting—the preservation of an honest judiciary and the possible loss of office if he should refuse to act according to the law.

2. The Judge and Possible Euthanasia Laws

Legislation permitting or commanding euthanasia, or mercy killing, the "termination of human life by painless means for the purpose of ending severe physical suffering,"[173] has not been passed in the United States. We most sincerely hope that it never will be. But there is the possibility. Attempts have been made in that direction in the past, are being made today and will be made. In 1937 State Senator John H. Comstock, now a member of the Advisory Council of the Euthanasia Society of America, Inc., introduced into the Nebraska Assembly his own bill for legalized voluntary euthanasia. However, the bill was never submitted to a vote.[174] The Euthanasia Society of America organized in New York City in 1938 has been carrying on

[173] Joseph V. Sullivan, *Catholic Teaching on the Morality of Euthanasia*, (Washington, D.C.: The Catholic University of America Press, 1949), p. 25.

[174] *Ibid.*, p. 22.

a persistent campaign to gain interest and favor for the quiet and quick release of those who suffer from incurable, fatal and painful diseases and have the desire to end their life. This Society has succeeded in gaining for its movement the support of a number of nationally known persons including such names as: Max Eastman, Fannie Hurst, Robert Sherwood, Eugene O'Neill, Margaret Sanger, and clergymen, Dr. Harry Emerson Fosdick and Dr. Ralph W. Sockman.[175] A number of other New York clergymen have signed a statement favoring mercy killing, maintaining that they see no ethical wrong in this manner of taking life.[176] A large number of physicians are known to favor euthanasia. The Euthanasia Society itself has prepared a bill which the members hope to introduce into the New York State Assembly as soon as it can be done. This bill would legalize voluntary euthanasia.[177]

The concentrated effort now being made to gain prestige for the movement, together with the pagan ideals, thought and practices of our time, make the future legalization of euthanasia a definite possibility. Should a bill of the type proposed by the Euthanasia Society ever be passed, the judge would find himself faced with a very definite moral problem since the proposed bill provides that the granting of a petitioner's request for euthanasia be under the jurisdiction of the courts. Section 302 of Article 15 of the proposed bill reads as follows:

> Sec. 302. JURISDICTION OF COURTS. Any justice of the Supreme Court of the judicial district, in which the patient resides or may be, or any other judge of a county court of any county in

[175] *Ibid.*, pp. 20-21; Cf. also Robert F. Drinan, S.J., "Euthanasia: An Emergent Danger," *The Homiletic and Pastoral Review*, (Dec. 1949), pp. 220-23; T. O. Martin, "Euthanasia and Modern Morality," 10 *The Jurist* (October 1950) 437-64.

[176] "Statement on the Ethical Aspects of Euthanasia by Fifty Religious Leaders of New York State," Euthanasia Society, January 1947, Mimeographed; also Sullivan, *Ibid.*, p. 20.

[177] Cf. Sullivan, *op. cit.*, pp. 25-28, for the text of the proposed bill to legalize euthanasia.

> which the patient resides or may be, to whom a petition for euthanasia is presented, shall have jurisdiction of and shall grant euthanasia upon the conditions and in conformity with the provisions of this article.[178]

Other provisions of this proposed bill are as follows: Any person of sound mind over twenty-one years of age who is suffering from severe physical pain caused by a disease for which no remedy affording lasting relief or recovery is at the time known to medical science may address to the court a petition for euthanasia. This petition must be signed by the petitioner himself and two witnesses and be accompanied by a certificate from the patient's attending physician attesting that the disease, in his opinion, is incurable and that the patient understands the nature of his petition. Having received the petition the judge appoints a committee of three persons, two of whom are physicians, who examine the patient and within five days of their appointment report to the court whether or not the patient understands the nature and purpose of his petition and whether he is suffering from an incurable disease. The court is then given three days to grant or deny the petition. If an affirmative report is made by the committee, the court, if it believes the report correct and true, is to grant the petition and euthanasia is to be administered.[179]

As to the morality of euthanasia, whether it be voluntary or compulsory, the answer is that it is totally contrary to the law of God. It is intrinsically evil directly to take the life of an innocent person. Euthanasia is directly opposed to God's commandment "Thou shalt not kill." Now it is admitted, of course, in the interpretation of the Fifth Commandment that man can protect his own life in self-defense even to the extent of taking the life of the unjust agressor if necessary, that man can take another's life in the waging of a just war, and that the state has the right to inflict death as a punishment for serious crime. But no valid interpreta-

[178] *Ibid.*, p. 26.
[179] *Ibid.*, pp. 23-28.

tion of the Fifth Commandment can ever be made which permits the state or anyone else to commit murder by the direct taking of the life of an innocent person. God has given life to man as a sacred gift with the dominion of proper use. God reserves to himself the supreme dominion.

> So sacred is human life that no public authority, no private person, can for any reason directly kill an innocent man.
>
> There is a profound significance in the fact that this fundamental truth is so seriously challenged today; challenged, you understand, not in a classroom or a letter to the editor, but in the concrete actions of governments and men. Such a challenge is the execution of hostages as means of holding off the enemy, or the killing of an innocent but influential person whose death has been demanded by the military authority of the enemy: all this in the name of the common good. On the personal side there is the mercy killing calculated to relieve a man of his suffering; the painless killing of the hopelessly wounded, of the old, the misfit, the insane, social nuisances. The argument even includes an unborn child that the mother's life be saved. All this is murder. The smooth, somniferous length of the words we use to describe it—liquidation, euthanasia, mercy killing, solicitude for suffering mothers—does not destroy the ugliness of murder.
>
> Murder is its hideous, loathsome self no matter what name we give it. Society can kill in self-defense. But surely the man who violates no rights is not attacking society, nor is he an unjust agressor threatening the life or property of an individual citizen. He is innocent and his life is sacred.[180]

Besides showing that euthanasia is intrinsically evil because it is contrary to the natural law, that it is opposed to the teaching of the Old and New Testaments, and that it is contrary to man's natural desire to live, Father Sullivan, in his dissertation on the morality of euthanasia, also shows

[180] Walter Farrell, O.P., *A Companion to the Summa*, (New York: Sheed & Ward, 1945), III, pp. 199-200.

its evil effects from the "wedge principle"—that once it gets started, one can't tell where it will stop.

> Nevertheless, euthanasia must not be administered, for to permit in a single instance the direct killing of an innocent person, would be to admit a most dangerous wedge that might eventually put all life in a precarious condition. Once a man is permitted on his own authority to kill an innocent person directly, there is no way of stopping the advancement of that wedge. There exists no longer any rational grounds for saying that the wedge can advance so far and no farther. Once the exception has been admitted it is too late; hence the grave reason why no exception may be allowed. That is why euthanasia under any circumstance must be condemned. We are making use of this as a secondary argument; for the primary argument is found in the intrinsic malice of the direct killing of an innocent person. but even one who would not admit this should acknowledge the value of the present argument.[181]

Voluntary euthanasia is intrinsically evil since it is opposed to God's law. But the euthanasia enthusiasts do not intend to stop at voluntary euthanasia; it is to be used only as a stepping stone to the compulsory kind.[182] Of this Father Sullivan says:

> If voluntary euthanasia were legalized, there is good reason to believe that at a later date another bill for compulsory euthanasia would be legalized. Once the respect for human life is so low that an innocent person may be killed directly even at his own request, compulsory euthanasia will necessarily be very near. This could lead easily to killing all incurable charity patients, the aged who are a public care, wounded soldiers, captured enemy soldiers, all deformed children, the mentally afflicted, etc. Before long the danger would be at the door of every citizen.[183]

If in the future euthanasia is legalized the judge may very

[181] Sullivan, *op. cit.*, p. 55.

[182] G. J. Gustafson, "379 Against God," 47 *Catholic Mind* 556-57 (Sept. 1949).

[183] Sullivan, *op. cit.*, p. 55-56.

well be confronted with the problem of its enforcement. According to the principles of Pius XII the duty of the Catholic judge is clear. He can have no active part in the enforcement of this intrinsically evil law. The judge may be acting only as a "rubber stamp." He may be granting a petition which the law demands he must grant if the law's conditions are fulfilled. Nevertheless, he may not put his signature upon a petition or order requesting or commanding euthanasia. Responsibility rests upon his shoulders and if by his action he puts the law into effect he becomes a formal cooperator in the intrinsic malice of mercy murder. Even though the judge does not associate himself with the evil content of the law and does not therefore will the death of the innocent person, his action of commanding the law to take its course amounts to formal cooperation in the evil done, for the judge by his action commands an act in itself intrinsically bad,—opposed to the law of God and the Church—the killing of an innocent person.

Father Sullivan contemplates the case of a judge granting permission for a mercy killing.

> Judge Brown, in line with his office as judge, grants permission for a mercy killing when the legal requirements for the permit have been fulfilled. He asserts that in view of the enacted law he is compelled to grant euthanasia when the commission favors it. Hence he claims no responsibility for the mercy death. He believes also that morally speaking the case is similar to the judge granting a divorce.
>
> Judge Brown may not grant euthanasia even at the cost of disobeying civil law or of resigning from his position as judge. By granting euthanasia he has become a formal cooperator in murder. It makes no difference whether that person is healthy or sick, or even requests euthanasia, the fact remains that the person is innocent and the judge may not send an innocent person to death.... Judge Brown is also confused concerning the similarity between divorce and euthanasia. A divorce is not intrinsically evil; it is remarriage after di-

> vorce that is *in se evil*. In a divorce case the judge merely makes an official declaration that the state regards the civil effects of marriage as no longer existing.[184]

And Father Connell writing of the judge and euthanasia says:

> The case is very different if a judge is called on to give a decision in favor of an action that is intrinsically wrong. Thus, in the years to come—particularly if we shall have on our hands a large number of persons physically and mentally incapacitated as a result of war—the advocates of euthanasia may succeed in legalizing "mercy killing." Of course, law or no law, a judge would never be allowed to approve or decree such an act of murder.[185]

Should in the future an euthanasia law be passed and should the judge, despite the evil of it, cooperate in effecting the mercy killings by permitting or ordering the law to take its course, he sins against legal justice in improperly fulfilling his office and against the Fifth Commandment in permitting or directing murder. Both sins are mortal and the latter has the species of murder.

3. The Judge and Contraceptive Laws

Knowing the moral and social evil that can come to a nation should men and women of depraved minds and questionable morals be permitted to flood a country with all sorts of obscene and immoral literature, the federal government passed laws in 1873 forbidding the mailing of obscene and crime-inciting matter, and the importation and interstate transportation of obscene literature. These laws in substantially the same form are still on the statute books in the present penal code of the United States.[186] Included in the laws as obscene matter and literature are articles which are designed, adapted, or intended for preventing conception; articles which are advertised in a manner calculated to

[184] Sullivan, *op. cit.*, pp. 67-68.
[185] Connell, *op. cit.*, p. 33.
[186] *United States Code*, Title 18, § 1461, § 1462.

lead another to use or apply them for preventing conception; or any writing giving information how or by what means conception may be prevented. The mailing, the importation, and the interstate transportation of the above mentioned contraceptive devices and information are therefore prohibited.

When birth control organizations led by Margaret Sanger began their attempts to instruct the nation in preventive methods in 1914, they found that their publication was in violation of the federal laws. In a number of cases the law was defied and birth control information was sent through the mails despite the law. In some instances the violators were caught, convicted and punished.[187] Attempts were also made to introduce legislation into the United States Congress to change the postal laws, but all these efforts were unsuccessful. The laws were interpreted strictly and literally and enforced in the same manner, and there seemed to be no desire on the part of Congress to change them.[188]

It was in the courts that the law was changed. In 1930 in the case of Youngs Rubber Co., Inc., v. C. I. Lee & Co., Inc., the court, although not deciding this point, in its opinion set aside the literal interpretation of the laws and their application to contraceptive devices.[189] The law taken literally, the court said, would seem to forbid the mailing or shipping of any article which was "adapted," that is, which could be used for contraceptive purposes, even though that article might also have a legitimate use. Obviously, the court reasoned, Congress did not intend to prevent the proper use of these articles merely because they could be used for evil purposes. Hence the court discarded the literal interpretation and ruled in effect that such things could be mailed and shipped provided they were intended for legitimate purposes. "Legitimate purposes," of course, admitted of a very broad

[187] Edgar Schmiedeler, O.S.B., *25 Years of Uncontrol*, (Huntington, Ind., Our Sunday Visitor Press, 1943), pp. 61-65, 72.

[188] *Ibid.*, pp. 66-70.

[189] C.C.A., Second Circuit, (Dec. 15, 1930), 45 F. 2nd 108.

interpretation for those who were not inclined to recognize a definite moral standard.

In another case in 1933 a like opinion was handed down in which the opinion in the above Youngs-Lee case was quoted. Here it was held that in order to secure a conviction in accordance with the postal law, it was necessary to prove that the person mailing the contraceptive information intended the article described therein should be used for condemned purposes.[190] This undoubtedly is very hard to prove in this case since the evil intent is internal, and since some legitimate uses are said to exist, the sender can always claim he has mailed them for these legitimate purposes.

There was cause for great rejoicing in the birth control camps when in the case of United States v. One Package in 1936 the Second Circuit Court of Appeals in its opinion given by Judge Augustus N. Hand maintained that the design of Congress "was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients."[191] All a doctor had to say now was that contraceptive information and devices were given for the "well-being" of their patients and the law was fulfilled. One must admit that "well being" offers lots of latitude.

The same Second Circuit Court of Appeals in 1938 decided that the sending through the mails of contraceptive articles or publications is not forbidden absolutely, but only when such articles or publications are unlawfully employed.[192] Which really makes the law in regard to contraceptives no law at all. Who is to say in a pagan world when such devices are unlawfully employed? We find the law in the anomalous position of saying such things are forbidden

[190] Davis v. U.S., C.C.A., Sixth Circuit, (Jan. 10, 1933), 62 F. 2nd 475.

[191] C.C.A., Second Circuit, (Dec. 7, 1936), 86 F. 2nd 729.

[192] U.S. v. Nicholas, C.C.A., Second Circuit, (June 13, 1938), 97 F. 2nd 511, 512.

when they are unlawful, but they are practically never unlawful.

While one might agree with the opinion of the court (and it seems to be medically true) that most of the articles used as contraceptives could have possibly another and also a legitimate use, yet it cannot be doubted that their primary and almost sole purpose is to prevent conception, an action intrinsically evil in its nature and opposed to God's law. Nor, can their use be defended as a disease-preventive measure, as is so often attempted. In this latter instance the devices have the additional effect of encouraging adultery and illicit relations among the unmarried by offering a minimum possibility of disease as well as of conception. Abstention from illicit relations is the moral protection against venereal disease. It is inconceiveable that the great amount of information and the great number of articles and instruments that are manufactured and distributed with such abandon are intended or used for legitimate, lawful purposes. The court would have done better if it had made clear in the light of God's law the limited lawful purposes to which these devices and instruments could be put, rather than discard the law entirely by leaving the question of lawful use to a liberal-minded pagan group in society who know not God's law, and to whom all is lawful. If the court can be said rightly to interpret Congress as not wishing to hinder the lawful use of these devices, it is wrong in handing down a decision making the interpretation possible that practically every use is a lawful use, thus nullifying the purpose of Congress in writing the law. One most certainly is led to question the sensibility, truth and wisdom of the courts' decisions.

The result of all this is that contraceptive devices and information have flooded the country with resultant moral decay of youth and with utter disregard for the sacred purpose and sanctity of the married life. The federal law is still on the statute books but it is as if it were not. The campaigns of the birth control advocates have had their success. The words "birth control" together with a few others have be-

come a kind of oft repeated paganistic cure-all answer to the social ills of our time. But ought we not to know that instead of curing it is only adding more ills to those we have? No nation ever flaunts God's laws with impunity.

Taking up where the federal government is now lacking, thirty-one of the states have laws either prohibiting or regulating the dissemination of contraceptive devices and information, while seventeen states have no law at all.[193] In view of the freedom with which such devices are distributed in those states which have no law, it seems that when a prohibitory law is impossible to pass, a regulating law is desirable as the lesser of two evils. Yet even the regulatory law has the effect of giving legal recognition and respectibility to an intrinsically evil trade.

Concerning the moral evil of birth control, Pope Pius XI in *Casti Connubii* states clearly the Catholic teaching. We quote at length.

> And now, Venerable Brethren, We shall explain in detail the evils opposed to each of the benefits of matrimony. First consideration is due to the offspring, which many have the boldness to call the disagreeable burden of matrimony and which they say is to be carefully avoided by married people not through virtuous continence (which Christian law permits in matrimony when both parties consent) but by frustrating the marriage act. Some justify this criminal abuse on the ground that they are weary of children and wish to gratify their desires without their consequent burden. Others say that they cannot on the one hand remain continent nor on the other can they have children because of the difficulties whether on the part of the mother or on the part of family circumstances.
>
> But no reason, however grave, may be put forward by which anything intrinsically against nature may become conformable to nature and morally good. Since, therefore, the conjugal act is destined

[193] Vincent C. Allred, Unpublished compilation of contraceptive laws in the United States, National Catholic Welfare Conference, Washington, D.C., January 1950.

> primarily by nature for the begetting of children, those who in exercising it deliberately frustrate its natural power and purpose sin against nature and commit a deed shameful and intrinsically vicious.
>
> Small wonder, therefore, if Holy Writ bears witness that the Divine Majesty regards with greatest detestation this horrible crime and at times has punished it with death. As St. Augustine notes, "Intercourse even with one's legitimate wife is unlawful and wicked where the conception of the offspring is prevented. Onan, the son of Juda, did this and the Lord killed him for it."[194]
>
> Since, therefore, openly departing from the uninterrupted Christian tradition some recently have judged it possible solemnly to declare another doctrine regarding this question, the Catholic Church, to whom God has entrusted the defense of the integrity and purity of morals, standing erect in the midst of the moral ruin which surrounds her, in order that she may preserve the chastity of the nuptial union from being defiled by this foul stain, raises her voice in token of her divine ambassadorship and through Our mouth proclaims anew: any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.[195]

We see therefore in this clear statement of Pius XI that it is directly opposed to the law of God and of nature for husband and wife so to use the conjugal act as to frustrate deliberately its natural power and purpose to generate life. Pope Pius XI is here not teaching a doctrine merely ecclesiastical binding Catholics only, but as the protector and teacher of correct morals is making clear what binds all people since it is the teaching of the natural law itself. Those

[194] "Illicite namque et turpiter etiam cum legitima uxore concumbitur, ubi prolis conceptio devitatur. Quod faciebat Onan filius Judae, et occidit illum propter hoc Deus." St. Augustine, *De conjugiis adulterinis*, PL 40, 479; Genesis 38, 8-10.

[195] Pope Pius XL, *Casti Connubii, op. cit.*, pp. 92-93.

who advocate and promote and make possible by legislation the dissemination of contraceptive information and devices, who manufacture and sell such devices for contraceptive purposes are cooperating in a program that is intrinsically evil.

Civil government is not fulfilling its duty to protect its citizens from grave moral evil if it does not take measures to prohibit the dissemination of immoral birth control devices and information. In its law of 1873 the federal government did its duty in this respect. Since 1930, however, court decisions have made the federal law ineffective. Therefore legislators have the duty to enact a new law which would admit of no equivocal interpretation. States too have the duty to enact such laws and to prosecute those who break them. Never is it permitted to the state to foster through public funds, as has been and is being done, an immoral birth prevention program.[196]

In fulfilling the duties of his court the judge may be called upon to preside over cases dealing with the vice of contraception. He may be thus required to judge in a civil suit involving a matter of justice between companies or persons engaged in the buying and selling of contraceptives. In those states where such transactions are permitted by law the judge is permitted to award the decision according to the rules of justice applicable in the case. In doing so he is a cooperator in the promotion of such businesses, but his cooperation is only material and is sufficiently remote to permit his giving a judgment.[197]

The federal judge may be faced with a case involving an interpretation of the present federal law relating to the prevention of conception. Since this law is just and good, the judge is held to interpret it according to its true meaning.

[196] Don Wharton, "Birth Control: The Case for the State," *Atlantic Monthly*, October, 1939, pp. 463-467; George M. Cooper. "The Possibilities of a Statewide Program on Abortion Control," in *The Abortion Problem*, (Baltimore: The Williams & Wilkens Co.), 1944, pp. 167-168.

[197] Connell, *op. cit.*, p. 33.

The obvious meaning of the federal law when enacted was to keep contraceptive devices and information from flooding the country and working grave harm to youth and the family. That is its true meaning today. Court decisions since 1930, however, have in effect set aside this true meaning. These decisions are correct in saying Congress did not intend to hinder the legitimate and lawful use of devices adapted to contraception. But these decisions err in making in effect every use a legitimate use, thereby setting aside the obvious meaning of the law and defeating its purpose. The result is that contraceptives today are working the harm the Congress of 1873 foresaw they would. If today a Catholic judge were faced with such a case he would be held to interpret the law so that in effect its obvious meaning would be attained and the nation-wide immoral use of contraceptives be thwarted. This he could do by interpreting the law literally and strictly or by deciding to what legitimate uses these devices could be put. An examination of the law itself shows that it permits either interpretation. Should the judge, therefore, interpret it otherwise, that is, according to the previous court decisions,[198] he sins in not properly fulfilling his office and cooperates in the furthering in society of a great moral evil opposed to the law of God and nature. The judge's action is proximate material cooperation in the resulting sins, for which he here in this case has and can have no justifying reason since the law itself admits of a moral interpretation.

In states which have laws prohibiting the sale of contraceptive devices and the giving of birth control information, the judge should strive to protect the law against the numerous subterfuges of the protagonists of planned parenthood.[199] As in the case of the federal law, here likewise the judge is held to interpret the prohibitive law in such a way that birth

[198] The celebrated mode of action "Stare decisis" does not bind when previous decisions are erroneous in principle. Cf. Editorial in 34 *American Bar Association Journal*, pp. 919-20. There have been sound reversals.

[199] Connell, *op. cit.*, p. 33.

control devices and information shall not be distributed for immoral purposes, if such an interpretation can be given the law. If the law admits only of an interpretation which would in effect permit the widespread distribution of birth control devices and information, to be used without doubt for immoral contraceptive purposes, the judge must then apply the principles of material cooperation in the evil of others. If the judge gives judgment according to the law, he would seem to be cooperating proximately and materially in evil actions, for by his judgment contraception is permitted to flourish with great ensuing harm to youth and the family. Such a judgment gives legal encouragement to actions opposed to the law of God and nature.

According to the principles of material cooperation in this case, the judge is permitted by his decision in accordance with the law to permit the evil of sins committed through the use of contraceptive devices if he has a sufficiently weighty reason for so acting. If the reasons which would prompt a judge to decide according to the law, that is, freedom from public criticism and abuse, the retention of his office, the preservation of an honest judiciary, are not thought weighty enough to overbalance the tremendous harm done through the moral degradation of youth and the family resulting from the widespread use of contraceptives, then the Catholic judge would not be permitted to give an interpretation according to the law, and would be obliged to resign his office rather than do so. On the contrary, given a case and instance wherein the good resulting from his judging according to the law is greater than the evil done, and therefore the reasons for acting are sufficiently weighty, then he would be permitted to give a decision or interpretation according to the demands of the law, for example, when the preservation of an honest judiciary is thought to be of more importance than whatever evil will be done as a result of the judge's decision. We must remember that here we are dealing with material cooperation only and not with formal cooperation.

Not wishing or being able to pass a law prohibiting altogether the sale of contraceptives and the distribution of birth control information, some of the states have passed laws regulating their advertisement and distribution. These laws have the good effect at least of restricting the sale and advertisement of contraceptives and are regarded as the lesser of two evils and may be permitted. In states where these regulating laws are in existence the judge may be asked to punish violators of the law. This he may do, according such punishments as the law permits or directs.

The judge may also be called upon to settle certain civil suits regarding these regulating laws. For example, a person who has been denied a license for the sale of contraceptive devices may file suit to secure a license and the court may be asked to decide whether or not he is to be permitted to have it. If the judge can find a reason under the law to deny the man the license, he is bound in conscience to deny it. But what is the judge to do if in examining the case he finds all the requirements fulfilled for the granting of the license and no grounds on which to deny it? This case also must be decided by applying the principles of proximate material cooperation. If he grants the license the judge acts according to the law and frees himself from public abuse and criticism and runs no risk of losing his office, but he cooperates in the sins committed through the subsequent sale and use of the contraceptive devices. If the evil done is greater than the good resulting to the judge and society, then the judge cannot give decision according to the law. But if on the other hand the good foreseen as resulting to the judge and society is greater than the evil done then the judge would seem to have a sufficiently weighty reason and would be permitted to grant the petitioner his license in accordance with the law.

There are indeed a variety of cases relating to contraceptives that could come before the judge. The judge should diligently study all the relevant factors and apply to each case the proper moral principles.

4. The Judge and Laws Opposed to a Human Good

In the division of unjust laws, besides those opposed to the divine law, positive and natural, and to the ecclesiastical law, we have laws opposed to purely human good in social living. The just law directing human good in social living must issue from proper authority and be ordered to the common good or public welfare, so that if a law exceeds authority or is ordered not to the common welfare but to the good of individuals, or if it burdens special groups excessively, it is unjust. The society in which we live today is extremely complex, requiring a vast amount of complex regulating legislation on the part of federal, state and local governments. Because of the complexity of the present social order it is oftentimes difficult for legislators to know what is the proper legislation needed to establish the necessary regulations and direction of human civil temporal affairs. Hence it becomes a difficult matter to judge in particular cases whether laws are really conducive to the common good or rather tend to favor or burden disproportionately certain individuals, groups or classes. It becomes then a difficult matter to judge whether or not particular laws are just or unjust. In order to maintain the good order of society and trust in our legislative system, the presumption in doubtful cases is that the law is a just one and to be observed. The judge accordingly will give a decision in accordance with the demands of such a law. If, however, a law supposedly directing human good in society is obviously unjust, the judge in his role as the minister of justice ought not to apply it, but he may do so if necessary to impede a much greater evil, that is, if the good order of the community demands, so that scandal or disturbance may be avoided, or should he suffer grave harm to himself and to society by refusing. In determining whether he should allow such a law to take its course or not, the Catholic judge must again apply to the specific case at hand the principles of the double effect and material cooperation.[200]

[200] Cf. *supra* p. 162.

An example in our land of what might be called an unjust law opposed to a human good insofar as it burdens a special group excessively is the legal tax arrangement whereby Catholics contribute a large amount in taxes for educational purposes but do not receive anything from these collected funds for the support of their own parochial schools which they conduct by divine and constitutional right. In reality this is a case of unproportional taxation without proportional benefits being placed upon a special group, as it were a penalty for exercising their divine and constitutional right of being interested in the spiritual development of the child.

Distributive justice demands that those who rule distribute the benefits and the burdens of a community upon its members according to their merits, capacities, and needs in the quality of due proportion. There is little doubt that distributive justice is violated and injustice is done in the disproportionate burdens without benefits Catholics are made to carry because of our educational tax laws. Since these laws are unjust, Catholics could not be held bound in conscience, in light of the demands of legal justice, to pay the excessive taxation, except in order to avoid scandal or disturbance. For these reasons and for the maintenance of good order in society Catholics have been yielding their right and observing the law,[201] with the hope, however, of better legislation in this matter.

If because of the injustice involved a particular Catholic should refuse to pay a portion of his taxes, his portion of that part set aside for schools, and as a result be brought before the court in contesting the law, the Catholic judge should do what he can to show the law's injustice and to avoid its application. If circumstances necessitate application of the law, the judge, in order to impede a much greater evil, could demand according to the law and in view of the maintenance of good order in society, that he pay his full taxes. Should the accused refuse to pay, the judge could inflict the penalty that the law provides, if it is the only means of impeding the

[201] *Summa Theologica*, II-II, q. 96, a. 4, ad 3.

much greater evil, if the penalty of its nature is acceptable, and if the judge knows or can reasonably presume that the accused is willing to accept it in order to avoid harm to the judge, the Church, and society and to preserve an honest judiciary.[202] The most mitigated penalty possible should be inflicted.

[202] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 597; *The Catholic Mind*, 48 (Jan. 1950), 57.

CHAPTER V

THE CATHOLIC JUDGE AND DIVORCE CASES

Perhaps no part of Pope Pius XII's talk to the jurists of Italy provoked more comment and caused more concern throughout the world, especially in the United States, than that part in which he spoke of the Catholic judge's handling of divorce cases. One writer over a month after the publication of the Holy Father's speech wrote: "Legal circles the world over were stirred recently when Pope Pius XII reiterated the Roman Catholic Church's adamant stand on divorce . . . But the most extensive reaction was in the United States, where many Catholics sit on judges' benches, and where divorce has increased steadily from 55,000 in 1900 to 613,000 in 1946."[1]

In order to understand fully the principles governing the Catholic judge's handling of divorce cases, it is necessary first of all to understand the Church's basic teaching on marriage and divorce, and the powers that both Church and state exercise over the sacred matrimonial contract.

A. The Church, Marriage and Divorce

The Church's teaching on the question of marriage and divorce is well known. It is simply the Christian teaching that a valid marriage is a holy, enduring, perpetual and indissoluble union, to which God is a partner, and that simply man cannot render asunder what God has joined together. God is the author of marriage and from the beginning made it indissoluble. In the beginning God created man and woman. He gave to them the power and duty of continuing the race. He united them two in one flesh. As is noted for us in the book of Genesis, "God created man to his

[1] Frank Brutto, Article in *The Courier-Journal*, a newspaper of Louisville, Kentucky, December 25, 1949, Section 3, p. 4.

own image; to the image of God he created him. Male and female he created them. And God blessed them saying: Increase and multiply and fill the earth . . . Wherefore a man shall leave father and mother and shall cleave to his wife: and they shall be two in one flesh."[2]

But as time went on the unity and perpetuity of marriage began to be corrupted by degrees and to disappear among the heathen, and to be obscured and clouded among the Jews. Among the Jews the custom was gradually introduced whereby it was accounted lawful for a man to have more than one wife. Eventually the way was laid open to divorce when Moses by reason of the power God had given to him and because of the hardness of their hearts permitted them to put away their wives.[3]

But when Christ came, he changed all this. He ennobled marriage by his presence at the marriage feast of Cana, honoring it as the occasion of his first public miracle.[4] Later he restored marriage to its pristine dignity by condemning the Jewish practice of granting bills of divorce. Christ commanded firmly that no man had the power to dissolve the perpetual bond which God had sanctioned. All this is brought forth clearly in the scene from Sacred Scripture when the Jews approached Our Lord to test him with the question, "Is it lawful for a man to put away his wife for any cause?" In his answer Christ said to them:

> "Have you not read that the Creator, from the beginning, made them male and female, and said, 'For this cause a man shall leave his father and mother, and cleave to his wife, and the two shall become one flesh'? Therefore now they are no longer two, but one flesh. What therefore God has joined together, let no man put asunder." They said to him, "Why then did Moses command to give a written notice of dismissal, and to put her

[2] *Genesis* 1, 27-28; 2, 24.

[3] *Deuteronomy* 24, 1-4; Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 387; *The Great Encyclical Letters of Leo XIII*, (New York: Benziger Bros., 1903), p. 61.

[4] *John* 2, 1-11.

> away?" He said to them, "Because Moses, by reason of the hardness of your heart, permitted you to put away your wives; but it was not so from the beginning. And I say to you, that whoever puts away his wife, except for immorality, and marries another, commits adultery; and he who marries a woman who has been put away commits adultery."[5]

And previously in his Sermon on the Mount, Jesus had said:

> "It was said, moreover, 'Whoever puts away his wife, let him give her a written notice of dismissal.' But I say to you that everyone who puts away his wife, save on account of immorality, causes her to commit adultery; and he who marries a woman who has been put away commits adultery."[6]

And in St. Luke's Gospel:

> "Everyone who puts away his wife and marries another commits adultery; and he who marries a woman who has been put away from her husband commits adultery."[7]

These texts, along with other corroborative texts in the Scriptures, show firmly the divine teaching that no man or human agency has the power to dissolve the valid marriage bond.[8] The schismatic churches of the East,[9] theologians of the Protestant Revolt[10] and non-Catholic theologians of the present day[11] have interpreted the Scriptures as permitting divorce on the grounds of adultery or immorali-

[5] *Matthew* 19, 3-12. [6] *Matthew* 5, 32. [7] *Luke* 16, 18.

[8] Cf. *Mark* 10, 11; *Romans* 7, 2; *1 Corinthinas* 7, 10-11; 7, 39.

[9] Donald Attwater, *The Christian Churches of the East*, (Milwaukee: Bruce Publishing Co., 1948), Vol. 2, p. 163; Merkelbach, *op. cit.*, III, n. 815.

[10] Martin Luther, *The Babylonian Captivity*, Chapter on Matrimony, cf. *Works of Martin Luther* (Philadelphia: A. J. Holman Co., 1915), Vol. II, p. 271; John Calvin, *Institutes of the Christian Religion* (Philadelphia: Presbyterian Board of Publication, 1902), Vol. II, p. 632.

[11] P. J. Gannon, "The Teaching of Christ on Divorce," *The Irish Ecclesiastical Record*, Vol. 28 (July 1926), pp. 1-18; Cf. page 9 for views of some Anglicans that adultery is a cause for divorce; G. H. Joyce, S.J., *Christian Marriage*, (London: Sheed & Ward, 1948), pp. 409-28.

ty. In the course of the centuries much has been written in discussion of the texts of St. Matthew, but a critical examination of the texts themselves, their comparison with other texts, and the constant and firm teaching of the Church declare that such an interpretation is erroneous.[12] An accepted and tenable interpretation of these texts declares that unfaithfulness is sufficient justification for separation, but is not a cause for the breaking of the marriage bond.[13]

Another tenable explanation of the texts of St. Matthew holds that the words "save on account of immorality" (5,32) and "except for immorality" (19,9) have not been clearly rendered in the English version and that following a strict analysis of the Greek text the first should read "outside the question of adultery" or "prescinding from the question of adultery" or "fornication," and the second "not (doing it) for adultery." In these words Our Lord was referring to the Hillel-Shammai controversy over the question of Jewish divorce, a matter much discussed at that time. In this controversy the Hillel school of thought gave a wide interpretation to Moses' permission of divorce and held that divorce could be granted for almost any reason; whereas the Shammai school insisted that divorces could be granted only in cases of adultery or immorality. The Jews to whom Our Lord spoke on both occasions were well aware of the controversy, and would expect him to consider it in speaking of divorce. The Pharisees themselves expressly brought up the discussion in their test question, "Is it lawful for a man to put away his wife *for any cause?*" —which, in truth, is the Hillel position. In view of a clearer rendering of the Greek and in view of the controversy of the time, the explanation here spoken of maintains that the words of Matthew 5,32 make complete sense if they should read: "But I say to you that everyone who puts away his wife—putting aside the question of adultery (that is, put-

[12] John Pitrus, *The Problem of Divorce*, (Fribourg, 1934), pp. 49ff; F. E. Gigot, *Christ's Teaching Concerning Divorce*, (New York: Benziger Bros., 1912).

[13] Gannon, *op. cit.*; Also *Codex Juris Canonici*, Canon 1129.

ting aside the Hillel Shammai controversy, which I do not consider to the point)—causes her to commit adultery; and he who marries a woman who has been put away commits adultery." With this reading, St. Matthew, instead of making exception, proclaims the absolute indissolubility of Christian marriage.[14] In his words, therefore, in the Sermon on the Mount, Our Lord was neither permitting divorce nor separation because of adultery or immorality, but was declaring that he was not taking into consideration as at all relevant the Hillel-Shammai controversy. Hence he was abrogating divorce altogether and strongly proclaiming the absolute indissolubility of the Christian marriage bond.

This opinion also maintains that Matthew 19,9 is a direct answer rejecting the view of Hillel and should read, "I say to you, that whosoever shall put away his wife, not (doing it) for adultery, (but doing it for any other cause) and shall marry another comitteth adultery." This is equivalent to saying that if a man puts away his wife in accordance with the teaching of Hillel for almost any cause as opposed to that of Shammai, he commits adultery. It can be seen, therefore, that in Matthew 19,9 in the words "not (doing it) for adultery," Christ is referring to and rejecting the Hillel teaching, and that here he does not really refer to Christian marriage. He merely answers negatively the question which amounts to "Is Hillel's teaching on divorce right?" At the same time, however, he states the true Christian teaching of the indissolubility of the marriage bond. Such an interpretation is in complete agreement with the other texts of Sacred Scripture referring to divorce in the New Law.[15]

So sacred and important, then, did God consider the valid marriage bond that he withheld it altogether from the power of human authority, declaring "Let no man put asunder what God has joined together." In addition Christ bestowed

[14] For a full discussion of this explanation see Vincent P. Hanley, "The Indissolubility of Christian Marriage," *The Irish Ecclesiastical Record*, Vol. 27, (Feb. 1926), pp. 148-177; Cf. also E. LeCamus, *The Life of Christ*, (St. Paul: Catechetical Guild, 1945) Vol. II, pp. 487-99.

[15] *Mark* 10, 1-12; Cf. *supra* Note 8.

an even greater nobility, strength and firmness upon the matrimonial bond of Christian marriages, raising them to the dignity of a sacrament and comparing the union of husband and wife in a Christian marriage with the inestimable union of Christ with his Church.[16] The Council of Trent declares definitively that Christian marriage is one of the seven sacraments,[17] and Pope Leo XIII speaks of the marriages of Christians as "far the noblest of all matrimonial unions."[18] Pope Pius XI points out that when these unions are valid and consummated not even the power of the Church extends to their dissolution.

> However, not even this power (of the Church) can ever affect for any cause whatsoever a Christian marriage which is valid and has been consummated, for as it is plain that here the marriage contract has its full completion, so, by the will of God, there is also the greatest firmness and indissolubility which may not be destroyed by any human authority.[19]

It is seen, therefore, that from the very beginning the marriage contract was always regarded as begetting a firm, perpetual and indissoluble bond. It is true that God, by his divine power and as the author of marriage, did for a time permit divorce to the Jews because of their hard hearts. But it was not always so. And Christ by his divine power restored marriage to its former status. It is true also that in the Christian dispensation the valid marriages of unbaptized persons may be dissolved in view of the Pauline Privilege, and that valid marriages between baptized and unbaptized persons may be severed in favor of the faith under certain circumstances, and that a sacramental marriage, *ra-*

[16] *Ephesians* 5, 25-33; *Codex Juris Canonici*, Canon 1013, 2.

[17] Council of Trent, Session XXIV; Denzinger, *Enchiridion Symbolorum*, 969, 971.

[18] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 389; *The Great Encyclical Letters of Leo XIII*, p. 68.

[19] Pope Pius XI, *Casti Connubii*, *AAS*, 22 (December 31, 1930) 552; *Five Great Encyclicals*, (New York: The Paulist Press, 1939), p. 87; Cf. *Codex Juris Canonici*, Canon 1118.

tum non consummatum, may be dissolved by the power of the Holy See in certain cases, but these dissolutions are made by the divine authority which God has given to his Church, and confer spiritual benefits which compensate for any temporal harm which may result. They occur rarely and under restricted conditions and hence are not destructive of the general ends of marriage. The words of Christ are clear and firm. No man, no state, nor human agency of any kind, of its own authority, has ever had or will have the power to sever a true marriage bond. The state, therefore, has no power whatsoever to grant an absolute divorce which in the mind of the law itself purports to break a valid bond and to permit a true remarriage.

B. The Church, State and Marriage

It is true that the state has certain definite regulating powers over natural marriages of unbaptized citizens. For them the state can establish invalidating and prohibitive-impediments, together with rules and procedures for entrance into the married state, provided these regulations are in accord with right reason.[20] It is equally true, however, that even over these marriages, in consideration of the intrinsic nature of marriage itself and Christ's command, the power of the state does not extend to the dissolution of the bond.[21] Pope Pius XI makes this clear when he writes:

> This inviolable stability, although not in the same perfect measure in every case, belongs to every true marriage, for the words of the Lord: "What God has joined together let no man put asunder," must of necessity include all true marriages without exception, since it was spoken of the marriage of our first parents, the prototype of every future marriage.[22]

[20] Petrus Cardinalis Gasparri, *Tractatus Canonicus de Matrimonio,* (Ed. 9, Romae: Typis Polyglottis Vaticanis, 1932), n. 240; Felix Cappello, *De Sacramentis,* V, n. 75.

[21] H. A. Ayrinhac, *Marriage Legislation in the New Code of Canon Law,* p. 13; Cappello, *op. cit.,* V, n. 81.

[22] Pope Pius XI, *Casti Connubii, AAS,* 22 (Dec. 31, 1930) 551; *Five Great Encyclicals,* p. 86.

Pius XI then quotes his predecessor Pope Pius VI in regard to this question.

> "Hence it is clear that marriage even in the state of nature, and certainly long before it was raised to the dignity of a sacrament, was divinely instituted in such a way that it should carry with it a perpetual and indissoluble bond which cannot therefore be dissolved by any civil law. Therefore, although the sacramental element may be absent from a marriage as is the case among unbelievers, still in such a marriage, inasmuch as it is a true marriage there must remain and indeed there does remain that perpetual bond which by divine right is so bound up with matrimony from its first institution that it is not subject to any civil power.[23]

If the state does not have the power to dissolve the bond even of natural marriages, much less can it dissolve the bond of the marriages of baptized persons. In view of the power Christ gave to His Church in religious matters, and because Christ raised matrimony to the dignity of a sacrament, the Church claims full, independent and exclusive authority and jurisdiction over the marriages of baptized persons.[24]

In his encyclical *Arcanum*, Pope Leo XIII speaks of the Church's power over the sacrament of matrimony, power given to it by Christ Himself.

> Christ, therefore, having renewed marriage to such and so great excellence, commended and entrusted all the discipline bearing upon these matters to His Church. The Church, always and everywhere, has so used her power with reference to the marriage of Christians, that men have seen clearly how it belongs to her as a native right; not being made hers by any human grant, but given divinely to her by the will of her Founder.[25] As then, marriage is holy by its own power, in its own nature, and of itself, it ought not to be regulated and administered by the will of civil rulers, but by the divine authority

[23] *Ibid.*

[24] *Codex Juris Canonici*, Canon 1016.

[25] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 390; *The Great Encyclical Letters of Leo XIII*, p. 65.

> of the Church, which alone in sacred matters professes the office of teaching.[26]

Over marriages involving baptized persons the state has no power regarding the bond and its essentials. Since, however, these marriages are necessarily related to the social order, the state does have a rightful interest in them, and a rightful authority over their merely civil effects, that is, effects which pertain to the temporal order and are separable from the marriage contract, as for example, legal residence, suffrage, dowry, and citizenship.[27] Leo XIII recognizes and explains that the state has power over the civil effects of matrimony.

> Moreover, she is not unaware, and never calls in doubt, that the Sacrament of Marriage, being instituted for the preservation and increase of the human race, has a necessary relation to the various circumstances of life which, though connected with marriage, belong to the civil order, and about which the State rightly makes strict inquiry and justly promulgates decrees.[28]

This power, however, which the state has with regard to the civil effects of the marriage contract cannot ever be extended to include the power of breaking the bond of a valid marriage. If a marriage is valid, whether it is a natural marriage or whether it involves a baptized person, its enduring, indissoluble bond cannot be broken by any human power. The state simply does not have any power to sever any marriage bond whatsoever that is valid before God and the Church.

C. The State and Divorce Laws

Yet despite the inherent sacredness of the natural marriage contract, despite the fact that marriage between baptized persons has been raised to the dignity of a sacrament and the marriage involving any baptized person is under the

[26] *Ibid.*, *ASS*, 12, p. 392; *op. cit.*, p. 68.
[27] Bouscaren-Ellis, *Canon Law*, p. 407; Ayrinhac, *op. cit.*, p. 12.
[28] Pope Leo XIII, *op. cit.*, *ASS*, 12 (1879/80), 399; *Op. cit.*, p. 78.

full authority of Christ's true Church, despite the divine command that the marriage contract validly entered into cannot be severed by any human authority or agency, we find through history that men and governments, disregarding the word of God and declaring that man can put asunder what God has joined together, have proceeded to grant divorces. We therefore find governments and states enacting laws permitting, not just separation from bed and board, legitimate and necessary in certain instances, but absolute divorce, which declares the previous valid bond broken and permits the entering into a new marriage valid in the eyes of the state, but certainly invalid in the sight of God. In our own United States, every state in the Union has enacted laws permitting divorce with remarriage.[29] Such causes as adultery, cruelty, desertion, impotence, imprisonment or conviction of crime, intoxication, non-support, insanity and a number of other miscellaneous causes are considered sufficient grounds for severing the marriage bond and permitting remarriage to other partners.[30] Such too has been the interpretation and application of the divorce laws that today in many jurisdictions a divorce can be received and another marriage entered into for the most trivial of reasons and with a minimum of difficulty.

What judgment can be made of these divorce laws except to say that they are unjust? They are in direct opposition to the divine law. In enacting these laws the state takes to itself a power which it does not possess. As a human agency it defies the law of God and attempts to rend asunder what God has joined together, attempts to terminate the marriage

[29] Chester G. Vernier, *American Family Laws*, (Stanford University: Stanford Univ. Press, Calif., 1932), II, pp. 3-4. South Carolina was the last of the states to pass a divorce law. In this state a law granting divorce from the bonds of matrimony on the grounds of adultery, desertion, physical cruelty and habitual drunkeness was approved April 15, 1949. Cf. *Acts and Joint Resolutions of the General Assembly of the State of South Carolina*, Regular Session of 1949, First Part, (Printed under direction of Joint Committee on printing, General Assembly of South Carolina), No. 137, pp. 216-20.

[30] *Ibid.*

bond and to permit remarriage contrary to an express divine command. The state has no right whatsoever to declare a valid marriage no longer existent and to permit entrance into a new contract, and whatever laws it does make in this regard are invalid and totally ineffective in breaking the real marriage bond. In the sight of God a validly married couple are still validly married even after the state hands down its divorce decree. What God has joined together no man can put asunder. It must be said too in judgment of the laws of the states that in claiming for themselves power, other than over civil effects, over the marriages of baptized persons, they are claiming a jurisdiction which in no way can be called their own.

It may be objected, and it is true, that some religious groups and churches so interpret the Scriptures as to permit absolute divorce in case of adultery or immorality of one of the parties. In light of this interpretation, is not the state privileged to grant divorces? As has been mentioned before, such an interpretation is erroneous and cannot be admitted. A critical study of the texts referring to divorce and their comparison, together with the traditional interpretation and official declarations of the one true Church of Christ, show that while separation is permitted for these reasons, yet they cannot be a cause for breaking the bond. Other churches are totally lacking in authority to give definitive interpretations to Scriptural passages. It is only the true Church of Christ, the Catholic Church, which has from God the power and mission to interpret the Scriptures authoritatively, and to give the true teaching in matters of faith and morals.[31]

D. Divorce Statistics

Widespread divorce laws and the ease with which divorces are obtained have had drastic results in the United States. Statistics show that in 1867 there were in our land 357,000 marriages and 9937 divorces, or one divorce for every 36 marriages. In 1900 the ratio reached one divorce for every

[31] *Codex Juris Canonici*, Canon 1038.

12.7 marriages. By 1925 the average was one divorce to 6.77 marriages. The year 1946 reached a new all time high both as to marriages, of which there were 2,291,045, and divorces, which numbered 610,000. This gives the United States for 1946 the record of one divorce to every 3.75 marriages. The year 1947 was a little more favorable and the ratio was one divorce to 4.12 marriages, and 1948 rated one divorce to 4.49 marriages.[32] According to the provisional figures for 1949 a rise was again indicated in the ratio of divorces to marriages. Estimated figures, released April 16, 1950, show that in 1949 there were 1,585,440 marriages and 386,000 divorces.[33] This gives us the ratio of one divorce to every 4.1 marriages. The number of divorces granted in the United States in the ten years from 1939 to 1949 comes to the total of 4,257,000.

E. Evils of Divorce

These are enormous figures relating facts evil in themselves and productive of many others. They betray a shallowness of thought, an absence of an understanding of the sacred purpose of human existence and the holy purpose of the married state. They reveal a substitution of man's views for the law of God. Such a vast number of divorces cannot but be productive of a nationwide instability of family life and the consequent weakening of our nation. Most of our juvenile problems have their basis in the broken home.

Speaking of the evils that flow from divorce, His Holiness, Pope Leo XIII, in his masterful encyclical on Christian marriage, wrote to the world over seventy years ago, in 1880:

> Truly it is hardly possible to describe the magnitude of the evils that flow from divorce. Matrimonial contracts are by it made variable, mutual kind-

[32] *Provisional Marriage and Divore Statistics*, United States, 1948, (Washington, D.C. National Office of Vital Statistics), Vol. 31, No. 16, Nov. 4, 1949, pp. 228-9.

[33] *Marriages and Divorces, and Crude Rates: Continental United States, Each State, and Territories and Possessions, 1949*, (Wash., D.C., Natl. Office of Vital Statistics), Advance Release, April 16, 1950, p. 2-3.

> ness is weakened, deplorable inducements to unfaithfulness are supplied, harm is done to the education and training of children, occasion is afforded for the breaking up of homes, the seeds of dissension are sown among families, the dignity of womanhood is lessened and brought low, and women run the risk of being deserted after having ministered to the pleasures of men. Since, then, nothing has such power to lay waste families and destroy the mainstay of kingdoms as the corruption of morals, it is easily seen that divorces are in the highest degree hostile to the prosperity of families and states, springing as they do from the depraved morals of the people, and, as experience shows us, opening out a way to every kind of evil-doing in public as well as private life.[34]

Continuing, Pope Leo XIII says that if the matter is diligently considered one can see that these evils are especially dangerous, because once divorce is tolerated no restraint will be strong enough to keep it within the bounds that have been set for it. If the force of example is great, greater is the force of passion. From these two forces, example and passion, he points out that one can expect an eagerness for divorce to spread itself in devious ways and to afflict the minds of many "like a virulent contagious disease."[35] Experience shows, Leo XIII continues, that as soon as the road to divorce is made smooth by law, quarrels, jealousies, judicial separations and such shamelessness of life follow so as "to make even those who previously had favored divorces repent of their action lest, if a remedy is not sedulously sought, by repealing the law, the State itself might come to ruin."[36]

Pope Pius XI writing fifty years later in 1930 in his encyclical on Christian marriage, *Casti Connubii*, makes his own the words of Leo XIII. He declares once more that the far reaching effects of the evil of divorce are a "formidable

[34] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 396; English translation from *The Great Encyclical Letters of Leo XIII*, pp. 74, 75.

[35] *Ibid.* [36] *Ibid. ASS*, 12, p. 397.

menace to the whole human society,"[37] and points out for all to see the "daily increasing corruption of morals and the unheard degradation of the family"[38] in those lands where the unlimited use of divorce has been practiced. In 1948 the Catholic Bishops of the United States in their national pastoral statement speak of secularism, the practical exclusion of God from human thinking and living, as completely undermining the stability of the family as a divine institution and as having given our country the greatest divorce problem in the Western world.[39] They speak of "a sixty-fold increase in our divorce rate during the past century" as one of the "terrible evils" which secularism has brought to our land.[40]

F. The Catholic Judge and Divorce Cases

In carrying out the manifold duties of his public office the Catholic judge may be called upon, and sometimes quite frequently, to give judgment in divorce cases. In light of Christ's teaching on divorce, of the Church's necessary full and faithful adherence to that teaching, and of the tremendous evils that flow from divorce, one can readily understand that taking part in divorce proceedings is for the Catholic judge a perplexing problem. In the light of Catholic principles is the Catholic judge permitted to handle divorce cases? If so, how does he justify himself? What is to be his mode of action and what are his obligations in handling the cases?

There are in reality three types of divorce cases the Catholic judge may be asked to hear, first, those in which persons seeking divorce are presently joined in an invalid union; second, those in which the persons seeking the divorce have entered into a valid marriage which has already been or is

[37] *Casti Connubii, AAS*, 22 (Dec. 31, 1930) 575; *Five Great Encyclicals*, p. 104.

[38] *Ibid., AAS*, 22, p. 576; *op. cit.*, p. 105.

[39] *The Moral Catastrophe of Secularism* by the American Hierarchy, (New York: The Paulist Press, 1948), pp. 4, 8, 9.

[40] *Ibid.* pp. 9-10.

about to be dissolved by the divine authority Christ gave to his Church; and third, cases in which couples are joined in a valid marriage which cannot be dissolved by the divine authority of the Church. We shall consider each of these three types.

In the first type, wherein the couple seeking the divorce are joined in a union recognized by the state but invalid before God, there is no difficulty in the Catholic judge's granting the divorce.[41] There is no intrinsic harm in declaring as severed before the state a marriage that was always invalid before God. And indeed the judge ought to grant it, since it has the effect of publicly dissolving an invalid union. Catholics who have attempted marriage before a civil magistrate or a non-Catholic minister and non-Catholics validly married, divorced and remarried offer examples of this case. In exercising her right and duty to legislate for the administration of the sacraments and for her own members, the Church has ruled that Catholics, if they are to receive marriage validly, must be married before an authorized priest and two witnesses.[42] Should a Catholic neglect this required form, and attempt marriage before a civil magistrate or a non-Catholic clergyman, the attempted marriage is invalid in the sight of God, even though the state recognizes it as valid. Such a Catholic then is actually not married. Should such a person subsequently desire to enter a new and this time valid marriage in the Church, before doing so it is necessary for him to secure a civil divorce from his first invalid civil union, else he runs the risk of being charged by the state with bigamy. In a case of this sort, civil law being

[41] Connell, *Morals in Politics and Professions*, p. 30; Cappello, *De Sacramentis*, Vol. V, *De Matrimonio*, n. 834; Iorio, *Theologia Moralis*, III, n. 996.

[42] *Codex Juris Canonici*, Canon 1094. Canon 1098 lists two exceptions when marriage can be validly contracted before two witnesses only: when one or both of the Catholic parties to be married are in danger of death and a duly authorized priest cannot be obtained without grave inconvenience, and outside the danger of death if it is prudently foreseen that the duly authorized priest cannot be obtained without grave inconvenience for a period of a month.

what it is, there is a real need for a civil divorce and the Catholic judge may and ought to grant it. Also, non-Catholics who validly marry, obtain a divorce and then enter into a second marriage while their former partner is still living indeed enter into invalid remarriages. Since these second marriages are not valid, the judge may grant civil divorces from them when such cases come before his court for dissolution. If, however, for some particular reason the granting of the civil divorce will be a cause of grave scandal or if for some reason proper ecclesiastical authority forbids it, it ought not to be granted.[43]

Likewise in the second type of case, those in which couples have entered into valid unions which have been or are about to be dissolved by ecclesiastical authority, the Catholic judge may and should grant the divorce. Such, for example, is the case of the Pauline Privilege, the case of the Privilege of the Faith, and the case of a marriage *ratum non consummatum.* The Pauline Privilege, so called because it was promulgated by St. Paul in virtue of his power as an apostle, may be applied in the case of two unbaptized persons validly joined in a natural marriage, one of whom later is converted to the Christian faith, validly receiving the sacrament of baptism. Should the non-baptized party to the marriage thereafter be unwilling to live peaceably with the Christian party without blaspheming the Creator,[44] the latter is privileged to enter upon a new marriage. When the new marriage is contracted, the first marriage is dissolved and the non-baptized party is also free to contract a second marriage.[45] The first and natural marriage, however, is recognized by the state as a valid one. The Christian party, therefore, before entering the new marriage must secure a civil divorce from the first one, if he is not to be exposed to a charge of bigamy. Should a judge, therefore, know that a person is seeking a civil divorce with a view to entering a second marriage by virtue of

[43] Connell, *op. cit.*, p. 30.
[44] *Codex Juris Canonici,* Canon 1121.
[45] *Codex Juris Canonici,* Canons 1120-1126.

the Pauline Privilege (ecclesiastical authority permitting), he may and ought to grant the divorce.

Somewhat wider than the Pauline Privilege, which presupposes a valid marriage between two unbaptized persons, is the Privilege of the Faith, in which the Holy Father, exercising the fulness of his apostolic power may for a grave cause dissolve the natural bond of a marriage validly contracted between a baptized person and an unbaptized person.[46] Should, therefore, the Catholic judge know that a certain marriage has been or is soon to be dissolved by reason of the Privilege of the Faith, and a party thereof is now seeking a civil divorce in order to be able legally to enter a second and valid marriage, he may and ought to give the judgment of civil divorce.

A marriage *ratum non consummatum* is a sacramental marriage validly entered into by two baptized persons, but one in which the normal physical marital action in itself suitable for generation has not taken place.[47] The Holy Father has power to dissolve such a marriage.[48] Here again if the Catholic judge knows that such a marriage has been or is soon to be dissolved by the Holy See and a party thereof is seeking a civil divorce to make it legally possible to enter another marriage without being subject to a charge of bigamy, the judge may and ought grant the decree of civil divorce.

It is clearly seen in the above cases that the judge does no wrong in granting the divorces. The persons concerned are before God free or very soon will be free to enter new marriages. The civil divorces here granted are not inherently evil and are necessary requirements to free the parties from the possibility of state charges of bigamy.

The third type of divorce with which the Catholic judge is confronted is that in which the persons concerned are joined in God's sight in a valid marriage which is not able to be

[46] Ayrinhac, *op. cit.* p. 322ff.
[47] *Codex Juris Canoici,* Canon 1015, 1.
[48] *Ibid.* Canon 1119.

dissolved, since no legitimate cause or reason is present for the dissolution of the marriage by the divine power of the Church. A valid natural marriage between two unbaptized persons when the Pauline Privilege cannot or will not be applied, a valid marriage between a baptized and an unbaptized person when the Privilege of the Faith is not applicable, a non-consummated valid Christian marriage or a non-consummated marriage between a baptized and an unbaptized person for the dissolution of which no special Papal dispensation has been, or will be, granted, and finally a valid Christian marriage that has been consummated—these are all marriages of the third type, all valid in God's sight and for the dissolution of which there is no reason, cause and, in the last case, no possibility. In these cases divorce is sometimes sought merely for its civil effects with no thought of remarriage, and sometimes for the express purpose of making legal way for a new, but, of course, invalid marriage.

Should the Catholic judge be faced with a case involving a natural marriage in which he is morally certain that the parties are seeking the divorce merely for its civil effects, that no attempt at a second marriage will be made by either of the parties and that a just cause and the legal grounds required for the divorce are present, as an official of the state he may grant the divorce. Because of the tremendous evil in divorce to the home and society, even when there is no idea of remarriage, the judge ought to do all he can to protect the marriage bond. Before granting the divorce, therefore, he should do what he can to effect a reconciliation between the parties. If reconciliation is impossible, in those states in which the desired civil effects can be obtained through a limited divorce, the judge ought to grant this type of divorce, if it can be done, rather than the absolute divorce. Since the limited divorce in itself does not attempt to break the bond, and is equivalent to a separation from bed and board, it is preferred as the lesser of two evils. An absolute divorce, however, may be granted if it is necessary according to the civil law in order to gain the desired civil effects, of course,

with the moral certainty that there will be no remarriage. In practice the Catholic judge may apply the principles stated in this paragraph also to cases involving a baptized non-Catholic and an unbaptized person, or two baptized non-Catholics, whenever divorce is requested for its civil effects and there is moral certainty of no remarriage. While it is true that matrimonial causes involving baptized persons belong to the exclusive tribunal of the Church,[49] and strictly speaking ecclesiastical permission should be obtained by all baptized persons before requesting civil divorce for its civil effects, yet, in practice, the Church does not insist that baptized non-Catholics adhere to the form of obtaining ecclesiastical permission. The Catholic judge need not, therefore, inquire if this permission has been granted.

The case is somewhat different, however, if a Catholic party seeks a civil divorce solely for its civil effects with no thought of remarriage. Insisting upon the Church's exclusive right over matrimonial causes involving Catholics, the Third Council of Baltimore forbade Catholics, under pain of grave sin, to approach the civil court for obtaining separation from bed and board without first obtaining the consent of the proper ecclesiastical authority,[50] the ordinary of the diocese.[51] Once the Catholic party has obtained the proper permission to have recourse to the civil court, the Catholic judge may grant the divorce. The type of divorce granted ought to be the limited divorce if it is sufficient to obtain for the petitioner the desired civil effects. But even an absolute civil divorce may be granted by the judge if this is necessary according to the existing laws of the state to obtain

[49] *Codex Juris Canonici*, Canon 1016; Concilium Tridentinum, Sessio XXIV, Canon 12; Cf. Denzinger, *Enchiridion Symbolorum*, 982.

[50] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii* (Baltimore: John Murphy Co., 1886), n. 126, pp. 64-65.

[51] James P. Kelly, "Divorce—Some Practical Canonical Considerations," *The Jurist* (Washington Catholic Univ. of Amer., School of Canon Law, Wickersham Ptg. Co., Lancaster, Pa.) Vol. 9 (April 1949), p. 198.

the civil effects the petitioner rightfully seeks. The Catholic party who knowingly and willingly seeks a civil divorce for its civil effects without the consent of Church authorities sins gravely. When permission has not been obtained the Catholic judge must have a very good reason for accepting such a case and pronouncing a divorce, even though he is morally certain no remarriage will take place. If it can be done the judge should urge the Catholic party to seek the proper permission, but if the party will not and the judge is constrained by the duty of his office to handle the case, he may do so.[52]

The most difficult divorce case for the Catholic judge to handle, and which unfortunately is quite frequent in our land, is the case wherein a divorce is sought from a valid marriage with good reason to believe that should it be granted, one or both of the parties will attempt a new and invalid marriage. It is this type of divorce case that the Holy Father, Pope Pius XII, spoke of in his talk to the jurists of Italy. Some theologians have held that a divorce of this kind is intrinsically evil, that is, evil in its very nature, and therefore can never be permitted for any reason whatsoever.[53] If this opinion is accepted as the true one, then the Catholic judge could never sit in a divorce case of this kind and grant the divorce judgment. Other theologians, how-

[52] Connell, *op. cit.*, p. 32.

[53] Joseph Aertnys, *Theologia Moralis* (Tornaci: H. et T. Castermann, 1893), II, n. 522; Januarius Bucceroni, *Institutiones Theologiae Moralis* (Romae : Ex Typographica Augustiana, 1900), II, n. 983; M. M. Matharan, *Asserta Moralia* (Paris: G. Beauchesne & Co., 1909), n. 295; Rosset, *De Sacramento Matrimonio* (Parisiis: Roger et Chernoviz, 1896), VI, n. 4085, p. 411—where he also cites others holding this view. "Certa mihi videtur sententia quae negat licere sententiam divortii aut separationis ferre, vel ei cooperari, quando matrimonium est validum coram Ecclesia, aut nulla ratio canonica pro separatione. Hanc sententiam potissime propugnavit in Gallis P. Baudier; eam docet Romae P. Bucceroni in Universitate Gregoriana; eam tenuit Card. Zigliara, et illam amplexus Marc in extremis. Oppositam tenuerat, sed postquam prodiisset Decretum S. Officii 25 June, 1885 ab illa recessit."

ever, expressing the more common view, hold that the act of the judge in pronouncing a divorce of this kind, even if remarriage is certain, is not intrinsically evil, but is proximate mediate material cooperation in the evil of the invalid remarriage.[54] They say, therefore, that the judge is permitted to grant the divorce when there is present a sufficiently weighty reason.

When the state purports to break the bond so that a new marriage can be validly entered into, it attempts something beyond its reach. Actually, therefore, for the state to claim that in reality it breaks the bond, to intend to do so and to

[54] Aertnys-Damen, *op. cit.*, II, n. 925; Cappello, *op. cit.*, n. 834, 839; Noldin-Schmitt, *op. cit., III*, n. 669; Prümmer, *op. cit.*, III, n. 893; Merkelbach, *op. cit.*, III, n. 977; Lehmkuhl, *op. cit., II*, n. 921 in note; Wouters, *op. cit.*, II, n. 844; Iorio, *op. cit.*, III, n. 996; F. X. Wernz, *Jus Decretalium*, IV, *Jus Matrimoniale* (Romae: Ex Typographia Polyglotta, 1904), n. 750; Genicot-Salsmans, *op. cit.*, II, n. 561; Cl. Marc-F. X. Gastermann, *Institutiones Morales Alphonsianae* (ed. 18, Lugduni: Typis Emanuelis Vitte, 1927), n. 2126; Benedictus Ojetti, *Synopsis Rerum Moralium et Juris Pontificii*, (ed. 3, Romae: Ex Officina Polygraphica Editrice, 1912), III, Syndicus, n. 3894; Aloysius De Smet, *De Sponsalibus & Matrimoio* (Brugis: Car. Beyaert, 1927), n. 393ff.; F. X. Wernz-Petrus Vidal, *Jus Canonicum*, Vol. V, *Jus Matrimoniale* (Romae; Apud Aedis Universitatis Gregoriana, 1946), n. 712; P. Chretien, *De Matrimonio*, (ed. 2, Metis: Typis Imprimerie Du Journal, 1937), n. 57 bis, p. 93; V. Heylen, *De Matrimonio*, (ed. 9, Mechliniae: H. Dessain, 1945), pp. 373-374; G. Peyen, *De Matrimonio*, (Zi-ka-wei: In Typographia T'ou-se-we, 1936), III, n. 2516,—where he says: "Judex civilis nonnisi ad effugiendum *gravissimum damnum*, qualis certe est amissio officii, atque insuper nonnisi palam agnita propria et exclusiva Ecclesiae competentia, servatis conditionibus de quibus diximus, id est, spectando solos effectus civiles, et praemissa, hac de sua mente, clara monitione, *probabiliter* potest, necessitate parens, divortium civile pronuntiare. In casibus difficilioribus Ordinarium consulat." So also Gasparri, who formerly was inclined to the more rigid opinion. He says: "At, quidquid sit de anteactis temporibus, quando nos ipsi in rigidam opinionem inclinabamur, cui S.C.S. Officii, quae in his questionibus suprma est, favere videbatur, hodie S. Officium mitiorem sententiam sequi videtur." For Gasparri's treatment of this whole problem, and for comment on the decrees of the Holy Office and the Sacred Penitentiary concerning civil divorce see *op. cit.*, nn. 1304-1326.

try to do so is to perform an action intrinsically evil, opposed in its very nature to God's law. An analysis of the action of states in writing their divorce laws indicates without doubt that they really intend in absolute divorce to sever the real marriage bond. The very fact that remarriage is permitted is sufficient evidence of this. To associate oneself with the intention to sever the real bond is truly something intrinsically evil. And the judge who would grant an absolute divorce sharing the intention of the law would sin in formally cooperating in an action *in se* evil.

Yet, in granting an absolute divorce in the court the Catholic judge need not perform an action intrinsically evil. It is true the divorce laws of our states intend to break the real bond and hence in themselves are intrinsically evil. But the Catholic judge need not associate himself with the evil intent of these laws, nor with the evil intention of the parties seeking the divorce and remarriage. He can disassociate himself by declaring that all he intends to do is to exempt the parties from the civil recognition of the effects of their marriage. The non-conformity of the judge with the evil intention of the law removes from the divorce action one aspect *in se* evil. Once the evil intention is discarded, the judge's declaration that in the eyes of the state the persons are no longer considered husband and wife is not an action intrinsically evil, since the judge in his declaration of the civil divorce declares exactly what is the true nature and effect of his act, namely, that in the eyes of the state the man and woman are no longer considered husband and wife. That is all his act effects; that is all he actually does. He has no power to do more than that. The judge's declaration, then, is the true assertion of an actuality, and as such, in itself, is not intrinsically evil. Nor again is scandal so tied up with the judge's action as to make the pronouncement of the divorce *in se* evil. The position of the Catholic Church and of the Catholic judge, that when the judge so acts he breaks not the real bond but only the civil bond, is clearly and publicly known. Nor finally is the remarriage of the parties so con-

nected with the judge's pronouncement of divorce as to make that pronouncement *in se evil.* If remarriage were necessarily bound up with the granting of the divorce so that it was not separable from it, and commanded by it, we would have to say that the judge's granting the divorce were evil *in se.* But such is not the case. In granting the divorce the judge is not commanding an invalid marriage; he only says the state no longer considers this man and woman husband and wife. The remarriage need not and in many cases does not necessarily follow. If, therefore, the Catholic judge, knowing that he cannot sever the bond of a valid marriage, does not join in the evil intention of the law, if all the Catholic judge does is to declare officially that in the eyes of the state and as regards the civil effects of their marriage the two parties are no longer considered husband and wife, if an invalid remarriage need not necessarily follow, and if the position of the Catholic Church and the Catholic judge is sufficiently well known to remove scandal—if these conditions are fulfilled, then the action of the judge in granting a civil divorce is not something intrinsically evil.

Nevertheless, when the judge foresees that an attempted remarriage will certainly or probably take place after the divorce, his act of granting it is closely tied up with the evil of remarriage, making that evil union legally possible. The judge's judgment becomes indirect and mediate material cooperation in the evil of this sin. According to the principles of material cooperation, the judge must have a sufficiently weighty reason for permitting the evil effect of remarriage.[55] The fact that should they refuse to grant the divorces, abuse and criticism would be heaped upon Catholic judges with loss of prestige, and the fact that they might even be forced from office with resulting grave harm to an honest judiciary are considered sufficiently weighty reasons for their giving the divorce decrees.

To the more common view Pope Pius XII lends his teach-

[55] Prümmer, *Manuale Theologiae Moralis,* III, n. 893.

ing authority. In speaking to the jurists of Italy, the Holy Father said:

> In particular, a Catholic judge cannot pronounce, except for reasons of great weight, a sentence of civil divorce—where this is in force—for a marriage valid before God and Church. He must not forget that such a sentence, in practice, does not come to touch only the civil effect but in reality rather conduces to the erroneous consideration of the actual bond as broken and of the new one as valid and binding.[56]

One clearly sees that in these words the Holy Father is following the more common Catholic teaching on this subject—that the granting of a civil divorce for marriages valid before God and the Church is not intrinsically evil and hence can be permitted. He says, however, that in practice, that is, when such civil divorces are granted, in the popular mind, and in the minds of those receiving them, they are often looked upon not just as producing civil effects, but wrongly are considered as breaking the actual existing bond of valid marriage and permitting the entrance into a new marriage valid and binding. Since, therefore, these evils are so closely allied with absolute divorce, the judge is permitted to grant divorce in this case only for reasons of great weight.

In our own United States in our day it may safely be said that Catholic judges have at times sufficiently weighty reasons for granting divorces from marriages valid before God and the Church, even when there is probability or certainty of remarriage. Should a Catholic judge be called upon in his office to grant such a divorce in accordance with the existing, even though unjust, law refuse to do so, in all probability he would suffer serious abuse, criticism, loss of prestige and possibly the loss of his office. The reaction that occurred when Pope Pius XII restressed Catholic principles on this matter in his talk to the jurists is a recent indication of the criticism one could expect to arise. It is thought that as a

[56] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (December 22, 1949), 603; *The Catholic Mind*, 48 (January 1950), 58.

result grave harm would be done to the position of Catholic judges in our country, and should they be forced to resign, or unable to obtain office, grave harm would be done to the entire judiciary. Theologians in the United States consider these reasons sufficiently present and weighty for Catholic judges here to grant such divorces when they must do so in the course of fulfilling the duties of their office.[57] They must keep in mind all the while, however, that it is only the civil bond and its effects they sever and not the real bond valid before God. The real bond endures after their decree.

We have seen that according to the more common view and according to the teaching of Pope Pius XII, in cases of marriages valid before God and the Church, the Catholic judge for reasons of great weight may grant civil divorces, which in no wise, however, sever the true marriage bond. The judge, on his part, we have seen, is considered to have sufficiently weighty reason for so acting if his refusal to grant these divorces would subject him to serious criticism, loss of prestige and possible loss of office, with harm done to the maintenance of an honest judiciary. Also on the part of those seeking the divorce the reasons or grounds they offer as evidence must not be trivial but weighty to the extent of satisfying the strict interpretation and requirements of the civil law.[58] Should the reasons, grounds and evidence offered not comply with the strict interpretation and requirements of the civil law then the divorce cannot be granted.

If the Catholic judge, therefore, may grant these divorces for reasons of great weight, what are his obligations and his

[57] Sabetti-Barrett, *Compendium Theologiae Moralis* (New York: Frederick Pustet Co., Inc., 1920), p. 477; A. Konings, *Theologia Moralis S. Alphonsi Compendium* (New York: Benziger Bros., 1877), n. 1053; Francis P. Kenrick, *Theologia Moralis* (Baltimore: John Murphy Co., 1866), Tractatus VIII, 114; Connell, *op. cit.*, p. 31; Harding, *op. cit.*, p. 3347.

[58] Connell, "Duties of Judges," *The Record*, November 19, 1949, p. 8; V. Heylen, *De Matrimonio*, (ed. 9, Mechliniae: H. Dessain, 1945), p. 374—"Vi enim officii judices divortium pronuntiare coguntur, quoties legaliter requisita verificantur, sin minus munere suo destituerentur, idque cum gravissimo tum Status, tum Ecclesiae detrimento."

ordinary manner of action in handling such a case in the daily performance of his duties of office? Normal judicial procedure in our land requires the judge to hear what cases come before him. He is not free to accept or to reject them at will. Granted, however, a situation in which the Catholic judge should have a choice of either accepting or rejecting a case of this type, we should say first of all, that if the Catholic judge in some way should foresee that those seeking the divorce, even though intending remarriage, have not a true legal cause on which to obtain it and consequently he will be able to deny it on insufficient grounds, or should he foresee some other possible way of keeping the parties together, he would have a good reason for accepting the case in his court. On the other hand, if he fears the presence of a true legal cause, and does not foresee a possibility of keeping the parties together, then, because of the evil of remarriage so closely connected with these divorces, because many think the real bond is broken, and because of the evil of divorce in general to home and society, the Catholic judge is obliged to do what he can to avoid accepting the case.[59] If, nevertheless, it is not possible to take the case conveniently before another judge and the Catholic judge must accept it, he may in conscience do so. Having accepted it he is obliged to do what he can to reconcile the parties and keep them together. If his efforts at reconciliation prove fruitless and the parties persist in their attempt to obtain the divorce, then the Catholic judge is obliged to examine closely the legal grounds on which the divorce is sought to see that they are not false or flimsy, but solid and according to the strict interpretation of the laws of the state. If the divorce is sought on false or shallow grounds, which do not fulfill the strict requirements of the civil law, the Catholic judge cannot grant the divorce decree. Nor in his interpretation of the divorce laws is the Catholic judge permitted to take as precedents the broad interpretations of some courts which have made a travesty of sacred marriage and granted divorces to disgruntled par-

[59] Connell, *Ibid.*

ties for the slightest of reasons. Such court actions make divorce and the disruption of the marriage contract a trivial, cheap and easy thing. If close examination and interpretation, however, show the parties have a solid legal cause for the divorce, the judge may grant the divorce decree, mentioning to the parties that since in their petition and grounds for divorce they have satisfied legal requirements, it is incumbent upon him as a proper judicial officer to declare that the state no longer considers them husband and wife. In his own heart and mind the Catholic judge remembers that in reality he is severing only the civil bond[60] and that he has his own reasons of great weight for this action so closely allied with a possible invalid remarriage, namely, that should he refuse to grant it, the position of Catholic judges would become untenable in our land.

G. The Catholic Judge as an Official at Marriage

According to the law of our land the Catholic judge in the performance of his duties as a public official may be called upon at times to officiate at marriages. If both the parties seeking marriage are non-Catholics, are free to enter a union valid before God, and have fulfilled the requirements of the civil law, the Catholic judge may unhesitatingly officiate.[61] Needless to say at the wedding the judge's official participation should be done with a decorum fitting the sacred contract upon which the parties are entering. He should remember too that when both parties are baptized, he is officiating at the true and valid reception of the sacrament of matrimony.

Normally the marriages of Catholics to be valid must take place before an authorized priest and two witnesses.[62] Canon 1098 of Church's law, however, lists two occasions when this required form is not demanded. According to this Can-

[60] Heylen, *op. cit.*, p. 374 and note 1.
[61] Connell, *Morals in Politics and Professions*, p. 32.
[62] *Codex Juris Canonici*, Canon 1094.

on, when one or both of the parties desiring to be married are in danger of death, and no authorized priest can be secured without grave inconvenience, or outside the danger of death, when it is prudently foreseen that a priest cannot be had for a month, the marriage may validly and licitly be contracted without the priest in the presence of two witnesses only. The Catholic judge may lawfully assist at Catholic marriages of this kind.

A difficult problem arises when the Catholic judge is asked to officiate at a marriage which he knows for certain or gravely suspects will be an invalid union. This would be the case when the judge knows or suspects one or each of the parties requesting the marriage is a divorced person, or when one or both of the parties are Catholics attempting a civil marriage, or when he is aware of some other impediment invalidating the marriage. The Catholic judge's mode of action and his obligations in this case have been very much discussed by the theologians. Basing their contention on a number of responses issued from the Holy Office and from the Sacred Penitentiary before 1900, some theologians have maintained that the Catholic judge may not witness such a marriage even if by refusing he should be required to give up his office.[63] Other theologians, expressing the common opinion which can be safely followed, say that under certain circumstances the judge may officially assist as witness in such marriages.[64] These authors point out that although the replies from the Holy Office and the Sacred Penitentiary forbade Catholic judges so to act in specific cases, never in their replies did they class the assistance of the

[63] Cf. Gasparri, *op. cit.*, n. 1302; Cappello, *op. cit.*, V., n. 734.

[64] Felix M. Cappello, *Tractatus Canonico-Moralis De Sacramentis*, (Romae: Marietti, 1947), ed. 5, Vol. V., n. 734; Petrus Cardinalis Gasparri, *Tractatus Canonicus De Matrimonio* (Romae: Typis Polyglottis Vaticanis, 1932), n. 1303; Prümmer, *op. cit.*, III, n. 889; Noldin, *op. cit.*, III, n. 677; Merkelbach, *op. cit.*, III, n. 976; Wernz-Vidal, *op. cit.*, nn. 591, 712; Wernz, *op. cit.*, n. 208; Lehmkuhl, *op. cit.*, II, n. 952 note; De Smet, *op. cit.*, n. 406; Genicot-Salsmans, *op. cit.*, II, n. 476; Payen, *op. cit.*, III, n. 1961.

judge in such a case as an intrinsic evil. They maintain the judge's assistance is not an intrinsic evil, but is proximate material cooperation in the evil of the invalid marriage and therefore can be admitted for a most grave cause. This opinion is based upon a partcular decision of the Sacred Penitentiary dated February 13, 1900. In this case the Sacred Penitentiary was consulted as to what should be done in a particular case wherein if the Catholic public official refused to assist in civil marriages of this kind, he would be forced to give up his office, and an irreligious official would be chosen with resultant grave public harm. In its response the Sacred Penitentiary said:

> Attention having been given to particular circumstances, the Sacred Penitentiary advises that the public official is not to be disturbed, who gives his assistance in the proposed case, provided he publicly declares (1) his faith in the Catholic doctrine of the unity and indissolubility of marriage and (2) that he regards his act as a civil ceremony in which he is compelled to take part to avoid greater evils. In addition, he should gravely warn, at least privately, those attempting marriage in this manner of the enormity of their sin and of the absolute invalidity of their act.[65]

In our land the judge is ordinarily free to decline assisting at a particular marriage. The normal course of action for the Catholic judge, therefore, is to refuse to officiate at a marriage he knows certainly or very probably will be in-

[65] Gasparri, *op. cit.*, n. 1303: Ita v.g., se gessit quidam parochus dioc. N***, qui, occurente gravissimo damno publico si, denegata assistentia huiusmodi matrimoniis civilibus, syndicus catholicus officium dimittere cogeretur et areligiosus eligeretur, Sacram Poenitentiariam consuluit. Et Sacra Poenitentiaria, die 13 februarii 1900, respondit: "Attentis singularibus circumstantiis, S.P. censet non esse inquietandum officialem civilem, qui suam operam in casu proposito praestat, dummodo publice declaret se 1° catholicum dogma circa unitatem et indissolubilitatem matrimonii profiteri: 2° actum illum civilem habere uti civilem caeremoniam, eique interesse coactum et ad majora mala vitanda. Graviter insuper moneat, saltem privatim, contrahere hoc modo attentantes de enormitate sceleris, quod commitunt et de omnimoda actus nullitate."

valid, and if it can be done the judge is obliged to refuse. If, however, as the above reply indicates, particular circumstances are such that the judge cannot refuse without involving himself in serious difficulties comparable to those mentioned in the above case, he would be permitted to assist at the marriage. It will be necessary for the judge to fulfill the conditions laid down. He must declare publicly his faith in the Catholic doctrine of the unity and indissolubility of marriage, that he regards his act as a civil ceremony done to avoid greater evils, and must seriously warn the parties, at least privately, that they sin gravely and that their marriage is invalid.[66] These conditions must be fulfilled in such a way as to remove effectively the element of public and private scandal.

In practice, faced with the possibility of assisting at a marriage of this sort, the Catholic judge is held first of all, if time and circumstances permit, to consult the Ordinary of his diocese for a proper mode of action. For it belongs to proper ecclesiastical authority to judge whether or not there is present in particular territories a sufficient cause for the judge's assistance at the marriage,[67] and to prescribe the manner of the aforementioned public declarations. If, however, circumstances are such that the judge does not have time to approach ecclesiastical authority, and if in his prudent judgment a sufficiently weighty cause is present, it seems that he may assist at the marriage without recourse to the Ordinary. Should, however, there exist for a particular territory a positive ecclesiastical prohibition of the Catholic judge's assistance at such a marriage, he would not be permitted to assist even if as a result he should be forced to quit his office.[68]

H. Contemporary Thought and Divorce

When the Holy Father, Pope Pius XII, in his talk to the jurists of Italy on November 6, 1949, reminded Catholic

[66] Cf. Connell, *op. cit.*, p. 32-33.
[67] Prümmer, *op. cit.*, II, n. 889, p. 644-645.
[68] Gasparri, *op. cit.*, n. 1302, p. 322.

judges of their duties relative to unjust laws and that they could not grant divorces from marriages valid before God and the Church except for reasons of great weight, there were those who protested he was voicing a new teaching inimical to the welfare of our country and interfering with the lawful powers of the state. The truth is he was voicing no new doctrine, but was repeating the customary and common teaching of Catholic moral theologians. Moreover, far from advocating interference in the rightful powers of the state and teachings harmful to society, he was declaring true basic principles calculated to foster the common welfare and with which the better element of juristic and social thought in the United States today is inclined to agree. As has already been pointed out, the Christian concept of law, so profoundly explained by the Holy Father, and the norms he laid down relative to unjust laws are in conformity with the natural law concepts and norms used officially by our government in its prosecution of the war criminals at Nurnberg. So also what he said on divorce and its evils is at least partially agreed to today by many socially minded non-Catholic thinkers. These persons are deeply interested in the welfare of our nation and are becoming more and more aware of the evils that have come and are coming to our United States because of our tremendously high divorce rate—the highest in the world. While these persons do not understand the inherent evil of divorce with remarriage of validly married couples and admit the power of the state to rend asunder what God has joined together, and while they erroneously maintain that in certain cases divorce of validly married couples with remarriage must be allowed, yet they do see divorce's evils. They see divorce as causing sorrow and sadness to the individually wrecked lives of husband and wife. They see it as creating great social and legal problems, as causing emotional instability in the lives of children of broken homes, and thus leading to the delinquency of young boys and girls. In this respect it becomes a major factor in the perpetration of crime. They see divorce as the greatest enemy of family life, as a weakening of that life and the life

of the nation. They see our divorce laws in their present state as thoroughly bad. And therefore, they reason that as much as possible must be done to prevent so great a number of divorces, and thus to protect the family in the United States from the ravages that divorce effects.

In a series of articles on divorce appearing in the *Saturday Evening Post,* captions talked of it as of the "sordid story of America's broken homes," as of "our biggest national scandal,"[69] and the question is asked what can be done to clean up this national disgrace.[70] In the course of one article the author speaks of how one out of five marriages winds up in the divorce courts and then says: "That is no longer news; it has been widely viewed with alarm in pulpits, courtrooms, colleges and the press."[71] In another article he maintains that if the implications of the survey on divorce which he is reporting are correct, our divorce rate could be cut fifty per cent if efforts were made to cure sick marriages rather than rush them immediately into the "execution chamber of divorce."[72]

Another author writing about the American family and divorce says: "The American divorce record is, from the social point of view, startling, and, when one translates it into the disappointment and suffering of individual men and women, pathetic . . . An increase in happy wholesome marriages is the only permanent solution of our divorce problem."[73]

But perhaps the most important and most widely publicized civil recommendation that something be done about the national scandal of our divorce laws and that a better preparation for marriage be required is contained in the report requested from the American Bar Association by the

[69] David G. Wittels, "The Post Reports on Divorce," *Saturday Evening Post,* January 21, 1950, p. 20.
[70] *Ibid.,* February 18, 1950, p. 28.
[71] *Ibid.,* January 28, 1950, p. 22.
[72] *Ibid.,* February 4, 1950, p. 42.
[73] Ernest R. Groves and Gladys H. Groves, *The Contemporary American Family,* (Chicago: J. B. Lippincott Co., 1947), p. 480.

National Conference on Family Life, held at Washington, D.C., May 5-8, 1948, and made to that body by the legal Commission which the American Bar Association appointed. In this report it was recommended that the National Conference on Family Life record "its convictions (1) that our present divorce laws are producing widespread evils, and (2) that our laws in the field of domestic relations, instead of constituting a bulwark, are themselves a continuing threat to the stability of marriage in contemporary America."[74] Realizing the seriousness of the problem the Conference recommended that the President of the United States appoint a commission of ten or more citizens, outstanding leaders drawn from the field of law, religion, medicine, education and sociology, "to reexamine the laws regulating both marriage and divorce and legal procedures in divorce cases, in terms of their objectives, methods, and facilities: their results: and in light of the social role they have to play in the preservation of the American Home."[75] It also urged the further extension and establishment of family courts to handle divorce and marriage problems.[76] The report was presented to the Conference by Judge Paul W. Alexander of Toledo, Ohio, Vice-Chairman of the Association's Committee. It made a deep impression and was much discussed.[77] The remedial recommendations concerning divorce and marriage laws and family courts was received with much favorable comment in special articles and editorials throughout the country.[78] Considering that the National Conference on Family Life is reported to have a membership of 40,000,000[79] and that the nation at large manifested an evi-

[74] Mimeographed Report of National Conference on Family Life, Washington, D.C., May 5-8, 1948, p. 3.

[75] *Ibid.*

[76] *Ibid.*

[77] "Report on Divorce Laws Acclaimed at National Conference on Family Life," 34 *American Bar Association Journal*, (June 1948), p. 448.

[78] *Ibid.*

[79] 34 *American Bar Association Journal*, (Jan. 1948), pp. 43, 52.

dent interest in what was recommended, one must conclude that many of the people of our country are aware of the evils of divorce and see the necessity of something being done to check the divorce rate.

On September 7, 1948, the House of Delegates of the American Bar Association in a meeting at Seattle, Washington, approved and adopted as their own the recommendations which their delegation had made at the National Conference on Family Life.[80] They too voted to urge the President of the United States to appoint a commission to study marriage and divorce problems and recommended that family courts be extended and established.[81] They also voted to set up within their own body a "Special Committee on Divorce and Marriage Laws and Family Courts," to carry forward their proposals. Through this special Committee the Association said that it hoped to make a "major contribution to the stability and moral health of the American family, and so to the well-being of our nation."[82]

Clearly, therefore, together with the Church and Pope Pius XII there are others who understand the tremendous evil daily befalling our country because of divorce. While these persons do not understand the inherent evil of divorce with remarriage, they are in agreement with the Holy Father to this extent that something must be done to stem divorce's tide. To the divorce problem of the United States a solution is earnestly sought. A modification of present laws with an attempt at uniformity among the states, and the setting up of family courts to explore and counsel every possibility of reconciliation before the granting of the divorce decree would be a vast improvement over the present ease and lack of concern with which divorces are granted in many areas. It would probably lessen to a certain degree the large annual number of divorces granted and hence in

[80] "Association Offers Specific Solutions for Marriage and Divorce Law Evils," 34 *American Bar Association Journal*, (Oct. 1948), p. 894.

[81] *Ibid.* pp. 894-895.

[82] *Ibid.* p. 896.

this respect is desirable. Such a program, however, does not go to the heart of the problem, since it denies the basic enduring quality of the valid matrimonial contract. The heart of the problem is that the valid matrimonial contract has the property of indissolubility and that the state has no power whatsoever to sever the real and valid marriage bond.

It is profoundly hoped that should the President of the United States do as has been suggested by the American Bar Association and the National Conference on Family Life and appoint a committee to study in a special way the divorce problem, that the committee will find the solution which God himself has given us with regard to marriage and divorce, the solution which ever and firmly has been taught by the one true Church—namely, the unity and indissolubility of the marriage bond, that "what God has joined together, let no man put asunder," that the state has no power whatsoever to break the bond of a valid marriage.

CONCLUSION

And so this dissertation is brought to a close. In general we have based our treatise on Pope Pius XII's "Address to the Union of Italian Catholic Jurists," given November 6, 1949 and his "Address to the Sacred Roman Rota," of November 13, 1949. We may now state the following conclusions:

(1) The profession of judge is indeed a noble one. This nobility rests in the judge's dealing with things human and divine, in administering justice to maintain civil peace and order, in his safeguarding, restoring and perfecting in socity the rights of the noble creature man, who is made like unto the image of God, raised to a supernatural order and destined to everlasting life with God in heaven.

(2) There is today the spectacle of a crisis in the administration of justice which expresses itself in the antagonism between the just and the unjust law. This crisis can be resolved only by a return to the true Christian concept of both the nature of man, a little less than the angels, and the nature of law, which aids man to attain his ends both mediate, proper human social living, and final, his return to God, his Creator. The Catholic judge has the obligation to put into practice the Christian concept.

(3) The judge is the personification of justice, giving to each what is his due in the cases coming before his tribunal.

(4) The judge must possess the necessary qualities of knowledge, integrity and jurisdiction and follow correct judicial procedure.

(5) False concepts of law have resulted in current unjust laws. The judge who by his sentence applies an unjust law to a particular case shares with the authors of the law responsibility for its effects. He may never command anyone to commit an act intrinsically evil. He may in no case expressly recognize and approve an unjust law. Since, how-

ever, not every application of an unjust law is equivalent to its recognition and approval, the judge may, and sometimes must, permit an unjust law to take its course in order to avoid a much greater evil. He may at times inflict a penalty for the violation of an unjust law, if the penalty is of such a nature that the person affected by it is reasonably disposed to accept it for a much higher good and for higher motives.

(6) Some theologians have held that the judge's granting of a civil divorce for marriages valid before God and the Church is an act intrinsically evil and hence cannot be permitted. Other theologians have held the more common view that the granting of such a divorce is not intrinsically evil but is proximate material cooperation in the evil of a possible invalid remarriage, and hence can be permitted for a sufficiently weighty reason. The Holy Father in his address to the jurists followed the more common view when he said a Catholic judge could not pronounce a sentence of civil divorce for a marriage valid before God and the Church except for reasons of great weight. If reasons of great weight are present the judge may grant the divorce. The Holy Father in his address settled the above controversy. Therefore we may now say it is certain that the judge's granting of a civil divorce for a marriage valid before God and the Church is not intrinsically evil and that it can be granted for reasons of great weight.

(7) Theologians in the United States consider that Catholic judges here have sufficiently weighty reasons for granting such divorces when they are required to do so in the fulfillment of their office. If they should refuse to do so, the position of Catholic judges would become untenable in our land, with resultant grave harm to the entire judiciary.

When His Holiness, Pope Pius XII, clearly and fearlessly stated the Catholic judge's obligation regarding unjust laws an divorce cases, there were those who accused him of advocating principles opposed to the welfare of our country. Special effort has been made in the course of the dissertation

to point out that such is not the case. What the Holy Father had to say about unjust laws and divorce cases is the common teaching of the Church's moral theologians especially brought to the attention of our times and applied. Nor is this teaching opposed to the welfare of our land. Rather, objectively true, it is calculated to foster the common good, and is in conformity with what the better element of juristic and social thought in our country is today advocating.

What the Holy Father said of unjust laws and the individual responsibility of the Catholic judge when he applies them is in complete agreement with the very principle of individual responsibility of government officials for their official acts written into the Charter of the International Military Tribunal, and stated and used by our own government in the conduct of the Nurnberg War Criminal Trials of 1945. The Holy Father's declaration that Catholic judges cannot grant divorces from marriages valid before God and the Church except for reasons of great weight also is to this extent in agreement with the recommendations of the National Conference on Family Life, The American Bar Association, and other social thinkers, that something be done to lessen the vast number of divorces annually granted in the United States.

No more fitting parting word to the Catholic judge can be made than the words of Pope Pius XII to the jurists of Italy: "To you, dear sons, We wish with full heart that Divine Providence may grant you the exercise of your office always within the sphere of just legislation and in conformity with legitimate social requirements. Labor in every way to make for yourselves the perfect ideal of a jurist who through his competence, his wisdom, his conscientiousness, his rectitude, merits and gains the esteem and confidence of all."