“Catholic Gobbledegook” Revisited
How the Church Got Involved in the Annulment Business

John P. Beal

Drawing on his expertise as canon law professor at the Catholic University of America, the author analyzes the evolution of the church’s current role in adjudicating annulments of non-sacramental unions, even as it struggles to remain faithful to Jesus’ imperative to preserve “what God has joined together” in a society pushing to redefine marriage apart from religious values.

In her reflection on her own close encounter of the wrong kind with the marriage tribunal, Sheila Rausch Kennedy approvingly cites John Noonan’s observation that an “annulment is a fiction, obtained as an adjunct to a hoax. Annulments . . . are the magical product of an incomprehensible process in which legal reasons play no part and clerical discretion is absolute.” What Ms. Kennedy overlooked is the fact that Noonan’s words describe no actual annulments, present or past, but the fictional papal annulment of the marriage of Walter and Griselda recounted in Chaucer’s “The Clerk's Tale.” This quibble does not blunt Ms. Kennedy’s critique of the Church’s annulment process, but it does point out that disillusionment with what her ex-husband called “Catholic gobbledegook” has a long history. The long history of popular dissatisfaction with the annulment process raises two questions: how did the Church get into this annulment business in the first place and why is it still in this business today?

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The Rise of Church Jurisdiction

Among the very few recorded sayings of Jesus about marriage is his ringing rejection of divorce as Moses’ concession to human hardness of heart. No human has the right to separate what God had joined, Jesus taught, and the married person who divorces his or spouse and marries another commits adultery against the abandoned spouse. From New Testament times on, church leaders and ordinary faithful could not escape the conclusion that fidelity to the Gospel required rejection of divorce as a legitimate solution for marital difficulties, although some hedged a bit on “hard cases.” Church leaders proclaimed Jesus’ teaching as gospel truth, and, to the extent they could, they used it as leverage when disciplining the sometimes wayward members of their flocks. However, the position of the church in the West underwent a revolutionary change during the twelfth century. No one has yet offered a fully satisfying explanation of exactly when and how it happened, but the church emerged from the upheaval of that remarkable century with unchallenged and exclusive jurisdiction over marriage.

Jurisdiction gave the church and its leaders the authority to impose and enforce its long held theological views about the nature and obligations of marriage upon society and its members great and small. However, jurisdiction also gave the church the responsibility to arbitrate messy concrete conflicts over marriage and its consequences. On church decisions whether marriages ever existed and whether they could be legitimately terminated now hinged rights and obligations, lawful succession to titles and property, liability for high crimes and misdemeanors, and, as the matrimonial imbroglio of Henry VIII illustrates, the fates of kingdoms and empires. To fulfill the responsibilities for church and society which jurisdiction over marriage had thrust upon them, church leaders could no longer be content to be “Sunday morning quarterbacks” who fulminated about their flocks’ infidelities and threatened dire punishment here but, more ominously, hereafter if they did not reform. Church leaders soon discovered, however, that “the law” they had inherited was better suited for admonition than for adjudication.

Throughout the twelfth and subsequent centuries, the Western church begged, borrowed, and stole to cobble together a law that translated gospel principles into jurisprudential tools with which to strive for justice tempered by mercy in its adjudication of matrimonial cases. A necessary first step was to define
clearly what made a relationship a legally recognized marriage. Beginning with Alexander III, the popes enshrined as dogma the Roman law principle that consent, not cohabitation, makes a relationship a marriage. However, since consent is an internal act of a person’s will that can be manifested in a variety of often ambiguous ways, some more practical criteria were needed for the adjudication of concrete cases. Canon lawyers found these criteria in the recently rediscovered Roman law governing consensual contracts, i.e., those in which contractual rights and obligations arise from consent alone prior to, and even without, any subsequent handing over of the object of the contract. Although the Romans had not considered marriage to be a contract of any kind but a social fact and had used the consensual contract for such mundane transactions as sale and hire, canonists were not deterred from adopting it as their paradigm for marriage. The contractual model with its built in jurisprudence was too useful for the resolution of marriage cases to be ignored. The conviction that marriage is a contract spread “like a contagion” (LeBras), despite the reservations of theologians like Aquinas, and endures in Western legal systems down to today.

The impact of the contractual model for marriage was soon felt in the actual adjudication of matrimonial cases. Like any other contract, a marriage contract could be valid (in the sense of “true,” “legitimate,” or “real”) or invalid. The notion of contractual invalidity was a Godsend for church leaders who wanted to balance the stern demands of the Gospel with pastoral sensitivity to concrete couples. To put the matter crudely, Jesus had prohibited mere humans from separating what God had joined, but he had not barred humans from examining whether God had had anything to do with a particular joining of a man and a woman. Both popular literature and legal texts continued, however, to speak of decisions of church tribunals as “divorces” or “dissolutions” long after the law had made its paradigm shift to the contractual model for marriage and the annulment model for its termination. Nevertheless, by the fourteenth century, legal language began to catch up with legal reality, and the terms “valid” and “invalid” in their modern sense were applied to the sacrament of matrimony (and later by analogy to the other sacraments).

From the twelfth century on, the validity of a marriage contract hinged on three critical factors: contractual capacity of the parties, consent by the parties
themselves to the terms of the matrimonial contract, and observance of the ceremonies or formalities required by law for entering marriage.

A. Defects in Contractual Capacity

From an early date, contractual capacity of the parties for marriage was determined mostly by establishing the absence of impediments. Since most of the church’s impediments to marry were borrowed from Roman law (often presumed to be “natural law”) and the Old Testament (“divine positive law”) and baptized for church use by early councils, it did not require great flights of imagination for people to accept church decrees that unions entered despite the presence of one of these impediments were not “of God” and were, therefore, “invalid.” Popular cynicism about the “annulment process” was fostered, however, when, as not infrequently happened, the “rich and famous,” whose marriages had gone sour, conveniently remembered or discovered that they were related to their spouses within the prohibited degrees of kinship and had their unions declared invalid by the church so that they could enter more advantageous marriages. Eleanor of Aquitaine, who was freed from her marriage to Louis VII of France when it was discovered she was related to him within the forbidden degrees of consanguinity and then married Henry Plantagenet, was only one of the better known beneficiaries of this medieval version of Catholic “gobbledegook.”

Medieval canonists recognized that mental impairments (amentia and dementia) could also be a source of contractual incapacity. Since the consent that brought marriage into existence was an act of the will, any disturbance that compromised the exercise of a person’s rational faculties could render him or her incapable of contracting marriage. Nevertheless, medieval canonists lacked the sophisticated and subtle understanding of human mental and emotional functioning that would allow them to exploit fully their rudimentary insight into the bearing of mental impairments on the validity of marriage. Their belief that even the chronically insane could have “lucid intervals” during which they could validly consent and their inability to distinguish neuroses from garden variety “goofiness” and personality disorders from depraved character impeded a more nuanced psychological analysis of consent.
Development in canonical jurisprudence on “psychological grounds” would have to wait for its full flowering in the twentieth century.

B. Defects in Consent
Since the Roman law governing consensual contracts was developed mostly for commercial purposes, it did not allow contracts to be easily voided because of defects in the consent given by the contractants. This minimalist approach to the requirements of consent in consensual contracts was carried over into canon law as the church used Roman jurisprudence to parse the language of marital consent. Consistent with its Roman law antecedents, canon law gradually recognized that the consent of a party to a marriage was fundamentally vitiated from the beginning when external force induced such fear in the contractant that his or her freedom was compromised, when he or she was ignorant of the nature of the substance of the contract entered, when the contractant was so in error about the true nature of the contract that he would not have entered it except for this erroneous understanding (error of law), when he or she was in error about the identity of his or her spouse or about some quality of the spouse that was tantamount to a mistake about his or her identity (error of person or of quality of a person), when he or she understood the terms of the contract but intentionally withheld internal consent from the contract itself or one of its essential terms while going through the motions of entering it (simulation), and when he or she conditioned the validity of consent on some past, present, or future circumstance that was not subsequently verified. Although any of these defects of consent could justify a declaration of the invalidity of a marriage, proof of their existence could be extremely hard to come by. As a result, annulments on grounds of defective consent were relatively rare.

C. Defects in Canonical Form
Observance of legal formalities for entering the marital contract became a salient issue only after the Council of Trent, which, for the first time, imposed the obligation of observing the canonical form of marriage as a condition for the church’s recognition of the validity of a marriage. Prior to Trent and even afterward where its decrees were not promulgated, marital consent had to be exchanged by words in the present tense, but the precise wording of the vows themselves and the involvement of representatives of church or state in their exchange were largely irrelevant to the validity of the resulting marriage. It was only in 1909 that the Tridentine form became necessary for the validity of marriages involving Catholics in the United States. The ease and rapidity with which marriages, even multiple marriages, could be dispatched by tribunals when Catholics married “outside the church” bred resentment that some divorcés (especially prominent figures like Frank Sinatra) seemed to be rewarded for violating church law with quick annulments while ordinary members of the faithful
who “followed the rules” were trapped in hopeless situations. As in the Middle Ages, this resentment fostered the suspicion, mostly unfounded, that beneficiaries had paid dearly for these cheap annulments.

The Demise of Church Jurisdiction

Exclusive jurisdiction over marriage began to slip away from the church after the Protestant Reformation of the sixteenth century. The secular states that assumed jurisdiction over marriage in society rejected the church’s core conviction that marriage is indissoluble, but they retained the canonical procedures for the separation of spouses as the model for their procedures for civil divorce “for cause” that prevailed until the “no fault divorce” revolution of the 1970s. Like the post-Tridentine church, states required observance of certain formalities as the condition for civil recognition of the marital contract—and, in the United States, most jurisdictions were happy to allow the church’s now mandatory ceremony to double as the civil ceremony. While states jettisoned specifically religious impediments to marriage like sacred orders, they retained and adapted other impediments (often, as in the case of the required age for marriage, in forms more stringent than the church’s) as the criteria for contractual capacity.

Both the law of the church and the laws of the several states viewed marriage as a contract between a man and a woman, which had a rather minimal but identifiable normative content that was beyond the spouses’ poor human power to add or to detract and which existed to benefit not only the contracting individuals but society as a whole. From at least the Supreme Court’s 1878 decision in Reynolds v. United States, American courts upheld and enforced the conviction that the marriage contract gave rise to a social institution with its own web of rights and obligations of generically Judaeo-Christian provenance which the law would use society’s coercive power to require and enforce. Until the 1960s, canon law viewed marriage as a contract by which the parties mutually gave and accepted the perpetual and exclusive right to the body for sexual acts per se apt for the generation of children and which had as its primary purpose the procreation and education of offspring and as its secondary purpose mutual assistance and the

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remedy of concupiscence (1917 Code, cc. 1081, §2 and 1013, §1). The 1917 Code articulated the minimum required for legal recognition by the church that a relationship was a real “marriage” and the maximum beyond which the church would not require the married faithful but only encourage and exhort them. Despite their differences, especially on the indissolubility of marriage, American law and canon law shared a contractual paradigm for marriage, a minimalism in imposing requirements for entering it, and an insistence on its public celebration. As a result, many were lulled into believing church and state were “on the same page” when it came to marriage.

Since the 1960s, however, canon law and civil law of marriage in the United States have been headed in opposite directions. On the one hand, civil law has progressively evacuated the term “marriage” of normative content. In short, American law has increasingly left decisions about marriage, procreation, contraception, and family relationships to autonomous individuals who are free to define the content of their marital relationship to their hearts’ content within the sphere of their constitutionally protected privacy. The recent move to accord “marital” status to same-sex unions is but the latest stage in the long retreat of American law from imposing a normative version of marriage. On the other hand, following Vatican II, canon law has invested “marriage” with personal and interpersonal expectations that are neither romantic reveries nor moral exhortations, but legally binding norms. In short, in canon law, marriage is now a covenant, by which a man and a woman mutually give and accept one another perpetually and exclusively to establish between themselves a partnership of the whole of life which is ordered by its nature to the good of the spouses and the procreation and education of offspring (1983 Code, cc. 1057, §2 and 1055, §1).

The emergence of this decidedly “personalist” understanding of marriage as normative in canon law has necessitated yet another retooling of jurisprudential principles governing defects of consent and contractual capacity to help to maintain the precarious balance between fidelity to gospel teaching and pastoral sensitivity. To enter marriage as it is now defined in the church’s law, couples need a much deeper knowledge and understanding of marriage than can be presumed of those who have merely reached puberty. As a result, tribunals carefully scrutinize the developmental histories of survivors of shipwrecked marriages to ascertain whether they enjoyed sufficient maturity to make prudent and internally

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free decisions to marry and to be bound by its obligations or whether they “lacked the due discretion” for marriage. In a society where views on marriage contrary to those of the church have coalesced into a “divorce mentality,” tribunals pay painstaking attention to the way deeply rooted attitudes have determined what people consented to when they contracted marriage and assess the impact of “errors” about the church’s teaching on the validity of their contracting. In a society that guarantees people the freedom to fashion marriage in their own image and to their liking, tribunals examine whether people substituted, in whole or in part, their own private versions of marriage for the church’s normative version when they contracted. Thus, there has been an explosion of jurisprudence on “simulation” that subtly parses the grammar of consent to determine whether a person by a positive act of the will excluded from marital consent the traditional “goods” of children, fidelity and permanence or the non-traditional “good of the spouses” or the sacramental dignity of marriage. Most controversially, to establish an intimate community of life and love, people need a considerable degree of maturity, self-possession, and personal and interpersonal integration. Where these qualities are lacking or seriously deficient, people lack contractual capacity for marriage.

As a result of these jurisprudential developments, marriages once recognized as valid before state law and before the bar of popular opinion are frequently declared to have been invalid from the beginning by ecclesiastical tribunals. When news of these church annulments gets around, people innocent of the technicalities of canon law but familiar with the facts sometimes nod their heads in intuitive agreement and say, “That was no marriage; something fundamental was missing.” Sometimes, however, people are outraged that the church would dare to declare invalid marriages that had been duly contracted in accord with state law. People are also often surprised to learn that, even after they have been duly dissolved by civil divorce, marriages of both Catholics and non-Catholics are considered still valid and binding by the Catholic church and that remarriages after these divorces, although valid at civil law, are not considered to be valid marriages by the Catholic church. These discrepancies are sometimes derisively dismissed as the result of “Catholic gobbledegook,” but the “gobbledegook” is not peculiarly Catholic. Such discrepancies are inevitable whenever two social groups, whether they are church and state, church and...
synagogue, or majority culture and minority culture, simultaneously claim competence over marriage and judge it by different criteria, a fact illustrated brilliantly in J. M. Synge's little play “The Tinkers’ Wedding.” Only those who naively assume that whatever civil law says “is” a marriage must “be” a marriage will be surprised that, not infrequently, relationships that count as marriage in American law are not recognized as such in canon law and vice-versa.

Where Now?

Critics of the church’s annulment process from Chaucer to the present like to call attention to its artificiality. The result of any attempt to squeeze the matrimonial camel through the needle’s eye of a legal system is always going to appear—and be—awkward and artificial. However, as Noonan points out, the legal procedures that decree the end of marriages are no more artificial than those that declare their beginning. There is something inescapably artificial about the fact that the loving words and actions of a couple, while they float blissfully down the Susquehanna River on a moonlit summer night, can render them married or not before the law, depending on whether these words and deeds occurred when their love boat was north or south of the Mason-Dixon line. Since the commonwealth of Pennsylvania recognizes “common law” marriage and the state of Maryland does not, geography is an artificial intrusion into this midsummer night’s dream that determines whether or not, all things being equal, it results in “marriage” before the law. Is this scenario any more—or less—artificial than the decision of a church tribunal, five years after this romantic tryst, that this marriage was invalid because one of the parties, having become more than slightly tipsy before uttering sweet nothings in the moonlight, lacked the due discretion for marriage? Had he matriculated not at Wittenberg but at a university where students read canonical texts rather than burning them, Hamlet might have complained, “There are more things in heaven and earth, Horatio, / Than are dreamt of in your” canon law. And Hamlet would have been correct, but Horatio might still have exacted from Hamlet a begrudging concession that what is dreamt of in our canon law ought not to be disparaged.

The real litmus test for the adequacy of a legal approach to marriage is not how artificial it may seem, but how successful and credible it is in maintaining the precarious balance of fidelity to Jesus’ imperative and compassion for star crossed lovers who have foundered in seas of troubles. Only with difficulty can the contractual model of marriage, with its jurisprudential tools forged by Roman jurists to adjudicate disputes over commercial transactions in the ancient world and honed by medieval canonists to arbitrate the matrimonial politics of their age, be re-tooled again to achieve a credible balance between justice and mercy in dealing with divorced faithful of our post-modern age. The annulment
process is a product of an age when there was a virtually unanimous, albeit sometimes begrudging, consensus that the church’s vision of marriage and its norms articulating that vision were the appropriate standards for judging marriages. One has to wonder how credible this process can be in an age in which there is no consensus, even among Catholics, about the church’s jurisdiction over marriage and in which there is so little consensus not only about what the appropriate norms to apply are but even about whether norms should be applied at all.

One can also wonder how appropriate and credible a process which emerged as an extension of the church’s unchallenged jurisdiction over marriage and became a tool for enforcing internal church discipline or control can be in a church whose primary authority is no longer juridical but moral and which needs to exercise this authority not so much to coerce as to call to conversion. Nevertheless, an alternative process will be neither adequate nor credible if it promises justice without mercy or mercy without justice. Fidelity to Jesus’ command so absolute that it dooms the divorced to spend their lives in the church’s vestibule is no more adequate than compassion for survivors of marital breakdown so unconditional that, wittingly or unwittingly, it succumbs to the secular siren song that claims marriage and divorce are purely matters of personal conscience and are, therefore, none of the church’s business.

At the dawn of the twenty-first century the church finds itself again facing the challenge that confronted it at the dawn of the twelfth century: how to find an appropriate and credible balance between justice and mercy in its dealing with marital breakdown. It is easy to be critical of the achievement of the canonist of the twelfth and subsequent centuries, but the fact is they took what was given them and made it work as best they could. If we in the twenty-first century do the best we can with what we have to work with, perhaps we can dare to hope that it will be granted to some at least to hear the Gospel in our Catholic gobbledegook.

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**Endnote**

References


