

## THE MASS SERVER AND CANON 29

The increasing emphasis upon the social character of the Mass has occasioned a renewed appreciation of the function of the server and has underlined the propriety and even urgency of his presence arising from the nature itself of the Sacrifice. This element of propriety has been fortified, of course, and elevated to the status of obligation by the law of canon 813.<sup>1</sup> Nevertheless, it has also been observed consistently that there is no contradiction, absurdity, or deficiency in a Mass celebrated without a server, or indeed without any attendant at all. With characteristic perception the late Pope Pius XII expressed this balance of ideas, though in the reverse order, in his celebrated Encyclical on the liturgy, *Mediator Dei*: "While it is clear, from the foregoing explanation, that the Mass is offered in the name of Christ and of the Church, and that it is not lacking even in its social significance though it be celebrated by a priest without any acolyte in attendance, nonetheless, as befits the reverence due to a liturgy so sublime as this, it is Our insistent will (as in fact it has ever been the law of Mother Church) that no priest should approach the altar without a server present to assist and answer him, according to the principle of canon 813."<sup>2</sup>

In the historical application of this principle there has not been any doubt that Mass could sometimes be offered not only without incongruity but also legally and morally in the absence of any server. It is admitted, in other words, that the canon to which the Holy Father referred as the precedent and norm of his own insistence is not absolute or inflexible. The problem has always been rather to determine the precise limits of its flexibility, especially with reference to the perplexing case in which, apart from any compelling necessity, the priest must either celebrate without a server or abstain from offering the Holy Sacrifice altogether. I have referred to a renewed awareness, on the part of the faithful generally, of the social implications of the Mass. It is the purpose of this note to suggest an inquiry into the understanding, on the part of priests generally, of the extension of this law to the ultimate dilemma of Mass without a server or no Mass, and what, if any, canonical significance such an understanding might have.

<sup>1</sup> Canon 813, § 1: "Sacerdos Missam ne celebret sine ministro qui eidem inserviat et respondeat."

<sup>2</sup> "Licet tamen ex iis, quae modo exposuimus, clare pateat nomine Christi atque Ecclesiae litari, neque suis fructibus etiam socialibus Eucharisticum privari Sacrificium quamvis nullo praesente acolytho a sacerdote celebretur, nihilo secius ob huius tam augusti mysterii dignitatem, volumus atque urgemus—quod ceteroquin semper praecepit Mater Ecclesia—ut nullus sacerdos ad altare accedat, nisi adsit minister, qui ei inserviat eique respondeat, ad normam canonis DCCCXIII" (*AAS* 39 [1947] 557).

Any contemporary discussion of this question must almost necessarily begin with the Instruction of the Sacred Congregation of the Sacraments, October 1, 1949, to local ordinaries, on the norms to be observed in petitioning certain indulgences, including the indulgence to celebrate Mass without a server.<sup>3</sup> In the historical or narrative part of this latter section, the S. Congregation listed four situations in which celebration without a server has been held to be excusable: when viaticum is needed for administration to the dying; when the people's obligation of hearing Mass is urgent; when, in time of epidemic, a server is not easily had and the priest would have to abstain for a long time from saying Mass; when the server goes off during the Mass. The Instruction introduces these situations as the cases to which, in the common judgment of moral and liturgical experts, the few exceptions to this law are reducible, and concludes with the singular expression that apart from these cases, on which there is the unanimous consent of authors, the law does not suffer derogation except by way of apostolic indulgence.<sup>4</sup>

Notwithstanding the definitive tone of its language, however, the Instruction did not terminate the discussion of the cases or circumstances in which Mass might yet be said without a server.<sup>5</sup> On the contrary, it started a whole new debate regarding the sense in which its enumeration was to be considered exclusive. While some commentators were inclined to accept the four cases as a literally total list,<sup>6</sup> others through one approach or

<sup>3</sup> AAS 41 (1949) 493-511; *Canon Law Digest*, ed. T. L. Bouscaren, S.J., 3 (Milwaukee, 1953) 318-40.

<sup>4</sup> The full text of this important passage reads: "Lex utendi ministro in Missa perpauca tantummodo patitur exceptiones, quae ab AA. rei liturgicae et moralis peritis uno consilio reducuntur ad sequentes casus: (a) si viaticum ministrari debeat infirmo et minister desit; (b) si urgeat praeceptum audiendi Missam ut populus eidem satisfacere possit; (c) tempore pestilentiae, quando haud facile invenitur qui tale ministerium expleat et secus sacerdos debeat per notabile tempus se abstinere a celebrando; (d) si minister e loco abscedat tempore celebrationis, etiam citra consecrationem et offertorium: quo casu reverentia sancto Sacrificio debita prosecutionem exigit etiam illo absente. Extra hos casus, pro quibus habetur unanims auctorum consensus, huic legi derogatur dumtaxat per apostolicum indultum, praesertim in locis missionum" (*loc. cit.*).

<sup>5</sup> Among the more recent discussions of the question: J. McCormick, S.S., "Absence of a Server at Mass," *American Ecclesiastical Review* 142 (1960) 126-27; M. Campo, S.J., "El ministro de la Misa privada," *Estudios eclesiásticos* 33 (1959) 57-76; M. Huftier, "Peut-on dire la messe sans servent?", *Ami du clergé* 69 (1959) 529-31; J. Sanders, S.J., "Mass without a Server," *Clergy Monthly* 23 (1959) 281-84, 323-28, 368-69. Reports on the question also appear in the "Notes on Moral Theology" by J. Connery, S.J., *THEOLOGICAL STUDIES* 20 (1959) 615, and by J. Lynch, S.J., in the present issue, supra pp. 247-49.

<sup>6</sup> C. Zerba, in his commentary on the Instruction, writes: "In Instructione . . . hi casus ad quatuor sequentes taxative reducuntur" (*Monitor ecclesiasticus* 82 [1957] 204).

another considered further motives not excluded. Some were content simply to observe that other justifying causes could be verified in fact. Thus Cappello: "Enumeratio dici nequit exclusiva; nam, praeter casus recensitos, alii quoque in praxi verificari possunt."<sup>7</sup> A more involved suggestion proposed that the list is complete as to "exceptions," but not exhaustive as to excusing causes.<sup>8</sup> Perhaps the most thorough and successful explanation was offered by Fr. G. Kelly, who took pains to show how the cases could be said to be reduced to four (cf. "exceptiones . . . reducuntur ad sequentes casus") in the sense that each represents a certain category or type of excusing cause.<sup>9</sup> In this theory the case of the pestilence represents a cause personal to the celebrant. And in this understanding of the Instruction such other needs as the urgency of a Gregorian series, celebration for a seriously ill person, the priest's own Sunday obligation, and other circumstances which had enjoyed reputable, if not unanimous, support would still be admissible. Even authors who did not positively endorse what we may call this illustration-theory, did not seem prepared to commit themselves to the proposition that the cases were literally exclusive.<sup>10</sup> The result of all this has been that other considerations, and specifically other considerations personal to the celebrant, are still commonly held admissible in practice.

Among the considerations personal to the celebrant the most controversial has been the question whether, in the absence of any such compelling need as the Gregorian series or other instances suggested above, he might celebrate without a server from the sole motive of devotion.<sup>11</sup> To a large

<sup>7</sup> *Periodica* 38 (1949) 420.

<sup>8</sup> Sanders, *art. cit.*, pp. 326-27. Whether this is the sense of the Instruction or not, it is very unlikely that the Instruction was attempting something that must surely be unprecedented in canon law: an exhaustive and immutable list of excusing causes, which in the nature of human law are bound to be as variable and unpredictable as the contingencies to which the principle will have to be applied.

<sup>9</sup> G. Kelly, S.J., "Mass without a Server," *THEOLOGICAL STUDIES* 11 (1950) 577-83.

<sup>10</sup> Even Zerba, notwithstanding his reference to a "taxative" list (*supra* n. 6), refers to other opinions which have existed and concludes that the Instruction "tutior est amplexa disciplinam." Cf. also G. Montague, *Problems in the Liturgy* (Westminster, Md., 1958) pp. 4-7; E. Mahoney, *Priests' Problems*, ed. L. McReavy (London, 1958) pp. 82-84; M. Zalba, S.J., *Theologiae moralis compendium* 2 (Madrid, 1958) nn. 662-63; etc.

<sup>11</sup> Without attempting a complete bibliography, the following may be cited as representative: F. M. Cappello, S.J., *De sacramentis* 1 (4th ed.; Turin, 1945) n. 702; Matthaeus a Coronata, O.M.C., *De sacramentis* 1 (Turin, 1943) n. 210 and note; J. McCarthy, *Problems in Theology* 1 (Westminster, Md., 1956) 160-64; W. Curtis, "Mass without a Server," *American Ecclesiastical Review* 115 (1946) 364-75; P. O'Brien, C.M., "Mass without a Server," *ibid.* 116 (1947) 432-47; G. Kelly, *art. cit.*; M. Campos, *art. cit.*

extent the debate has been conducted in terms of extrinsic probability, and as this is one of the more indefinite areas of moral theology, the result has also been, to a large extent, obscure and unsatisfactory. In one of the more extensive examinations of the question on its intrinsic merits, however, Fr. Kelly argues competently and cogently that the devotion of the priest is not the insignificant consideration it is sometimes assumed to be—as implied in the expression “mere devotion,” for instance—and that, while it does not always and necessarily constitute a grave issue for the priest, it can amount to a hardship serious enough to justify celebration without a server in preference to the alternative of abstaining. Some gauge of this difficulty, as Fr. Kelly aptly observes, would be the degree of inconvenience which many priests will undergo in order not to miss their daily Mass.<sup>12</sup>

But although the priest's devotion certainly should not be shrugged off as a small matter, its acceptability as a justifying cause for celebration without a server is subject to other difficulties, partly in the order of principle, partly in the order of application. The first objection might be stated somewhat as follows. It is an important part of the principle of excusation that only such inconveniences or hardships can serve as valid causes of excuse which are extrinsic to the observance of the law; i. e., such as become involved only per accidens and not such as are connected ordinarily, normally, and per se with its observance. It follows per se, for instance, that a person who has broken his fast should suffer a sense of privation in abstaining from Communion; it would be per accidens that a person already at the altar rail should have to suffer loss of reputation through suspicion of mortal sin if he turns away without Communion. The first is a consequence of the law itself, for any normally devout person; the second would be an effect not envisioned by the law, resulting from the accidental circumstances of this particular case. The former sort of inconvenience is considered intrinsic to the law, something foreseen and intended by the legislator, and hence, if it does not exceed his authority to exact (which is not in question here), a normal concomitant of the observance of the law, and not a cause exempting from its application.<sup>13</sup> But, the argument continues, the hardship

<sup>12</sup> For other thorough developments of the intrinsic argument, cf. O'Brien, *art. cit.*; H. Bonzelet, O.F.M., “Mass without a Server, Again,” *American Ecclesiastical Review* 117 (1947) 369–72; and an unsigned note, *ibid.* 61 (1919) 318–23.

<sup>13</sup> Cf. L. Rodrigo, S.J., *Tractatus de legibus* (Santander, 1944) n. 430; A. Van Hove, *De legibus ecclesiasticis* (Mechlin, 1930) n. 291; G. Michiels, O.F.M.Cap., *Normae generales iuris canonici* 1 (2nd ed.; Tournai, 1949) 463 ff. (especially p. 463, note 3); A. Vermeersch, S.J., and J. Creusen, S.J., *Epitome iuris canonici* 1 (7th ed.; Mechlin–Rome, 1949) n. 114; E. Genicot, S.J., and J. Salsmans, S.J., *Institutiones theologiae moralis* 1 (17th ed. by A. Gortebecke, S.J.) n. 134. Rodrigo, for instance, writes: “[Incommodum] debet esse

entailed in the inability to satisfy the devotional impulse to say Mass is not extrinsic but intrinsic to this law. In making the law requiring a server as a condition for celebration, in other words, the legislator did not have in mind only those priests to whom it would not matter very much whether they offered the Holy Sacrifice or not. In levying a universal law he must have foreseen and intended that it would import for many the hardship of devotional privation. This hardship, therefore, is a consequence following per se from its observance and not a valid title to exception according to the principles of excusation.<sup>14</sup>

This theoretic objection seems to be strengthened by the consideration that it is, to say the least, difficult to think of any confessor or priest-consultant allowing the faithful to go to Holy Communion when certainly not fasting on the basis of one's allegation that he suffered a severe sense of emptiness (as many do) whenever obliged to forego daily Communion. The same might be said of various other obligations. If, then, the priest may celebrate without a server when no external necessity is urgent, it must be for some other reason than that the motive of devotion constitutes an excusing cause.

By way of parenthesis, it may be observed here that authors do sometimes speak as if certain light obligations admitted personal devotion as an excusing cause. The obligation of using an amice at Mass, for instance, is commonly regarded as of such a nature that, if none is available, the priest may still say Mass, even out of devotion, i.e., although there be no special need of the Mass. Without entering into the terminology actually used by authorities in this connection (which does not always imply an "excuse"), I believe it would be more accurately representative of the point at issue in such cases to say not that one is excused by reason of devotion but rather that, while the use of an amice (for instance) is indeed preceptive, the obligation does not extend so far as to prohibit celebration without one when it cannot be had with a moderate effort. The notion of a precept imposing a condition to be fulfilled in the placing of a certain act without necessarily and inseparably extending to the prohibition of the act itself in the unavoidable absence of that condition is important for the purposes of this note.

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*extrinsecum legi, seu per accidens cum observatione legis coniunctum: nam si intrinsecum fuerit, seu per se et natura sua normaliter coniunctum, censetur de substantia actus praecepti moraliter considerati, nec praeter intentionem praecipientis, qui illud praeviendo, tamen rem praeceptam voluit et imposuit prout ea normaliter accidit molestam evenire" (loc. cit.).*

<sup>14</sup> In somewhat briefer form this objection has been voiced by Curtis, *art. cit.*, p. 375; McCarthy, *art. cit.*, p. 163.

A second difficulty with the opinion of excusation by reason of devotion, at least if the latter is understood subjectively (as it seems usually to be),<sup>16</sup> is the fact that it forces upon the priest the responsibility of judging whether he does indeed experience a serious inconvenience in foregoing the celebration of Mass. Such a burden of introspection and evaluation is a fertile source of anxiety and hesitation which could easily deter especially the more devout priests in whose behalf it is proposed. That in itself is not necessarily an argument against the proposition. To some extent every excusing cause must be evaluated and even morally measured: whether, for instance, one's indisposition is severe enough to excuse from Sunday Mass. But in such cases there is an objective, external, and perceptible difference between the obliged and the excused; whereas if one priest may say Mass without a server because he feels a notable sense of loss in its omission, and another may not say Mass because he is not so conscious of the privation, the law is applying differently to two persons in exactly the same external situation. The difference is purely subjective, internal, and intangible. This militates against the theory's acceptability in two ways: it is more than ordinarily conducive to uneasiness and anxiety, and it contradicts the tendency of human law generally that for all subjects in the same external circumstances the norm of conduct should also be the same.

In attempting to propose as fairly as possible the case against the theory of excuse by reason of devotion, it is certainly not the purpose of this note to take sides against that theory or to disturb the peace of the many who have found satisfaction in it. Rather it is to essay a somewhat different approach to the question, one which may possibly be acceptable, both legally and psychologically, even to those who hesitate to admit the other in principle or who do not feel at ease in its application.

This suggested approach may be stated in the form of a question: whether it can be said that the practice of priests generally (including precisely the more observant, conservative, and conscientious) constitutes an interpretation of this law with reference to its extension, and specifically that it is not understood as extending to the necessity of abstaining from celebration when, all proportionate means to obtain a server having been employed, one is confronted with the alternative of saying Mass without one or ab-

<sup>16</sup> For a more objective (and, I believe, a preferable) concept of the "devotion" motive, cf. Curtis: "The expression 'devotionis causa' covers all cases where there is no obligation to celebrate, but where the priest says Mass for his own spiritual welfare, for the glory of God as manifested through each Mass, and for the good of the whole Church to which go the *fructus generales* of the Mass" (*art. cit.*, p. 370). Fr. Curtis, however, did not agree that Mass could be celebrated without a server for this motive alone.

staining from the Holy Sacrifice. More exactly, there are two questions: whether it is in fact the practice of priests generally to say Mass in such a case (*quaestio facti*), and whether such a practice can be said to constitute a legitimate interpretation of the law with regard to its extension (*quaestio iuris*).<sup>16</sup>

The concept of a customary mode of observing the law (*consuetudo iuxta legem*) is perhaps less familiar generally than the custom of not observing the law (*consuetudo contra legem*) or the custom of acting in a way not antecedently prescribed (*consuetudo praeter legem*). This last can have the force of instituting new norms; the second, the force of abrogating previous ones; and the first, the force of interpreting those which exist. Indeed, it is an ancient principle of law that such custom is the best kind of interpretation: "Consuetudo est optima legum interpres."<sup>17</sup> For the most part, to be sure, the mode of observing the law has no independent existence as a custom, because it simply coincides with the law itself in execution. This is called a mere *consuetudo facti*, as distinguished from the *consuetudo iuris*, in which the mode of observing the law is operative as a norm of interpretation. The latter also is twofold, accordingly as the custom preceded the law and now serves as a sign or indication of the intention of the legislator (who is presumed to have wished to canonize the practice), or arises subsequently and serves to determine the sense of a law whose precise meaning on some particular point is doubtful, or to preclude the origin itself of doubts by pre-establishing a uniquely recognized form of observance.<sup>18</sup> It was in this way, it would seem, that vocalization of the Divine Office in private recitation came to require neither more nor less than the moving

<sup>16</sup> The idea that the practice of good priests could serve as a guide in this matter is, of course, not new: cf. J. Donovan, C.M., *Homiletic and Pastoral Review* 46 (1946) 964; C. Augustine, O.S.B., *A Commentary on the New Code of Canon Law* 4 (St. Louis, 1920) 151; D. Creeden, S.J., *Compendium theologiae moralis*, by A. Sabetti, S.J., and T. Barrett, S.J. (34th ed.; New York, 1939) "Addenda," p. 1135. Fr. Donovan observed, in fact, that "the practice of judicious and careful priests is an interpretation of the Church's mind" (*loc. cit.*).

<sup>17</sup> Now canon 29 of the Code of Canon Law; cf., for Roman law, *Digest* 1, 3, 37 (Paulus), and for its adoption into canon law, c. 8, X, *De consuetudine* 1, 4 (Innocent III).

<sup>18</sup> Cf., e.g., Suarez, *Tractatus de legibus* 7, 4, 14-15, and 7, 17, 2-3; Van Hove, *De consuetudine* (Mechlin-Rome, 1933) nn. 235 ff.; Michiels, *op. cit.* 2, 192 ff.; Rodrigo, *op. cit.*, n. 696; etc. Suarez, for instance, writes: "Et iuxta haec intelligenda est multorum sententia dicentium, tam efficacem esse consuetudinem ad interpretandam legem, ut licet ex verbis, vel materia legis ambiguum sit, an contineat praeceptum, obligans sub mortali, necne, et ideo per se sumpta esset in benigniorem partem interpretanda, nihilominus si constet, consuetudinem esse receptam, ut graviter obligantem, sub mortali obligare, censendam esse" (*op. cit.* 7, 17, 5).

of the lips. So also, apparently, the gravity of the obligation of fasting became established.<sup>19</sup>

The function of determining the sense of a doubtful law is the aspect of these customs more usually discussed by the authorities. But interpretation of law, in its fullest sense, includes not only the exposition of its sense in the abstract. It includes a judgment of its force, its extension, its application in various contingencies, and of the causes which justify exceptions. Thus Van Hove appeals to the axiom ("consuetudo est optima legum interpret") to fortify his principle that in evaluating the sufficiency of an excusing cause the common estimation of prudent men and the practice of the Church are especially to be considered, since, unless it so insists explicitly, the Church may be considered unwilling to urge its law beyond this common estimate.<sup>20</sup> In this statement there appear also the significance and internal value of the custom as a form of interpretation in canon law. It is not something independent of, and possibly in conflict with, the mind of the legislator; its whole legality consists precisely in its conformity with that general intention which the ecclesiastical lawgiver habitually has, that the particular expressions of his will should admit some further refinement and determination in the practice itself of the community.

The great difficulty with any argument from custom, however, is not generally the question of law but the question of fact, the verification of its actual existence. That would mean, in our concrete case, that when priests through no fault of their own find themselves faced with the alternative of celebrating without a server or not at all, even though there be no external urgency for the Mass, it is the practice of the majority, including those who show themselves in other matters prudent, pious, and observant, rather to celebrate than to abstain, not indeed with the mind of acting contrary to the law but precisely because they do not judge that they are obliged to forego the Holy Sacrifice in such circumstances. It is rare enough to find adequate documents or witnesses strictly to prove any custom. In the present matter it is evidently impossible from the nature of the case. Still, we can perhaps go a little further than the bare assertion that in our opinion such a practice does obtain. We can introduce certain considerations which indirectly suggest that for one reason or another (and it is not necessary for all to arrive at the common conclusion by way of the same premises<sup>21</sup>) the existence of this attitude is sufficiently general.

<sup>19</sup> Suarez, *ibid.*

<sup>20</sup> "Praecipue tamen attendendae sunt *communis aestimatio* prudentum, et *praxis Ecclesiae*. Ecclesia non censetur velle legem suam urgere ultra hanc communem aestimationem: consuetudo est optima legum interpret . . ." (*De legibus*, n. 291).

<sup>21</sup> Cf. Van Hove, *De consuetudine*, n. 243.



The first inference would be derived from the fact that the practice of a community is formed, to a large extent, by its most widely circulated and most influential literature. It is highly significant, therefore, that from its inception in 1889 until the controversial Instruction of 1949, articles, notes, or replies to questions in the *American Ecclesiastical Review* defended, on at least twelve occasions, the priest's freedom to say Mass without a server even apart from any external urgency,<sup>23</sup> and challenged this opinion only four times.<sup>24</sup> These ranged, to be sure, from a few lines to long arguments, and the first five of the favorable answers came before the Code of Canon Law, when the American bishops enjoyed the faculty to permit Mass without a server. Writings in the *Homiletic and Pastoral Review*, though starting later and for a time on the opposite side, had come to be strongly favorable to that opinion by 1946.<sup>25</sup> It would be almost injurious to the promoters and staff of these two esteemed American periodicals to imagine that the common practice could have been at variance with this preponderance of authoritative opinion. Nor does it seem likely that a momentum thus induced would have been suddenly checked and reversed by a few brief, undeveloped statements, subsequent to the Instruction of 1949, to the effect that the favorable view was no longer tenable,<sup>26</sup> particularly since it has been known from the beginning that the exclusivity of the Instruction's list of exceptions was a matter of dispute.

More significant than the sheer number of sponsors, of course, is the fact that what we may call the broad interpretation of the law has been held by a modest but adequate group of authorities. And this second consideration carries us beyond the limits of America to a more general view of the problem and of its solution. It is not my intention to enter here into an exhaustive analysis and evaluation of the argument from authority.

<sup>23</sup> Scil.: 7 (1892) 381-82; 11 (1894) 386; 19 (1898) 190-91; 23 (1900) 640-41; 54 (1916) 346-47; 60 (1919) 550; 61 (1919) 100; *ibid.*, 318-23; 68 (1923) 294-96; 78 (1928) 407-13; 116 (1947) 432-47, by P. O'Brien; and 117 (1947) 369-72, by H. Bonzelet. With apologies to Fr. O'Brien, from whose carefully compiled list I have departed both by addition (60 [1919] 550) and by the omission of two loci which I did not consider clearly supportive (52 [1915] 218, and 55 [1916] 314).

<sup>24</sup> So far as I found. Scil.: 78 (1928) 403-7, by M. Forrest, M.S.C.; 91 (1934) 298-301, by V. Schaaf, O.F.M.; 102 (1940) 71, unsigned; and 115 (1946) 364-75, by W. Curtis.

<sup>25</sup> S. Woywod, who had originally been favorable, wrote against the opinion in 32 (1932) 969-70. J. Donovan, C.M., at first adhered to Woywod's position in 42 (1942) 953, and *ibid.* 1059-60, but in two later replies defended the broader view: 45 (1945) 537, and especially 46 (1946) 963-64. A citation from the latter appears above, n. 16.

<sup>26</sup> Scil.: F. Donnelly, commenting on the Instruction, *Homiletic and Pastoral Review* 50 (1950) 363-65; W. Schmitz, S.S., replying to a question, *American Ecclesiastical Review* 132 (1955) 121-22.

This has already been done very capably for both sides.<sup>26</sup> Suffice it to observe that the supporters of the broader opinion have included writers of the highest international standing (such as Cappello, Prümmer, Wouters, Varceno-Loiano<sup>27</sup>), as well as others whose influence was more limited by the medium in which they wrote (such as Donovan and Bonzelet<sup>28</sup>). The point I am trying to make is rather that the prestige of the opinion's sponsors cannot have failed to exert an influence in shaping the attitude and conduct of priests in the circumstances under discussion, who would tend to welcome and follow the more favorable opinion, provided only it be adequately subscribed.

Among the more intrinsic motives which will have contributed to the formation of a general attitude toward our problem is the fact that, in this context, the very alternative of having to omit Mass has long and widely been considered, and still is considered, to constitute a "necessity" of celebrating without a server. One of the special faculties currently granted by the S. Congregation of the Propagation of the Faith is the faculty to permit the celebration of Mass without a server "in casu necessitatis."<sup>29</sup> This is uniformly understood by commentators on these faculties as extending to any case in which the priest would otherwise have to abstain from celebrating.<sup>30</sup> There is a long and significant history behind this interpretation. For although the same terms were not used in the indult enjoyed in the United States previous to the Code,<sup>31</sup> it was always supposed that such concessions were subject to the condition that some necessity of the

<sup>26</sup> Particularly by O'Brien and Curtis; cf. supra n. 11.

<sup>27</sup> F. M. Cappello, S.J., *De sacramentis* 1, n. 702; D. Prümmer, O.P., *Manuale theologiae moralis* 3 (10th ed., by E. Münch, O.P.; Barcelona, 1946) n. 304; L. Wouters, C.S.S.R., *Manuale theologiae moralis* 2 (Bruges, 1933) 269; Gabriele de Varceno, O.M.Cap., and Seraphinus a Loiano, O.M.Cap., *Institutiones theologiae moralis* 4 (Turin, 1940) n. 217.

<sup>28</sup> *Art. cit.* (supra nn. 24 and 12).

<sup>29</sup> The latest text of the *Formula maior*, n. 4, reads: "Permittendi ut *Missa* celebrari possit, in casu necessitatis . . . etiam *sine ministro* . . ." (*Monitor ecclesiasticus* 75 [1950] 353). The form has been the same, on this point, for many years.

<sup>30</sup> Cf. Sanders, *art. cit.*, p. 282; G. Vromant, C.I.C.M., *Facultates apostolicas* (Brussels-Paris, 1947) n. 36; C. Sartori, O.F.M., *Iuris missionarii elementa* (Rome, 1947) p. 89; X. Paventi, *Commentarius in facultates S. Cong. de Propaganda Fide* (Rome, 1944) p. 19.

<sup>31</sup> Article 23 of the Apostolic Faculties read: "Celebrandi bis in die, si necessitas urgeat . . . per unam horam ante auroram et aliam post meridiem, sine ministro, et sub dio et sub terra, in loco tamen decenti, etiamsi altare sit fractum vel sine reliquiis sanctorum, et praesentibus haereticis, schismaticis, infidelibus et excommunicatis, si aliter celebrari non possit" (A. Konings, C.S.S.R., *Commentarium in facultates apostolicas* [4th ed., by J. Putzer, C.S.S.R.; New York, 1897] p. 268).

Mass be verified. And yet—on the authority of the Cardinal Prefect of Propaganda—it was judged sufficient cause if one were faced with the simple alternative of having to omit Mass.<sup>32</sup> Note that this “case of necessity” did not mean a necessity of celebrating without a server as opposed to celebrating with one; it meant precisely a situation comparable to, and actually listed together with, such other causes as the need to provide viaticum, the urgency of a Mass of precept, or for some special intention, etc. Hence it is not surprising that even after the cessation of the American indult at the time of the Code authors continued to regard this situation as a case in which the precept of a server would not be binding, as appears strikingly in this apparently first discussion of the question subsequent to the Code:

Although these faculties have been withdrawn simultaneously with the promulgation of the new Code of Canon Law, the interpretation of theologians mitigates the rigor of the prescription found in the missal (De Def. Tit. I, 10) as required by the liturgy. “Communiter dicunt Doctores licitum esse celebrare sine ministro urgente necessitate.” Among the cases which constitute a necessity is that which would oblige a priest otherwise to omit the celebration of Mass.<sup>33</sup>

But perhaps the most persuasive evidence of the sort of mentality I am suggesting is the very persistence with which this question has been raised so long and so universally. This is significant because, unlike certain other recurring problems and uncertainties, it cannot be attributed to any intricacy of the matter or obscurity of the text. The law is so utterly simple, and does so apparently—as far as words go—include the case at issue, that the only explanation of this constant query may well be that priests commonly, whether for intrinsic reasons or extrinsic, whether for clearly perceived ones or through some cultivated, if indefinable, sense of the spirit of ecclesiastical discipline, find it too difficult to think that the legislator meant the law to exclude their daily Mass when the lack of servers is not general enough or habitual enough to merit the concession of an indult.

It must be emphasized again that I am not proposing the existence of a custom contrary to the law, a practice of not observing it in a point in which it actually and certainly applies, with the effect that ultimately the obligation would cease to bind altogether. Certainly no one even inclines in that direction. I am thinking rather of a custom according to the law, a mode of observing it, with the effect of interpreting the law as to its extension and application. There are certain very practical differences. In the first

<sup>32</sup> Cf. *American Ecclesiastical Review* 7 (1892) 381–82; Konings-Putzer, *op. cit.*, pp. 281–82.

<sup>33</sup> *American Ecclesiastical Review* 60 (1919) 550. Cf. also *ibid.* 23 (1900) 640–41; 54 (1916) 346–47; 61 (1919) 100, 318–23.

place, a custom according to law does not require any specified duration before it acquires a value equivalent to doctrinal interpretation. That is to say that from the time it exists as a general practice it enjoys the same legitimate standing as a solidly probable opinion.<sup>84</sup>

A second important difference between this sort of custom and contrary custom is that, in this approach, the priest is emphatically not relieved of the grave obligation of taking proportionate means to obtain a server, as he would be if there were question of an abrogation of the law or obligation itself by adverse custom. On the contrary, in this explanation the principal weight and force of the law impinges precisely on the conscientious and reasonable effort to procure a server. These means are, of course, relative to the opportunities of the respective priests involved. There is a vast difference, for instance, between the situation and responsibility of the pastor of a parish, the superior of a religious community which conducts a high school or college, the assistant priest in a parish or the priest-professor in the school, and the mere priest-visitor at either one or the other institution. The effort, too, is to be a proportionate one. Which is to say that, on the one hand, it can involve moderate inconvenience, since the obligation is a grave one, and yet it need not involve serious hardship, since it is not more than ordinarily grave. But it is only after one has made whatever attempt is morally possible in one's respective circumstances that one can appeal to any sense and usage of the community as at all sympathetic to celebrating without a server.

No usage, however, can remain legitimate, either as a custom or as interpretation, which is repudiated by the authentic interpretations of the Holy See. Reference has been made above to the Instruction of the S. Congregation of the Sacraments in 1949, and its enumeration of exceptions to the rule of canon 813. The question must now be asked, whether the S. Congregation intended to exclude the legitimacy of any other title, or at least to disapprove the practice of celebrating unassisted, even in particular cases, in the absence of any external pressure comparable to those described therein. We have already mentioned the lack of agreement on the first, more general point. On the second, a number of authors regard the Instruction as decisive.<sup>85</sup> The late Canon E. J. Mahoney wrote: "Since the 1949

<sup>84</sup> Cf. Michiels, *op. cit.* 2, 194; Rodrigo, *op. cit.*, n. 696; Van Hove, *De consuetudine*, n. 243.

<sup>85</sup> E.g., Mahoney, *loc. cit.* (supra n. 10); Donnelly, *loc. cit.* (supra n. 25); Schmitz, *loc. cit.* (supra n. 25); McCormick, *loc. cit.* (supra n. 5); Montague, *loc. cit.* (supra n. 10). It does not seem necessary to refer especially to the Encyclical *Mediator Dei* in this connection (supra n. 2) since it is clear that the intention of the late Holy Father is to urge the matter "ad normam canonis DCCCXIII," which is, of course, the whole point at issue.

instruction, it seems certain to us that the lenient view can no longer be defended. It is within the competence of the Sacred Congregation to correct abuses, which has now been done in no uncertain terms."<sup>86</sup> I doubt there are many readers with a greater regard or admiration than my own for Canon Mahoney's consistently wise and balanced opinions; but I respectfully submit that if the S. Congregation intended, in this Instruction, to reprobate the doctrine or practice at issue, it did so in very uncertain terms indeed.

The problem, in other words, does not concern the authority of the document but the intention of the S. Congregation. Authors have observed that the phraseology employed in the conclusion denotes specific approbation (*in forma specifica*) on the part of the Holy Father, with the effect that the act would have the force of pontifical law and not just the administrative, and specifically directive, value usually ascribed to an instruction as distinguished from other curial acts.<sup>87</sup> The point might be critical and might require further examination—particularly with reference to the scope of the content to which this special efficacy extends—if the mind and purpose of the S. Congregation were manifestly hostile to the idea suggested here. There are, however, at least two reasons for believing that the Holy See did not set out to define the matter at all.

In the first place, the normal mode of indicating the direct purpose of a document is the title of the document itself. In this case the document is entitled "An Instruction to local ordinaries with a view to the petitioning of indulgences (1) of a private oratory, (2) of the portable altar, (3) of saying Mass without a server, (4) of reserving the Most Blessed Eucharist in private chapels."<sup>88</sup> A little further along (n. 5) the Instruction amplifies somewhat this statement of objective, saying that since abuses have arisen in the asking and use of all these faculties, the S. Congregation has thought it wise to review and remedy the whole discipline of the aforesaid indulgences.<sup>89</sup> But, as is

<sup>86</sup> *Loc. cit.*

<sup>87</sup> Cf. Sanders, *art. cit.* (supra n. 5) p. 327. The pertinent passage reads: "Sæpius autem D. N. Pius Papa XII . . . certa scientia et matura deliberatione approbare et Apostolica Auctoritate munire dignatus est, contrariis quibuslibet, etiam speciali mentione dignis, minime obstantibus atque mandavit ut Instructio eadem in *Actorum Apostolicæ Sedis commentario officiali* ederetur, ab omnibus sacerdotibus et fidelibus latini ritus sedulo et religiose servanda" (*AAS* 41 [1949] 511). Cf. Rodrigo, *op. cit.*, n. 614; Van Hove, *De legibus*, n. 342.

<sup>88</sup> "Instructio ad Locorum Ordinarios pro postulandis Apostolicis indulgentiis: (1) oratorii domestici cum suis extensionibus; (2) altaris portatilis; (3) litandi Missam sine ministro et (4) asservandæ Ssime Eucharistiæ in privatis sacellis" (*AAS* 41 [1949] 493).

<sup>89</sup> "Porro in exposcendis præfatis omnibus facultatibus iisdemque exercendis excessus atque abusus non leves aliquando irrepsisse conspectum est. Huic igitur S. Congregationi,

common to almost all official documents, besides what are called the dispositive sections (detailing the points to be observed in petitioning, executing, or using the indults), there are nondispositive passages also, devoted to historical background, motivating reasons, and the like. It is in such a context, rather than as the direct object of the Instruction, that the doctrine on the matter of the server is narrated.

It is altogether possible, of course, that notwithstanding the principal objective indicated by the title, the Instruction could issue at the same time an *ex professo* condemnation of related abuses. The second reason for doubting this intention with reference to the server is that the language itself does not clearly contain it. If it had been the purpose of the S. Congregation definitively to reform the matter of exceptions to the rule of the server, or at least to outlaw as an abuse celebrating when not pressed by serious external demands, it would have been quite simple to say so. Why, in that case, should the text have made no mention at all of abuses in connection with the server, whereas, with reference to each of the other three indults, and in one case at considerable length, it does protest against contrary abuses?<sup>40</sup> Some unmistakable language would have been especially called for if the protest were to be enclosed in a document addressed to the local ordinaries and officially designated as norms for regulating the petition of various indults. Or, in what sense does the Instruction speak of the recognized exceptions as *reducible* to four (“*reducuntur ad sequentes casus*”) and attribute to these a unanimity of authorities (“*uno consilio*,” “*pro quibus habetur unanimes auctorum consensus*”), when it is demonstrable that at least one example—the absence of a server due to epidemic—appears in very few authors and enjoys actually less support than others omitted by the Instruction (e.g., celebration with a view to the priest’s own Sunday obligation)?<sup>41</sup> Why, finally, if the purpose were to exclude other exceptions or broader interpretations, is it stated that apart from the listed cases only an indult *derogates* from the law (“*huic legi derogatur dumtaxat per apostolicum indultum*”), when the term “derogation,” though not very

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cui universa disciplina in iisdem indultis moderandis est concedita (can. 249), visum est ad difficultates et incommoda removenda, et in posterum praecavenda . . . praefatorum indultorum integram disciplinam ad trutinam expresse revocare remediaque suppeditare idonea quae infra singillatim recensentur, ut omnia recto ordine componantur” (*ibid.*, p. 494).

<sup>40</sup> *Ibid.*, pp. 496, 501, 504, 511. It is interesting that Zerba (Subsecretary of the same S. Congregation), while he does not admit the broader interpretation himself, does not say that the Instruction condemned the idea of Mass without a server from a motive of devotion, but only that on that point “*Instructio . . . tutiorem est amplexa disciplinam . . .*” (*art. cit.* [supra n. 6] p. 206).

<sup>41</sup> Cf. Kelly, *art. cit.* (supra n. 9) pp. 579–80.

precise at best, does at least generally signify removing a certain area from the scope of the law itself (a thought which we have vigorously disavowed above), and is usually not confused, as a legal institution, with such devices as excuses, exceptions, applications, or interpretations? Perhaps it has been assumed a little too hastily that all the hazards of the Instruction lie in the path of those who pursue the broader interpretation. I suggest that it is quite possible sincerely to read the Instruction without finding any clear evidence of an intention to reprobate such a customary interpretation as outlined above, or formally to change the status of the question relative to legitimate instances of Mass without a server.

But the existence of a custom is a very easy thing to affirm and a very difficult thing to prove. It is a question of fact, specifically of the actual practice of a majority. Perhaps my own estimate of the fact is wrong. Perhaps the true fact is that the majority of priests throughout the world, when under no particular external necessity of celebrating, actually do abstain from saying Mass rather than do so without a server. But if the contrary is true, that for the most part priests confronted with this dilemma do not consider themselves obliged to forego the Holy Sacrifice, then it is proposed that the practice constitutes an interpretation of the meaning and extension of the law, which any priest may follow without anxiety or scruple, without the need of establishing any further necessity in the objective order, or any discomforting sense of hardship in the subjective. That is to say that when one has taken all the proportionate means at his disposal and still has no server, he may legitimately say Mass on the ground that this is the common practice of other observant and conscientious priests in the same circumstances.

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