SELECT QUESTIONS ON THE EUCHARISTIC FAST

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FOLLOWING the appearance of the Apostolic Constitution *Christus Dominus* and the concomitant Instruction of the Sacred Congregation of the Holy Office,[1] unifying into one set of exclusive norms the various indults relaxing the Eucharistic fast, it was natural that all the periodicals devoted wholly or partially to questions of canon law and moral theology should issue commentaries on the new rules. It was natural, too, that there should be differences of opinion. It is not the purpose of these pages to review the whole field of the new legislation, nor even all the more remote details and cases on which conflicting views have been expressed. There are, however, certain issues so fundamental as to predetermine the answers to many particular questions or so generic as to influence the application of whole sections of the law. There are other points more limited in scope but especially significant in their implications. It may be of some service to gather together the various opinions on some of these issues and to offer a few modest and respectful suggestions toward their evaluation.

I

The most basic problem of all, of course, is to determine the precise norms of interpretation postulated by the new law. There is, however, a preliminary question: to what extent has the meaning of the law already been definitively settled by the Instruction of the Holy Office in those matters in which the latter is more explicit or more detailed than the Constitution (the formal law)? Specifically, the point at issue is whether this Instruction is to be accepted as an authentic interpretation of the Constitution in the sense of canon 17, §2, having therefore the same legislative force as the law itself, or whether it is an ordinary administrative act of the Sacred Congregation.[2]

[1] Jan. 16, 1953, *Acta apostolicae sedis*, XLV (1953), 15–24, 47–51.

[2] Canon 17, § 2: "Interpretatio authentica, per modum legis exhibita, eandem vim habet ac lex ipsa . . . ." The following attribute to the Instruction a binding force equal to that of the Constitution: F. Hürth, S.J., annotations in *Periodica*, XLII (1953), 53–55; A. Bergh, S.J., "Jeûne eucharistique et messes du soir," *Revue des communautés religieuses*, XXV (1953), 37; W. Conway, "The New Law on the Eucharistic Fast," *Irish Ecclesiasti-*

The difficulty does not arise precisely from the question of competence. For laws outside the Code the various congregations retain the power of authentic interpretation within the sphere of their specified interests.[3] And, in the supposition of several congregations partially competent, as in this case, there would be no incongruity in the assignment of the whole task to that congregation which, of all those concerned by reason of the matter, enjoys a certain traditional preeminence.[4] Nor does the difficulty come from the fact that the document is not issued in any of the more usual modes of formal interpretation: doubts, resolutions, responses, declarations. There is no exclusive formula for the issue of interpretations. The difficulty comes rather from the fact that the document is composed in another form, the form of an instruction, which has a specific function fairly well defined in the canonical system, and quite distinct from formal interpretation. The proper function of an instruction, as it is described in the *motu proprio* of Benedict XV (though the form did not originate with him), is to explain, illuminate, and complement the law, and to promote its execution.[5] It is to be supposed that in the present in-

cal Record, LXXX (1953), 300; L. McReavy, *Clergy Review*, XXXIX (1954), 237; E. Moriarty, "New Regulations on the Eucharistic Fast," *Jurist*, XIV (1954), 2; S. Alvarez-Menendez, O.P., "De eucharistico ieiunio ac vespertinis missis," *Angelicum*, XXXI (1954), 7–8; J. Ford, S.J., *The New Eucharistic Legislation* (New York: Kenedy, 1953), p. 114. Whether anyone has formally defended the contrary, it is suggested in the observation of W. Onclin that the Instruction's restriction on taking ablutions in immediately successive Masses does not have the same obligatory character as the Constitution: "La nouvelle législation sur le jeûne eucharistique," *Ephemerides theologicae Lovanienses*, XXIX (1953), 89.

[3] Cf. canons 247 ff. This power, acknowledged in a response of Feb. 11, 1911 (*AAS*, III [1911], 99–100), would not have been limited by the *motu proprio* of 1917 (*AAS*, IX [1917], 184) except with regard to the canons of the Code itself. Cf. J. R. Schmidt, *Principles of Authentic Interpretation* (Washington: Catholic University of America, 1941), pp. 104–105; A. Vermeersch, S.J., and J. Creusen, S.J., *Epitome iuris canonici*, I (7th ed.; Mechlin–Rome: Dessain, 1949), n. 121.

[4] M. Castellano, O.P., attributes the assignment to the fact that the Holy Office is competent in the principal matter involved, the Eucharistic fast of the celebrant (canon 247, § 5): "Ad novam disciplinam circa ieiunium eucharisticum commentarium," *Monitor ecclesiasticus*, LXXVIII (1953), 386.

[5] *AAS*, IX (1917), 484, n. II. Cf. Schmidt, *op. cit.*, pp. 85–105; Vermeersch–Creusen, *op. cit.*, n. 132; A. Van Hove, *De legibus ecclesiasticis* (Commentarium Lovaniense, Vol. I, Tom. II; Mechlin: Dessain, 1930), n. 243, and *Prolegomena* (Comm. Lov., Vol. I, Tom. I; 1945), n. 72; L. Rodrigo, S.J., *Tractatus de legibus* (Praelectiones theologico-morales Comillenses, II; Santander: Sal Terrae, 1944), n. 379.

stance it has its normal function, as an administrative act of the sacred congregation, unless the contrary is clearly indicated. Such an indication does not seem to be contained in the fact that the Instruction was issued *de mandato SSmi*,[6] nor in the actual form of its approbation.[7] A mandate to produce something, even when it extends the area of the agent's competence, does not alter the nature of the thing produced. There are many instances of documents issued *de mandato*;[8] it is no common doctrine that such a mandate automatically constitutes antecedent approbation *in forma specifica*.[9] And while there is no fixed formula for such special approbation in the conclusion of a document, there are at least certain usual expressions, wanting in this case; in particular, it should be evident that the Holy Father is ordering not merely the publication of the document, as here, but the observance of its content.[10]

On the other hand, it has been commonly recognized not only that the sacred congregations do in fact issue interpretations of universal and obligatory import, but that their instructions, while not formally and directly interpretative, frequently—as in this case—do indirectly

[6] ". . . Suprema haec Sacra Congregatio Sancti Officii, iussu mandatuque Summi ipsius Pontificis, statuit quae sequuntur" (*Inst.*, Prooem.). Fr. Hürth (*loc. cit.*) reads this to mean that the Supreme Pontiff determined the content itself of the Instruction. This is a literally possible understanding of the words, perhaps, but not the ordinary one. In other instances where such a thing has happened it is not stated that a Sacred Congregation determined this or that ("Sacra Congregatio . . . statuit") but "Sanctissimus . . . statuere dignatus est ut . . ." (*AAS*, XLII [1950], 330; similarly, *AAS*, XLIV [1952], 743; XLIII [1951], 602; XLII [1950], 602; XLI [1949], 616; etc.).

[7] "Summus Pontifex, hanc Instructionem approbans, statuit, ut ipsa promulgetur per editionem in *Actis Apostolicae Sedis* una cum Constitutione Apostolica *Christus Dominus*" (*Inst.*, p. 51).

[8] See, for example, *AAS*, XLIV (1952), 545, 552, 888; XLIII (1951), 37; XLII (1950), 19; XXXI (1939), 374; XXIV (1932), 75; etc.

[9] Approbation of an act "in forma specifica" confers upon it the authority of pontifical law, approbation "in forma communi" leaves it with the native administrative force proper to the organ from which it emanates. Cf. Van Hove, *De legibus*, n. 342; Rodrigo, *op. cit.*, n. 614.

[10] Cf. Rodrigo, *loc. cit.*: "*Formulae approbatoriae* diversae perhibentur; sed in *specifica* approbatione solent esse illae aut similes: Motu proprio, ex certa scientia, ex plenitudine potestatis Apostolicae . . . mandamus, statuimus, etc., aut Sanctitas sua mandavit, etc.: ita igitur ut aperte pateat Actum fieri ipsius R. Pontificis declarantis aut iubentis non meram publicationem, sed ipsam rem." Similarly Van Hove, *loc. cit.* Cf., for example, *AAS*, XXXVIII (1946), 353–54; XLVI (1954), 93; XXIV (1932), 81; etc. But the distinction is not expected to be always evident; cf. canon 1683.

involve actual interpretations. Canonists are not altogether unanimous in assigning the precise title and dignity of such interpretations, whether they should be called "authentic" or not, whether *per modum legis* or not.[11] There is, however, general agreement that an instruction is not necessarily limited to merely directive norms, but can, and frequently does, impose rules of practice which, with a view to the effective execution of the law and in conformity with its provisions, are strictly preceptive.[12] However significant, therefore, the question may be in the purely juridical order, there can be little doubt of the material effect of the present Instruction.

The practical problem, with which we are more concerned here, arises from the fact that not only the Constitution but the Instruction also (as time and experience have proved) requires interpretation. The question is whether they are to be strictly interpreted or broadly.

Interpretation is the explanation or determination of the sense of a law, or of a legal instrument in general.[13] It always begins, obviously, with the proper signification of the words employed in the text.[14] Ordinarily this proper signification is the meaning which the words have in common usage (*sensus usualis*) as opposed to figurative, literary, or purely etymological meanings which they might also have acquired. Sometimes, however, the law itself formally defines the sense of a term in general or in some particular context,[15] or, even without formal definition, has its own specific usage of words.[16] In such a case

[11] For the different opinions on this point, cf. F. M. Cappello, S.J., *Summa iuris canonici*, I (4th ed.; Rome: Pont. Univ. Gregoriana, 1945), nn. 58, 87, and *Periodica*, XXIII (1934), 231*–32*; Vermeersch–Creusen, *op. cit.*, nn. 121, 360; Schmidt, *op. cit.*, pp. 85–105; G. Michiels, O.F.M.Cap., *Normae generales iuris canonici* (2nd ed.; Tournai: Desclée, 1949), I, 499–503; A. Brems, "De interpretatione authentica C.J.C.," *Jus pontificium*, XVI (1936), 232, 236–39.

[12] Cf. Cappello, *op. cit.*, n. 107; Van Hove, *Prolegomena*, n. 71; Vermeersch–Creusen, *op. cit.*, n. 132; Rodrigo, *op. cit.*, n. 616; Schmidt, *op. cit.*, pp. 100–101.

[13] We are speaking here only of *doctrinal* interpretation on the part of private commentators, not of authentic interpretation on the part of the legislator or of some other person or body to whom this power has been committed (canon 17, § 1).

[14] Canon 18: "Leges ecclesiasticae intelligendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos Codicis parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum." Cf. canons 49, 67.

[15] Cf., for example, general definitions in canons 198, 145, 1409, 949–50, 1181; definitions limited to a context: canons 479, 1384, § 2; etc.

[16] Thus, for example, "sacellum domesticum" is not used in the law to designate what

this specialized meaning (*sensus iuridicus*) supersedes the usual as the "proper" signification of the words in legal documents generally or in the aforesaid context. It can happen, however, that a word is commonly used, whether popularly or juridically, in more than one sense, sometimes more inclusively, sometimes less. Both are proper senses of the word, one more broad, the other more limited. A broad interpretation, therefore, is one in which a word or unit of thought is understood in that proper sense which has the greater extension, i.e., applies to more cases; a narrow or strict interpretation is one in which the word or unit of thought is understood in that proper sense which has the lesser extension, i.e., applies to fewer cases.

But both broad and strict interpretations pertain to the genus of what is frequently called comprehensive interpretation. They do not go beyond or stop below the proper sense of the words. This comprehensive interpretation is opposed to extensive and restrictive interpretation, both of which depart from the proper sense, the first by excess, the second by defect. Extensive interpretation is the application of the law to a case which is not included in any, even the broadest, proper signification of the words. Restrictive interpretation is the non-application of the law to some case which in every proper sense of the words, even the narrowest, should be included.

Thus, for example, the word "non-Catholic" often signifies in the law, as it does in common usage, any person, baptized or unbaptized, who is not formally a member of the Roman Catholic Church.[17] It is also understood sometimes to mean only baptized non-Catholics.[18] These are both proper juridical usages of the word, and the only such usages. If, in some new piece of legislation, one accepts the term in the first sense, he interprets broadly, if in the second, strictly. Supposing, on the other hand, that the new law barred "non-Catholics" from certain Catholic activities; to exclude also Catholics who have joined the communist party would be an extensive interpretation; to exclude

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we call the "domestic chapel" of a religious house, which is, juridically, a semi-public oratory (canon 1188, § 2, n. 2). On the contrary, "domesticum sacellum" is used, in an Instruction of the S. Congregation of the Sacraments, of a *private* oratory as described in canon 1188, § 2, n. 3; *AAS*, XLI (1949), 497, n. 7.

[17] See canons 693, § 1, 1149, 1152, 1350, 1657, § 1, 1099, § 2; etc.

[18] Thus canons 2319, § 1, n. 1 ("minister acatholicus"), 2314, § 1, n. 3 ("secta acatholica"), 987, n. 1 ("filii acatholicorum").

only those non-Catholics who had once been Catholics would be a restrictive interpretation. Neither of these latter applications of the law is justified by a recognized sense of the word "non-Catholic" in common or legal usage. This is, of course, a simplification, as examples usually are. The point at issue may be rather a complex sense unit than any single word.

From these notions it follows immediately that the rendering of extensive and restrictive interpretations (if indeed they should be called "interpretations" at all) is the exclusive prerogative of the legislator himself or of someone to whom he has committed this special power, since they involve either an addition to the law or a partial derogation from it.[19] From the very nature of the thing, therefore, even if nothing had been said in the text, both extensions and restrictions are excluded from any merely private, i.e., doctrinal, interpretation of the present documents, and the question can only be one of broad or strict interpretation.[20]

With these concepts in view, we may consider to what extent the Constitution and the Instruction may have specified the norms to be employed in their interpretation. In the Constitution there is only one reference to interpretation: "Locorum tamen Ordinarii diligenter

[19] Michiels, *op. cit.*, pp. 478–79; Cappello, *op. cit.*, n. 84; I. D'Annibale, *Summula theologiae moralis*, I (5th ed.; Rome: Desclée, 1908), n. 187.

[20] It does not seem necessary or useful here to enter into the shades of difference with which various canonists approach the concept and divisions of interpretation; cf. Van Hove, *De legibus*, nn. 240–42, 296; Michiels, *op. cit.*, pp. 480–81; Schmidt, *op. cit.*, pp. 212–13, 218–19; A. Brems, *op. cit.*, XV (1935), 172–75; etc. In general there are two main attitudes, accordingly as one gives preeminence to the propriety of the words, toward the discovery of which the mind of the legislator is one means, or to the mind of the legislator, toward the discovery of which the propriety of the words is the first and principal means. Pre-Code canonists who are cited on one side or the other could possibly be read to favor either side. Compare these two passages in Suarez, *De legibus*, L. VI, C. I, n. 7 and n. 12; or the following two in Reiffenstuel, *Ius canonicum universum*, L. I, T. 2, nn. 371–72 and L. V, T. 33, n. 104. The language of the Code favors the first approach (canons 18, 49–50, 67–68), but the practical effect is so much the same that all employ the same examples and the tendency is to deny any real significance to this distinction; cf. Brems, *op. cit.*, p. 174. Similarly the distinction between extensions beyond the words but not beyond the mind of the legislator and extensions which go beyond both (e.g., Reiffenstuel, *op. cit.*, L. I, T. 2, n. 371) has no foundation in the Code and is pretty much abandoned in post-Code literature (except as some departure from the language may be strictly necessary in order to avoid futility, absurdity, or inequity in the application of the law). The reason is evident if one considers the nature of the old law, which had to be largely derived from particular enactments, as contrasted with the exact and general formulation of the Code.

curent, ut quaelibet vitetur interpretatio, quae concessas facultates amplificet . . . ."[21] In the Instruction there are five, in which the recurring theme is the same: ". . . evitetur quaelibet interpretatio, quae concessas facultates amplificet . . . ."[22] The normal meaning of *amplificare* is to make something larger than it is. This supposes that the dimensions of the thing are known. And this is the situation in an extensive interpretation, in which a provision is made operative beyond the known limits of the law. Broad or strict interpretation, on the other hand, is called for only when the intended meaning is not known. Consequently the sense of the clause is to prohibit the extension of those concessions whose limits are clear ("concessas facultates") rather than the broad interpretation of those provisions whose precise terms are doubtful in the text. This is very clear in the language of the Instruction, n. 10: "Causae autem gravis incommodi tres enumerantur, quas extendere non licet."[23]

So far as the text of the documents goes, therefore, the only norm of interpretation prescribed is the exclusion of extensive applications. But there is nothing new or peculiar in this. It is simply an admonition to observe the limits of all doctrinal interpretation, whether of laws, privileges, or rescripts in general.[24] It prevents, for instance, extension by analogy.[25] It does not touch the question of broad or strict interpretation.

It has been suggested that there is no place in the interpretation of these documents for the application of the rule of law, "Odia restringi,

[21] *Const.*, p. 23.

[22] *Inst.*, prooem.; cf. nn. 5, 10, 12, 19. In n. 12 the days for evening Mass are said to be determined "taxative"; in n. 10, "Causae autem *gravis incommodi* tres enumerantur, quas extendere non licet."

[23] It is in this sense that the admonition against "amplifying" the faculties is explained also by Onclin, *op. cit.*, p. 86; E. Regatillo, S.J., "El ayuno eucarístico," *Sal terrae*, XLI (1953), 173; W. Conway, *Irish Ecclesiastical Record*, LXXIX (1953), 388–89; etc.

[24] Canon 18; cf. note 14 above. Canon 49: "Rescripta intelligenda sunt secundum propriam verborum significationem et communem loquendi usum, nec debent ad casus alios praeter expressos extendi." Canon 67: "Privilegium ex ipsius tenore aestimandum est, nec licet illud extendere aut restringere." Cf. Suarez, *op. cit.*, L. VIII, C. XXVIII, n. 11: "Ratio est quia virtus et efficacia privilegii neque omnino neque essentialiter posita est in ratione, sed in voluntate concedentis; ergo parum refert quod in simili casu vel persona eadem ratio versetur, si voluntas ad illam non extenditur. Non autem extenditur si non exprimitur, quia (ut saepe dixi [e.g. L. VI, C. I, nn. 13–14]) inter homines voluntas non operatur nisi ut significata."

[25] Thus, it is clear that for the celebrant the labor which constitutes a recognized inconvenience is exclusively ministerial labor (*Const.*, III; *Inst.*, n. 4). It would be an ille-

et favores convenit ampliari."[26] This would be true, of course, if the meaning of "ampliari" in the venerable old rule were the same as that of "amplificare" in the texts under consideration. There are many passages in the classical canonists, however, where it is clear that by "ampliari" and "restringi" they meant not extensions or restrictions beyond or below the proper signification of the words, but precisely what we have called a broad or strict interpretation. "Ampliare" in the quaint style of the *regulae iuris* simply meant *sumere sensu amplo*.[27] Whether or not the adage has application in interpreting the present documents, therefore, is precisely the same question with which we began, whether they are to be broadly or strictly interpreted. And in defect of any specific provision in the text itself, the answer must be sought in the general principles of interpretation as given in the Code.[28]

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gitimate extension of the grant to allow other forms of labor on the analogy of the concession to the faithful, for whom any kind of debilitating labor suffices (*Const.*, V; *Inst.*, n. 10, *a*); cf. Suarez in note 24 above. With a view to the reception of Communion, however, the priest comes within the term "fideles," and could use their concessions to that extent. So also Castellano, *op. cit.*, LXXIX (1954), 31; Regatillo, *op. cit.*, p. 168; H. Werts, S.J., "The Eucharistic Fast," *Review For Religious*, XII (1953), 311–12.

[26] Reg. 15, *Regulae iuris in VI.* Thus Hürth, *op. cit.*, p. 83; Ford, *op. cit.*, p. 116; I. Gordon, S.J., "La nueva disciplina del ayuno eucarístico," *Razón y fe*, CXLVII (1953), 233, note 7.

[27] Thus, for example, Reiffenstuel, *op. cit.*, L. I, T. 2, n. 435: "Leges favorabiles ampliori interpretatione sunt adjuvandae: sive, in materia favorabili verba accipi debent secundum amplam suam significationem. Fundatur hoc in vulgata illa Reg. 15 Juris in 6: *Odia restringi, et favores convenit ampliari.*" Cf. also, in the same sense, Pirhing, *Ius canonicum universum*, L. V, T. 33, nn. 13, 17, 23, 25; L. I, T. 2, n. 104; Suarez, *op. cit.*, L. VIII, C. XXVIII, n. 17; Fagnanus, *Commentaria in quinque libros decretalium*, L. V, T. 40, c. 16, n. 14; D'Annibale, *op. cit.*, n. 184; Gonzalez Tellez, *Commentaria perpetua*, L. V, T. 40, c. 16, n. 5; T. 33, c. 7, n. 2; Veranus, *Universi iuris canonici commentarius, Regulae iuris*, R. XV, n. 21; B. Ojetti, S.J., *Commentarium in codicem iuris canonici*, I (Rome: Pont. Univ. Gregoriana, 1927), 146. If sometimes the rule was applied to extend the law to cases not expressed (cf. S. C. de Propaganda Fide, July 2, 1827, *Collectanea*, I, n. 796), it would only follow that in *that* sense (a peculiarity of the pre-Code system) the axiom has no further usefulness; cf. note 20 above.

[28] Hürth speaks of this law as containing its own norms of interpretation (cf. *op. cit.*, pp. 55, 83–84). Similarly, J. Genicot, S.J., and J. Putz, S.J., "The Eucharistic Fast," *Clergy Monthly*, XVII (1953), 250–51; Ford, *op. cit.*, pp. 116–17. But the only norm expressed in it is the exclusion of extensive interpretation, which really goes without saying. (All three writers, however [*loc. cit.*], seem to allow broad interpretation in the sense in which this is commonly understood.) Onclin observes more correctly, I think, that the Constitution is to be interpreted according to the norms proposed by the Code for ecclesiastical law in general (*op. cit.*, p. 86).

At this point the problem might seem to be just beginning, since in the Code principles of interpretation are given distinctly for privileges,[29] dispensations,[30] and laws which constitute an exception to the general law,[31] and there is no common agreement in referring the present concessions to any one or another of these categories.[32]

The text is not of much assistance on this issue. The term most commonly used to designate the new allowances is "facultates." It occurs thirteen times in the two documents, but in this connection it is a strictly non-technical usage of the word.[33] "Privilege" occurs once, but the reference is to previous indults.[34] "Dispensation" appears only in the Instruction, where it is used four times.[35] The word "exception" is not found anywhere in either document, and it is well known how difficult it is not only to determine the sense of the words "leges quae . . . exceptionem a lege continent" but even to apply in the concrete any particular theory about them.[36]

[29] Canon 68: "In dubio privilegia interpretanda sunt ad normam can. 50. . . ." Canon 50: "In dubio rescripta quae . . . iura aliis quaesita laedunt, vel adversantur legi in commodum privatorum . . . strictam interpretationem recipiunt; cetera omnia latam."

[30] Canon 85: "Strictae subsunt interpretationi non solum dispensatio ad normam can. 50 [cf. *supra*, note 29], sed ipsamet facultas dispensandi ad certum casum concessa."

[31] Canon 19: "Leges quae poenam statuunt, aut liberum iurium exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi."

[32] Thus Bergh, applying the rule for exceptions to the law and of dispensations in favor of particular persons, calls for strict interpretation (cf. *op. cit.*, p. 37). A. Bride is also for "strict" interpretation, but it is possible, from the context, that he means only to exclude extensions (cf. "Jeûne eucharistique, discipline nouvelle," *Ami du clergé*, LXIII [1953], 209–10). A. Peinador, C.M.F., in *Commentarium pro religiosis et missionariis*, XXXII (1953), 29, regards the concessions as true dispensations (by the Holy See) but, while excluding the use of analogy, does not draw the conclusion that strict interpretation is required.

[33] *Const.*, pp. 17, 22, 23 (four times); *Inst.*, prooem. (three times), nn. 5 (twice), 19, 20. This is not counting the use of the word in connection with former indults. In *Inst.*, n. 11, the term is used technically to designate the power of local ordinaries to permit evening Mass, but the interpretation of this faculty presents no difficulty, as it comes clearly under the principle of canon 66: "Facultates habituales . . . accensentur privilegiis praeter ius." Hence it is to be broadly interpreted. This might be significant, for instance, in judging the verification of solemnities "quae cum magno populi concursu celebrentur" (*Const.*, VI).

[34] *Const.*, p. 24.

[35] *Inst.*, prooem. and nn. 2, 3, 18.

[36] Cf. Van Hove, *op. cit.*, nn. 306–9; Michiels, *op. cit.*, pp. 576–80; Vermeersch–Creusen, *op. cit.*, n. 126; Rodrigo, *op. cit.*, n. 384. Thus, for example, Onclin calls for broad interpretation because he considers the new concessions not as exceptions ("iuris singularitates") but "ius singulare," since they are given not in the manner of particular dispensa-

But of course this diversity of norms is only a problem to the extent that the conclusion would be different accordingly as the norms of one or another category are applied. One has, therefore, the option either of choosing one species and attempting to prove it to be the right one,[37] or of showing that in any hypothesis the conclusion would be the same. Thus, passing over the opinion (now pretty much deserted) that canon 85 imposes a strict interpretation of all dispensations,[38] a strict interpretation of the new modifications would be required in only two suppositions: first, if these concessions constitute privileges or dispensations *in commodum privatorum* as explained in canons 68, 85, 50; or secondly, if, as exceptions to the general law, they fall under the norm of canon 19. Consequently, if it can be shown both that the concessions, whether dispensations or privileges, are not *in commodum privatorum*, and that not all exceptions (and specifically not these) demand a strict interpretation, then in any point of view on the precise nature of the grants, the conclusion will be the same. That is, broad interpretation will be in order. Both points can, in fact, be defended.

First, the concessions are not granted as a matter of private convenience. This does not follow, of course, from the fact that every law is for the common good, or that this law applies to all priests or faithful in the same circumstances. What must be shown is that the good envisioned in these relaxations is the good of religion or of the members of the Church collectively, not distributively. The relaxations obviously do benefit immediately the individual who is allowed to observe the mitigated fast. The point is that in this case the intention of the legislator is not directed exclusively or even primarily to making the law easier for the subjects but, through and by means of making it easier,

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tions but to promote the good of religion and the public welfare (cf. *op. cit.*, p. 86). G. Koerperich agrees (cf. "Jeûne eucharistique et messes de soir," *Revue diocésaine de Namur*, VIII [1953], 259).

[37] The application of broad interpretation is also defended by Regatillo, *op. cit.*, pp. 173–74, 364–65, on the general principle of favorable law. Others speak more negatively of broad interpretation not being excluded or of strict interpretation not being always required: Conway, *op. cit.*, LXXIX (1953), 388–89; Moriarty, *op. cit.*, pp. 2–3; E. J. Mahoney, *Clergy Review*, XXXVIII (1953), 365; Gordon, *op. cit.*, p. 233, note 7.

[38] Cf. Michiels, *op. cit.*, II, 760–61. The more common opinion now interprets broadly dispensations given for the common good, as was held before the Code; e.g., Schmalzgrueber, *Jus ecclesiasticum*, L. I, T. 3, n. 3.

to promote the glory of God and the sanctity of the Church as a whole. That such is the Supreme Pontiff's objective in the new law is formally and solemnly expressed in the Constitution: "Haec Nos decernentes, fore confidimus ut haud parum conferre possimus ad Eucharisticae pietatis incrementum, atque adeo aptius permovere atque excitare omnes ad Angelorum participandam Mensam, adaucta procul dubio Dei gloria ac Mystici Iesu Christi Corporis sanctimonia."[39]

Secondly, not all exceptions to a law require a strict interpretation. This is perhaps the more difficult point, as it involves an apparent contradiction of the general language of canon 19: "Leges quae . . . exceptionem a lege continent, strictae subsunt interpretationi." There is good reason to believe, however, that the intention of this canon is not as universal as it might seem. Certainly the idea does not appear for the first time in the Code. It was an accepted principle in canonical tradition that a disposition, whether of law or otherwise, correcting, modifying, or derogating from the general norm, was to be strictly interpreted.[40] The norm of canon 19, therefore, simply reproduces a concept already established in the old law. As such, in virtue of canon 6, n. 2,[41] it is to be understood according to the authority of the old law and the acceptation of approved authors. But it was part of the same tradition on this point that the principle of strict interpretation did not apply to those modifications which were inspired by considerations of public utility, the good of religion, or the furtherance of divine worship.[42] Several commentators on the Code have remarked the neces-

[39] *Const.*, pp. 21–22; cf. *Inst.*, n. 20.

[40] Cf. Suarez, *op. cit.*, L. V, C. II, n. 15: ". . . plures numerari solent modi, aut quasi species legum odiosarum: . . . lex exorbitans a jure antiquo, vel a communi jure, aut illi derogans, vel limitans, aut corrigens illud . . . ." Cf. Reg. 28, *Regulae iuris in VI*; Suarez, *op. cit.*, L. VI, C. VI, n. 11, C. XXVII, nn. 4–5; Reiffenstuel, *op. cit.*, L. I, T. 2, n. 419 ff., and *Regulae iuris*, R. 28, n. 5; Pirhing, *op. cit.*, L. V, T. 33, n. 14; D'Annibale, *op. cit.*, n. 184, note 23.

[41] Canon 6, n. 2: "Canones qui ius vetus ex integro referunt, ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt aestimandi."

[42] Thus Reiffenstuel, *Regulae iuris*, R. 15, n. 20: "Resp. eam [regulam] quoad primam partem de odiosis restringendis fallere in exorbitantibus a Jure, consequenter odiosis tam legibus, quam rescriptis, et privilegiis, ita ut non stricte sed late explicari et extendi possint ac debeant 1. Quando agitur de favore utilitatis publicae . . . . 2. In rescriptis et privilegiis concessis pro favore cultus divini, fidei, religionis, salutis animarum." (On the word "extendi" cf. note 27 above.) Cf. *ibid.*, R. 28, n. 6, and L. I, T. 2, n. 424; Pirhing, *op. cit.*, L. V, T. 33, n. 14; D'Annibale, *op. cit.*, n. 220; Michiels, *op. cit.*, I, p. 577; Van

sity of filling out its abbreviated language on interpretation, and specifically that of canon 19, by reference to the more exhaustive pre-Code doctrine.[43] And since it is evident from the language of the Constitution cited above that the objective of the present enactments is the public utility and the good of religion it follows that, even if regarded as exceptions to the law, they postulate not a strict but a broad interpretation.

Some commentators on the new law speak of the freedom to interpret broadly in some details, or allow that one need not always interpret strictly, or that broad interpretations are not excluded. The difficulty with this mode of expression is that, with regard to any particular doubt, it leaves us exactly where we started: is this point to be broadly interpreted or strictly, and by what criterion is one to decide? The only justification for any broad interpretation is that this is the sort of law which according to the canonical system calls for such interpretation. But if it calls for it at all, it calls for it equally throughout. Neither is it merely permitted in such a case, as if the commentator were still free to interpret strictly if he should prefer to do so.

II

Next to the heading of interpretation, perhaps the most generic issue occurs in those concessions which are granted to alleviate the inconvenience of observing the fast in certain situations. It is clear that not every inconvenience suffices, but only such as arise from those causes listed in the documents either mathematically (the celebration of Mass after nine o'clock,[44] a walk of at least a mile and a quarter) or indefinitely (infirmity, hard work of the ministry, debilitating labor).

Hove, *op. cit.*, n. 306; Ojetti, *op. cit.*, p. 149; F. Wernz, S.J., and P. Vidal, S.J., *Ius canonicum*, I (Rome: Pont. Univ. Gregoriana, 1938), n. 178.

[43] Cf. Van Hove, *op. cit.*, n. 299; Ojetti, *op. cit.*, p. 149; Wernz–Vidal, *loc. cit.*; Michiels, *op. cit.*, II, 432–33.

[44] For the celebrant this is expressly stated (*Inst.*, n. 4); it is rather commonly admitted as sufficient (though not always required) for the faithful also: F. J. Connell, C.SS.R., *American Ecclesiastical Review*, CXXVIII (1953), 251, note 19; R. Bruch, "Die neuen Bestimmungen über das Jejunium eucharisticum," *Theologie und Glaube*, XLIV (1954), 12; M. Zalba, S.J., "El ayuno eucarístico," *Estudios eclesiásticos*, XXVII (1953), 354; J. McCarthy, *Irish Ecclesiastical Record*, LXXIX (1953), 149; J. Madden, *Australasian Catholic Record*, XXX (1953), 150; A. Verhamme, *Collationes Brugenses*, XLIX (1953), 173, note 4; Bergh, *op. cit.*, p. 41; Bride, *op. cit.*, p. 205; Castellano, *op. cit.*, LXXIX (1954), 25; Regatillo, *op. cit.*, p. 167; etc.

The difficulty is whether it must be determined, for the application of the grants, that each individual in those circumstances does actually experience a personal hardship in the observance of the unmitigated fast, or whether it suffices that the objective situation be present in his case. (That objective situation, in those causes which are not already stated mathematically, would be such a degree of labor, infirmity, or relative lateness as, in the common estimation of prudent men, constitutes a notable difficulty for the average person.) In other words, must we distinguish the subjective discomfort itself, as a sort of formal element, from the source of the discomfort, as the material element, each to be separately examined; or do the enumerated circumstances constitute the total condition which the legislator himself judges inconvenience enough to merit the mitigation?

As we wish to confine the question to its more general aspects, i.e., to a commonly acknowledged problem, let us first separate certain subordinate distinctions which have been made. Several have pointed out that the collocation of words in the Instruction admits the interpretation that, in the case of the infirm, hardship is required only for the taking of liquid nourishment and not for the taking of medicine.[45] For the purposes of this discussion it is sufficient that inconvenience is required at least for the taking of liquid nourishment. Another distinction has been admitted by some that, as the references to inconvenience which are found in the listing of the late hour, hard work, and long walk on the part of the faithful are wanting in the dispositive paragraphs which enumerate the same causes for priests, the experience of inconvenience is not required in the latter.[46] Whether

[45] *Inst.*, n. 1: "Fideles infirmi . . . aliquid sumere possunt per modum potus, si, suae infirmitatis causa, usque ad sacrae communionis receptionem ieiunium, absque gravi incommodo, nequeunt servare integrum; possunt etiam aliquid sumere per modum medicinae . . . ." Cf. Zalba, *op. cit.*, p. 352; Gordon, *op. cit.*, p. 239; Werts, *op. cit.*, p. 307; Genicot–Putz, *op. cit.*, p. 45. The same condition is put with both medicine and liquids, however, in the norms circulated by the S. Congregation of the Council for insertion in the catechism of Pope S. Pius X: "Gl'infermi possono fare la santa comunione, anche dopo aver preso medicine o bevande, se per grave incommodo—riconosciuto dal confessore—non possono rimanere completamente digiuni" (*AAS*, XLV [1953], 809).

[46] J. Visser, "Nova legislatio canonica de disciplina servanda quoad ieiunium eucharisticum," *Euntes docete*, VI (1953), 7; Ford, *op. cit.*, p. 85; Moriarty, *op. cit.*, pp. 14–15; Conway, *op. cit.*, LXXX (1953), 316. The distinction is not admitted by others: Hürth, *op. cit.*, p. 64; Castellano, *op. cit.*, LXXIX (1954), 29; Genicot–Putz, p. 48; Koerperich, *op. cit.*, p. 268; Peinador, *op. cit.*, pp. 35–36.

this is sufficient argument to overcome the contextual indications that the condition of the faithful and the celebrant is identical in this respect, at least if one holds that subjective difficulty is not essential in the case of the faithful, he will hold the same a fortiori in the case of the priest, where the argument for it is less cogent.

In general, two points of view have been adopted in the matter. Some consider that, given the objective situation, it is not necessary to question further.[47] Others require that the subjective inconvenience be verified in each case.[48] But of those who regard the subjective state as the formal basis of the exceptions, many suggest that the enumerated circumstances constitute a presumption of grave inconvenience.[49] A presumption of grave inconvenience could be understood in either of two ways. It could mean that the legislator, anxious to mitigate the actual discomforts of the fast, presumes that such discomfort is commonly present in the given circumstance, and then proceeds to grant a relaxation absolutely in those cases. In such an interpretation, the presumption is only in the mind of the legislator. It is not part of the law; it does not require verification or admit contrary evidence. Thus understood, the idea of a presumed inconvenience simply coincides with the opinion that the subjective experience of the individual need not be questioned. But the presumption of inconvenience could also mean that, while the subjective hardship is required in each case and must be verified in fact, one may act as if it were verified, unless or until the contrary is clear. In this understanding, the presumption is not merely in the legislator, it is in the law itself. The grant is not absolute but conditioned upon the actuality of discomfort. It does not exempt the subject from examination; it merely determines the starting point of the examination. So understood, this proposal coincides in substance with the opinion which requires verification of the

[47] Visser, *op. cit.*, pp. 14–18; Connell, *op. cit.*, p. 252; Madden, *op. cit.*, p. 233; Werts, *op. cit.*, p. 312; Gordon, *op. cit.*, p. 249. Mahoney admitted the probability of this position; cf. *op. cit.*, pp. 231–32; also Genicot-Putz, *op. cit.*, pp. 252–53.

[48] Ford, *op. cit.*, pp. 93–94; Castellano, *op. cit.*, LXXIX (1954), 19, and LXXVIII (1953), 394–95; Onclin, *op. cit.*, p. 92; Koerperich, *op. cit.*, p. 272, note 1.

[49] Hürth, *op. cit.*, pp. 64, 68; Verhamme, *op. cit.*, p. 173; Bride, *op. cit.*, p. 326; Bruch, *op. cit.*, p. 9; Conway, *op. cit.*, LXXX (1953), 324; Peinador, *op. cit.*, pp. 35–36; Mahoney, *op. cit.*, pp. 231–32; Genicot-Putz, *op. cit.*, pp. 252–53; R. Carpentier, S.J., "Pour appliquer la nouvelle discipline du jeûne eucharistique," *Nouvelle revue théologique*, LXXV (1953), 406–7.

subjective hardship, and partakes of its difficulties in application. As a matter of fact, it is in this second sense that all the proponents of the presumption-theory seem to have understood their idea of presumed inconvenience. Apart from the fact that the tendency of modern canon law is to keep at a minimum presumptions in the law (they have always been a source of difficulty),[50] it is evident that if the objective circumstances can be shown to suffice, the presumption in the second sense becomes superfluous.[51]

The first line of argument, of course, must always be the text, and specifically the dispositive part of the text. The first textual argument for the necessity of subjective inconvenience is drawn from the Constitution:

> Christifideles pariter, etiamsi non infirmi, qui ob grave incommodum—hoc est, ob debilitantem laborem, ob tardiores horas, quibus tantum ad Sacram Synaxim accedere possint, vel ob longinquum iter, quod suscipere debeant—ad Eucharisticam mensam omnino ieiuni adire nequeant, de prudenti confessarii consilio, hac perdurante necessitate, aliquid sumere possunt per modum potus....[52]

The words, "Christifideles . . . qui ob grave incommodum . . . omnino ieiuni adire nequeant," do not indicate whether the judgment of real hardship (which is admittedly all that "nequeant" implies) is being made by the legislator or left to the individual. On the contrary, the use of the words, "hoc est, ob debilitantem laborem," etc., in apposi-

[50] Thus canon 21 ("leges latae ad praecavendum periculum generale") avoided the pre-Code terminology of laws based upon a presumption of danger; canon 92 ("domicilium acquiritur commoratione . . . protracta ad decennium completum") eliminated the presumed intention of permanence after ten years' residence; canons 1133–36 put an end to presumed convalidation of marriage in certain cases; etc. For a good survey of the presumption problem, cf. P. Hayoit, "La présomption du droit dans la tradition canonique," *Ephemerides theologicae Lovanienses*, XVII (1940), 218–84.

[51] A fourth position has been ascribed to Gordon and myself (Conway, *op. cit.*, LXXX [1953], 315, note 2), that the criteria of nine o'clock and two kilometers are automatic, while the others require subjective inconvenience. The reference is to Gordon, *op. cit.*, p. 249, and THEOLOGICAL STUDIES, XIV (1953), 230–31. I must accept the blame for obscurity, but I meant the objective inconvenience to suffice in all cases where it is clearly present. In the cases of infirmity and labor, that would be such an illness or occupation as would induce a notable difficulty, in the fast, for the average person (*op. cit.*, pp. 219, 231). But since, in these cases, there is more room for uncertainty, I proposed that in doubtful applications, presence or absence of subjective hardship might tip the scale one way or the other. So also Visser, *op. cit.*, p. 16.

[52] *Const.*, V.

tion with "grave incommodum" suggests that it is the legislator's own appraisal.[53]

The parallel text of the Instruction reads: "Fideles pariter, qui non infirmitatis causa, sed ob aliud grave incommodum ieiunium eucharisticum servare nequeunt, aliquid sumere licet per modum potus .... Causae autem gravis incommodi tres enumerantur ...."[54] The first part of the citation merely iterates the text of the Constitution; the argument here (for requiring subjective difficulty) is rather that the S. Congregation, in writing "causae gravis incommodi" instead of "casus in quibus grave incommodum habetur" (as appeared in the advance release of the Instruction in *Osservatore Romano*), indicated a distinction between the hardship itself, as the immediate condition of the grants, and the sources of the hardship.[55] Of course the cause of inconvenience is distinct from the experience of inconvenience, and the purpose of the document is to enumerate exclusively those causes which are recognized as bases for mitigations. This does not prejudice the question whether the legislator is judging their common sufficiency in general or leaving it to individual experience. And there is another good reason for writing "causae" rather than "casus" here: the documents are listing three generic headings of inconvenience (work, journey, hour), to which the word "case" is not properly applicable. "Casus in quibus grave incommodum habetur" might have implied that not only the headings but also the examples were exclusively given. It is significant, perhaps, that the final text, besides changing "casus" to "causae," also added "etc." to the illustrations of a late hour; and the Holy Office still found it necessary in a private reply to reassure someone that the examples of debilitating labor in the Instruction were not exclusive.[56]

[53] So also Visser, *loc. cit.*; Werts, *loc. cit.* The same suggestion is contained in the wording of the variations issued by the S. Congregation of Rites for the rubrics of the missal and ritual. Instead of "ob grave incommodum—hoc est," etc., the *incommoda* themselves are immediately listed: "Christifideles ... qui ob debilitantem laborem, tardiores horas ... vel longinquum iter eucharisticam mensam omnino ieiuni adire nequeant, aliquid sumere possunt per modum potus ..." (*AAS*, XLVI [1954], 70).

[54] *Inst.*, nn. 9–10.

[55] Genicot–Putz, *loc. cit.*; Conway, *op. cit.*, LXXX (1953), 314–15; Koerperich, *loc. cit.*; Ford, *op. cit.*, p. 94.

[56] Quoted in *Commentarium pro religiosis et missionariis*, XXXII (1953), 328–29.

A second textual argument is drawn from the following passage in the historical part of the Constitution:

> Placuit haec [facta historica] in memoriam ea de causa reducere, ut omnes perspectum habeant Nos, quamvis novae temporum rerumque condiciones suadeant ut non paucas facultates ac venias hac in re concedamus, velle tamen per Apostolicas has Litteras summam huius legis consuetudinisque vim confirmare ad Eucharisticum quod attinet ieiunium; ac velle etiam eos admonere, qui eidem legi obtemperare queant, ut id facere pergant diligenter, ita quidem ut ii solummodo, qui in necessitate versentur, hisce concessionibus frui possint secundum eiusdem necessitatis rationes.[57]

The first part of the passage causes no difficulty; it is simply a reminder that the present relaxations are not a first step toward the dissolution of the fast itself.[58] The difficulty is rather with the words "admonere," "queant," "secundum eiusdem necessitatis rationes." While the translations of other languages generally render "admonere" by some such close equivalent as "esortare," "exhortar," "exhorter," we find in English, besides "exhort," such renditions as "remind," "warn," "admonish."[59] Some commentators have regarded this as a recommendation that one should, if one can, forego even those mitigations of which one could legitimately avail oneself.[60] But even if regarded as preceptive, it remains to determine whether the precept is directed to those who do not suffer actual subjective hardship or only to those who do not come under the objective circumstances to be listed. The text directs it to those "qui eidem legi obtemperare queant." "Those who can observe the law" means, of course, those who can do so without notable inconvenience (compare above: "qui ob grave incommodum omnino ieiuni adire nequeant"). Whether this refers to subjectively grave inconvenience is the point at issue; it

[57] *Const.*, pp. 17–18. This passage is quite commonly cited as proof of the need for subjective inconvenience; cf., e.g., Castellano, *op. cit.*, LXXVIII (1953), 394–95; Genicot–Putz, *loc. cit.*; etc.

[58] Cf. also *Const.*, p. 23: ". . . Nos etiam atque etiam volumus Eucharistici ieiunii momentum, vim atque efficacitatem confirmare ad eos quod attinet, qui Divinum Redemptorem sub Eucharisticis velis latentem accepturi sunt."

[59] For example, *AAS*, XLV (1953), 27 ("esortare"); Regatillo, *op. cit.*, p. 149 ("exhortar"); Bergh, *op. cit.*, p. 35 ("exhorter"); Genicot–Putz, *op. cit.*, p. 49 ("exhort"); Ford, *op. cit.*, p. 9 ("remind"); Conway, *op. cit.*, LXXX (1953), 298 ("warn"); Moriarty, *op. cit.*, p. 4 ("admonish").

[60] Bride, *op. cit.*, p. 323; Visser, *op. cit.*, p. 17. Genicot–Putz regard it as containing at least an exhortation; cf. *op. cit.*, p. 254, note 14.

is no more clear here than in the first quotation. The phrase which might be expected to settle what precisely is required is, "secundum eiusdem necessitatis rationes." But *ratio* is one of the most flexible words in the Latin language.[61] A term whose sense usually has to be derived from the context is not a good basis for establishing the import of the context itself. In this text it has, in fact, been rendered as "measure," "limits," "nature."[62] It could also signify: according to the "description," or "enumeration," or "explanation" to be given of the various kinds of necessity. The whole phrase has even been understood as referring not to the present problem at all but to the principle that the causes are valid only to the extent that they are not freely created but exist by some necessity.[63] In a word, it is difficult to see how this oft-quoted passage proves anything other than the necessity of observing the whole fast on the part of those who do not come within the scope of the objective circumstances enumerated in the documents.

Indeed, as far as the text goes, it is significant that in the first norm of the dispositive part of the Constitution, where above all one would expect an inculcation of subjective difficulty, if it were intended, it is simply stated that the law of the fast continues the same for those who do not find themselves in the conditions about to be enumerated: "Ieiunii Eucharistici lex, a media nocte pro iis omnibus vigere pergit, qui in peculiaribus condicionibus non versentur, quas per Apostolicas has Litteras exposituri sumus."

In support of the textual argument it has been urged, for the requirement of personal hardship, that the function, or one of the functions, of the confessor is precisely to judge whether subjective difficulty is verified.[64] The documents do not say this. On the contrary, while the Constitution says only "de prudenti confessarii consilio,"[65]

[61] See Forcellini, *Totius latinitatis lexicon*, V, *s.v.* "Ratio," where thirty-five general usages are listed.

[62] It is rendered as "measure" by Ford, *loc. cit.*; Bergh, *loc. cit.*; Conway, *loc. cit.*; Bride, *op. cit.*, p. 326; as "limits" in *AAS*, *loc. cit.*, and by Regatillo, *loc. cit.*; Genicot–Putz, *loc. cit.*; as "nature" by Moriarty, *loc. cit.*

[63] Thus Bride, *op. cit.*, p. 326.

[64] Ford, *op. cit.*, p. 94; Conway, *op. cit.*, LXXX (1953), 314; Koerperich, *op. cit.*, p. 272, note 1; Bruch, *op. cit.*, pp. 13–14; Castellano, *op. cit.*, LXXIX (1954), 22; Carpentier, *op. cit.*, p. 407; Mahoney, *op. cit.*, pp. 231–32.

[65] *Const.*, II, V.

the Instruction says explicitly that the confessor must consider the conditions under which the infirm may use the concessions, and, for those other than the infirm, the causes of grave inconvenience.[66] Perhaps this is not a fair objection; but it does seem inconsistent to write, on the one hand, that "causae gravis incommodi" was inserted in order to differentiate the (subjective) inconvenience itself from its cause, and to say, on the other hand, that the confessor is to examine this inconvenience, when the text says he should study its cause. And he is allowed to give his judgment "semel pro semper" for as long as this cause exists.[67]

It has also been pointed out that the subjective experience of the individual is precisely the one thing the confessor cannot possibly examine.[68] The only one who can examine that (even if it could be made clear just how to measure a "grave" inconvenience here) is the individual himself. It is a little curious to read that the counsel would be superfluous if the confessor were only to verify the distance of a mile and a quarter or the late hour of nine o'clock, and yet find it somehow necessary that he should ask each time—which is all he could do—whether there is subjective hardship in the fast. There is an evident reason for the necessity of this counsel if one considers how many questions are disputed in this matter. It may be easy to grasp and retain an exact hour or distance; but there are many other points in the new law, concerning both the conditions and the concessions, which make the confessor's advice generally necessary, for purely objective reasons, in the faithful. And because it is generally necessary in fact, it is reasonable, as a matter of law, that it should be universally required.[69]

[66] *Inst.*, n. 2: "Condiciones, quibus quis dispensatione a lege ieiunii frui possit . . . prudenter a confessario perpendendae sunt . . . ." *Inst.*, n. 11: "Causae quidem gravis incommodi sunt prudenter a confessario pensitandae . . . ." So also the variations issued by the S. Congregation of Rites for the missal and ritual; cf. *AAS*, XLVI (1954), 70–71.

[67] *Inst.*, n. 11: "Confessarius autem consilium eiusmodi dare potest etiam *semel pro semper*, causa eadem gravis incommodi perdurante."

[68] Visser, *op. cit.*, pp. 14–15; cf. Gordon, *op. cit.*, p. 250.

[69] The changes circulated by the S. Congregation of the Council for the catechism of Pope S. Pius X attach the confessor's judgment to the "inconvenience": "Chi fa la comunione a tarda ora o dopo un lungo cammino o dopo un lavoro debilitante può prendere qualche bevanda fino ad un'ora prima di comunicarsi, se prova grande incommodo—riconosciuto dal confessore—ad osservare completamente il digiuno" (*AAS*, XLV [1953], 809). But it is evident that, having enumerated only the general headings in all cases, the

From this same reason, that the burden of deciding the presence of subjective hardship would necessarily devolve upon the faithful themselves, there arises another argument against that interpretation. Commentators have observed that such an understanding of the law would be a fertile source of scruples and anxiety.[70] Or, to avoid that problem, people would forego the alleviations which the legislator evidently wished them to have.[71] It is easy to say they should make the judgment without scruple; besides the well-known futility of such admonitions, the occasion of anxiety would be intrinsic to the law itself. Such an interpretation should be supported by more compelling evidence than any hitherto adduced for the need of subjective inconvenience. Note too that this difficulty is not avoided by the presumption-theory; ultimately the person would still have to decide for himself whether or not he actually felt sufficient discomfort.

Moreover, one of the expressed purposes of the new law is to effect a uniformity in the observance of the Eucharistic fast.[72] Would not an insistence on the subjective hardship as the formal, indispensable condition lead to quite the opposite effect?[73] Of two persons in the same external circumstances, one might experience notable difficulty, the other might not. Given the same difficulty, one might have the moral courage to affirm it, the other might not. Given the same sort of affirmation, one confessor might judge that the person sounded sufficiently harassed, another might not. Ordinarily it is the tendency of human law to condition as little as possible upon internal dispositions of the subject and as much as possible upon easily verified and easily judged external facts, in order that for all subjects in the same objective situation the norm of conduct may also be the same. "Optima lex est, quae minimum relinquit arbitrio iudicis."[74] The internal element is inescapable, of course, in matrimonial and penal law, from

confessor's advice would be necessary to determine whether even the objective conditions of the law were present.

[70] Visser, *op. cit.*, pp. 14–15 ("scrupulorum non esset finis"); Regatillo, *op. cit.*, p. 174; Gordon, *op. cit.*, p. 249; Werts, *op. cit.*, p. 312.

[71] Fr. Conway writes of such a situation in Ireland; cf. *op. cit.*, LXXX (1953), 305.

[72] "Quamobrem, ut gravibus hisce incommodis ac difficultatibus occurramus, utque indultorum diversitas in actionum discrepantiam ne cedat, necessarium ducimus Eucharistici ieiunii disciplinam ita mitigando statuere, ut quam largissime fieri potest . . . eiusmodi legi omnes obtemperare facilius queant" (*Const.*, p. 21).

[73] So also Visser, *op. cit.*, pp. 14–15.

[74] Cf. D'Annibale, *op. cit.*, n. 188.

the very nature of consent and guilt. In other matters too it is exceptionally a determining factor; in the establishment of residence, for instance, or in religious apostasy.[75] But because it is exceptional, the presumption is rather the contrary.

This same expressed purpose of reducing to a unified norm the various exceptions formerly conceded by indult lends a further clue to the intention of the legislator in this matter. It may be assumed, where the contrary is not clearly indicated, that the nature of the concessions was not meant to be changed. In the published relaxations of the fast granted prior to the new law, however, reference to individual subjective discomfort is significantly absent.[76]

Finally, it is very unlikely that the norm, in this respect, is to be basically different for priests and faithful. In the absence of a clear intention to distinguish, therefore, any doubt about the nature of the inconvenience should be resolved in favor of uniformity. But in the passages which state the freedom of priests to take liquid nourishment in consideration of a late hour, long walk, or ministerial work, there is no reference to any hardship other than that intrinsic to the causes enumerated.[77] The conclusion would be that, for the faithful also, the intention is to grant the concessions whenever the situations described in the law are objectively realized.

By way of appendix to this section, the problem of subjective inconvenience which we have been discussing is not to be confused with the somewhat similar but quite distinct question, whether the concessions may be enjoyed only when the conditions of a late hour, long journey, or hard work exist independently of the subject, or whether he may freely create these obstacles to the observance of the full

[75] Cf. canons 92, §§ 1–2; 664, §§ 1–2.

[76] Cf. T. L. Bouscaren, S.J., *Canon Law Digest*, II (Milwaukee: Bruce, 1943), 215–16; III (1954), 366–73. In the French indult for evening Mass (*ibid.*, III, 374–75), a confessor was to judge whether the faithful could not, without grave inconvenience, go to Mass in the normal morning hours. This does not seem to have been a question of subjective difficulty, but of circumstantial obstacles. Only in the permission of military chaplains to take liquids or medicine before the celebration of a second Mass, or a first at a later hour or distant place, is there mention of personal difficulty in the fast: "provided grave and certain inconvenience, especially physical weakness, makes it genuinely necessary for you to break the fast" (*ibid.*, II, 593).

[77] *Const.*, III: "Sacerdotes, qui vel tardioribus horis, vel post gravem sacri ministerii laborem, vel post longum iter celebraturi sunt, aliquid sumere possunt per modum potus, exclusis alcoholicis . . . ." Cf. Visser, *op. cit.*, p. 15.

fast. The preceding question regarded the inconvenience of observing the fast in certain circumstances; the present question regards the possibility of celebrating or communicating under other circumstances. The position one takes on either of these questions does not predetermine his answer to the other.

We have referred only to the cases of the hour, journey, and labor because the problem will scarcely arise of someone's procuring an infirmity precisely in order to enjoy the mitigated fast.[78] Similarly the question of necessity is not raised with regard to the freedom of receiving at evening Mass. Some necessity in that case is indeed postulated as a basis for having the Mass at that time of day; but of the faithful who assist, it is positively stated that even those for whom the Mass was not primarily intended may freely receive thereat.[79]

Actually the question does not seem to be so much whether the situation must be a necessary one, but to what extent it must be necessary; that is, how much difficulty must be involved in receiving or celebrating at some earlier time, or nearer church, or without previous occupations. That some necessity is required seems to be evident, for the faithful, in the text of the Constitution: "Christifideles . . . qui ob grave incommodum omnino ieiuni adire nequeant, . . . hac perdurante necessitate, aliquid sumere possunt. . . ."[80] And there is, again, the passage discussed above, in which the general principle is enunciated that only those who find themselves in some necessity can profit by the concessions, according to the "rationes" of that necessity.[81] Even if "necessity" in this text is used by metonomy for the inconvenience itself, or the inconvenient situation, it is an appropriate usage only in the supposition that the latter is to some extent imposed upon the subject.[82]

[78] It has been observed, however, that infirmity which results, for instance, from overindulgence the previous night is not excluded from the concessions; cf. Regatillo, *op. cit.*, p. 364; Werts, *op. cit.*, p. 307.

[79] *Const.*, VI: "Si rerum adiuncta id necessario postulant . . . ." *Inst.*, n. 15: "Fideles, quamvis non sint de eorum numero, pro quibus Missa vespertina forte instituta sit, ad sacram Synaxim libere accedere possunt . . . ."

[80] *Const.*, V.

[81] *Const.*, pp. 17–18.

[82] Several commentators hold that the *celebrant* is free to create the various excusing situations, because the Constitution, n. III (note 77 above), says: "Sacerdotes qui . . . celebraturi sunt . . . ." Cf. Onclin, *op. cit.*, p. 91; Ford, *op. cit.*, p. 86; Connell, *op. cit.*, p.

From the beginning, however, it has been commonly recognized that the necessity in question need not be absolute—the complete lack of any earlier Mass, for instance, or the absence of any nearer church. This might be a simple norm to apply; but it would largely defeat the purpose of the new legislation and is not postulated by the text. Relative necessity (an action is relatively necessary when it is the only way of achieving one good without sacrificing another) is a juridically proper understanding of the word; and in accordance with the principle of broad interpretation the term has been understood in that sense which allows the favors to the greater number.

But relative necessity is itself a variable thing; and some earlier commentators, perhaps on the basis of the examples in the descriptive part of the Constitution, were inclined to require a rather urgent cause.[83] Unlike the requirement of "grave" inconvenience, however, there is no indication of the measure of this necessity. Therefore, because the assignment of any limit would be arbitrary, another source of anxiety, and an impossible burden for the confessor who would have to assess the infinite variations of circumstance, it rapidly became the tendency to regard any reasonable cause, rather than only a grave one, as sufficient. Some have explicitly stated this as the norm;[84] others imply it in their lists of illustrations—Communion at the parochial or nuptial Mass, group Communions or pilgrimages, parents alternating with the care of the children, and so on.[85] Concretely, this would exclude the election of the late hour, distant church, or previous occupations, for the sole purpose of taking nourishment

249; Visser, *op. cit.*, p. 27. But "celebraturi" does not affirm freedom of action; it denotes futurity, prescinding from freedom or necessity. It is questionable whether this word is enough to offset the general language of *Const.*, pp. 17–18. Hence others explicitly require necessity of some kind in the celebrant, too; e.g., Regatillo, *op. cit.*, pp. 229, 366; Bride, *op. cit.*, p. 333; Conway, *op. cit.*, LXXIX (1953), 305.

[83] Regatillo, *op. cit.*, pp. 167, 228, 362–63. This author, however, mitigated his opinion subsequently; cf. *op. cit.*, p. 507.

[84] For example, Conway, *op. cit.*, LXXX (1953), 317; Gordon, *op. cit.*, p. 242. Others use terms which seem about the same: Hürth, *op. cit.*, pp. 71–72 ("quaedam necessitas"); Castellano, *op. cit.*, LXXIX (1954), 27 ("iusta ratio"); or at least say that it need not be a grave necessity: Bride, *op. cit.*, p. 333.

[85] Cf., for instance, Werts, *op. cit.*, p. 314; Castellano, *op. cit.*, LXXIX (1954), 29; Connell, *op. cit.*, p. 251; Bride, *op. cit.*, pp. 333–34; Bruch, *op. cit.*, p. 9; even though some of these authors speak of "considerable inconvenience" or "fairly serious" causes.

beforehand; for no other reason, that is, than to partake of the new benefits, to evade the total fast.[86]

One who gets home from a Saturday-night dance at one o'clock in the morning, for example, would not be justified in deciding on a ten o'clock Sunday Mass simply in order to be able to take a glass of milk. It might well be, however, that because of being up late, the later Mass would be indicated anyway for the sake of legitimate rest. This is sufficient necessity. In fact, if the person is so hungry that the alternative is the later Mass or no Communion, I suggest he could choose the later Mass. He would not be doing so exclusively to evade the fast, but in order to be able to receive. But this would be licit, I should think, only if he could not have taken something before midnight, or forgot to do so.

It seems even clearer to me, though some have judged otherwise, that a priest who inadvertently took some non-alcoholic liquid nourishment after midnight could still celebrate after nine o'clock, even if only out of devotion.[87] There is a reasonable cause for celebrating at that time, a motive other than escape from the fast. It is necessary that he say Mass after nine if he is to say it at all. Therefore he does not set the hour in order to drink; he sets it in order to say Mass. And the same would be true of the faithful with a view to receiving Communion. What is objectionable in this matter is the artificial arrangement of adjuncts for the sheer sake of personal comfort. But when an involuntary situation forces the election of celebrating or receiving at a late hour (for instance) or not at all, it does not seem any more unreasonable to choose the late hour in order to enjoy the substance itself of celebrating or receiving than to choose it for some accidental circumstance such as celebration at a special altar or Communion at a special Mass. If the choice is permitted in the latter cases, as it commonly is, it should be permitted in the former also.

III

In addition to the more basic headings of interpretation and inconvenience, we shall consider here only a few of the specific details

[86] Cf. also Bride, *op. cit.*, p. 334; Castellano, *op. cit.*, LXXIX (1954), 25; Hürth, *op. cit.*, pp. 71–72.

[87] Regatillo, for instance, would not allow this; cf. *op. cit.*, p. 366. Others permit it because of their opinion that the priest can freely create these situations (cf. note 82 above); so Ford, *op. cit.*, p. 86; Visser, *op. cit.*, p. 27; Connell, *op. cit.*, p. 251.

in the law which seem to have more general interest in proportion as they have more common application. Among these problems the questions of the confessor's qualifications, means of communication, and necessity have proved particularly lively points of discussion.

The issue of the confessor's qualifications is the question whether he must have actual jurisdiction over the person consulting him, even though (as is clear) it is not necessary actually to hear his confession. On this point the opinions, though presented in varying shades of expression, are basically three.[88] The first, and perhaps most common, requires that the priest have confessional faculties valid specifically for the individual to be advised.[89] The second position would allow the confessor, supposing that he has at least limited faculties here and now, to counsel even those persons whose confession he could not ordinarily receive in virtue of those faculties; for example, religious women.[90] A third group holds that the faithful can be advised in the matter of the fast by any priest who is a confessor in the sense of enjoying, in some territory, at least limited confessional faculties.[91] A striking variation or combination of the second and third positions is the view that while the power is not limited locally, it is limited personally, so that one who has faculties somewhere may give his counsel anywhere but only to those persons, individually or generically, for whom his faculties obtain.[92]

Certainly the law requires more than the priesthood as a qualification for this function. The priest must also be a confessor, at least in the sense of having some confessional faculties habitually, not merely *per modum actus*.[93] Granted this much, there seem to be only two

[88] Every attempt to fit the personal expression of a writer into some category runs the risk of misrepresentation. I have tried to present these (and other) "basic" positions in a basic way. For the more precise exposition of each author's thought one must, of course, consult the author's work.

[89] Bergh, *op. cit.*, p. 40; Bruch, *op. cit.*, p. 14; Ford, *op. cit.*, p. 63; Madden, *op. cit.*, p. 145; Hürth, *op. cit.*, p. 61; Conway, *op. cit.*, LXXX (1953), 307. Onclin speaks more generally of the need for faculties of the territory; cf. *op. cit.*, p. 91.

[90] Visser, *op. cit.*, p. 13; Gordon, *op. cit.*, pp. 247–48; Genicot–Putz, *op. cit.*, p. 46; Castellano, *op. cit.*, LXXVIII (1953), 398–99.

[91] Mahoney, *op. cit.*, pp. 363–64; Connell, *op. cit.*, p. 248; Bride, *op. cit.*, p. 203, note 3; Moriarty, *op. cit.*, p. 8; Regatillo, *op. cit.*, p. 165. Werts regards the view as tenable (*op. cit.*, p. 309), Conway as solidly probable (*op. cit.*, LXXX [1953], 308).

[92] Peinador, *op. cit.*, pp. 28–47.

[93] Carpentier, *op. cit.*, p. 407, speaks of "tout prêtre approuvé." But the expression could mean any priest with faculties, as distinguished from one's habitual confessor.

alternatives: either the confessor must have actual jurisdiction over this person, or he need not. If one is to require less than actual jurisdiction, there is no very cogent reason for requiring that he have faculties in one territory rather than another.

Those who require that the confessor be empowered to hear the confession of the individual who consults him do so either because they regard his judgment as an act of jurisdiction in itself,[94] or because they take this as the normal sense of the word "confessor," and because the Instruction says that he is to examine the case in the internal forum. Those who hold for the broader views do so because the text speaks without distinction of a confessor, which any priest with habitual faculties can be said to be, broadly speaking, and because any such priest is capable of achieving the purpose of this requirement, the proper application of the law.

It is not my intention to discuss this issue at length. I have already attempted to evolve an opinion in an earlier article.[95] The crucial point, it seems to me, is whether the words of the Instruction, "causae quidem gravis incommodi sunt prudenter a confessario pensitandae in foro interno sacramentali vel non sacramentali,"[96] are to be understood in a preceptive or permissive sense; whether, in other words, the intention of the language is that he must give his advice at least in the non-sacramental forum, or that he may give it in that forum rather than exclusively in the sacramental. If the latter is true, and there is some argument for it, we may say that the direct purpose is rather to exempt from the necessity of confession than to inculcate the necessity of jurisdiction. If the former is true, then the conclusion seems inevitable that jurisdiction over the individual is required. For the idea of a forum seems certainly to imply jurisdiction. A forum is originally a place and derivatively a manner of exercising administrative or judicial jurisdiction. It would not follow that the act itself is an act of jurisdiction. It could be that the possession of faculties relative to this person is simply an extrinsic qualification positively re-

[94] More commonly commentators do not regard the confessor's act as jurisdiction; cf. Bruch, *op. cit.*, p. 14; Conway, *op. cit.*, LXXX (1953), 305; Gordon, *op. cit.*, p. 247; Visser, *op. cit.*, p. 13; Bride, *op. cit.*, p. 203.

[95] THEOLOGICAL STUDIES, XIV (1953), 224–29.

[96] *Inst.*, n. 11; cf. n. 2: "Confessarius autem suum consilium dare poterit sive in foro interno sacramentali, sive in foro interno extra-sacramentali . . . ."

quired by the law. But where there is no jurisdiction, there is no forum either.[97]

The fact that at least the sacramental forum is not required has led the majority of commentators to admit that the confessor may be consulted by mail, or telephone, or through another person.[98] But the contrary has also been maintained.[99] Replying to the argument that if, in general, jurisdiction of the internal non-sacramental forum can be exercised toward the absent, then a fortiori the confessor's advice, which is not jurisdiction, can be so given, the author rejects the principle that it can always be exercised *inter absentes* and states that per se it is carried on secretly and with the subject present.[100] Of course, jurisdiction cannot be exercised toward the absent if actual presence is explicitly required, as it is not, however, in the present text. And while it may be true statistically that most internal forum transactions are conducted in person, the point at issue is whether there is any juridical preference for this mode of action, so that their conduct *inter absentes* would be an exceptional, abnormal procedure requiring special justification or permission. Nothing is offered to support this position.

A further argument is drawn from the abuses which are foreseen in consultation through another or by letter. Supposing (as the author holds) the necessity of verifying subjective inconvenience, the questioning would undoubtedly be easier if the subject were present. It would not be impossible, however, by mail or intermediary, and would hardly be any more difficult by telephone. Another suspected abuse is that confessors might be advising those who are beyond the territorial limits of their jurisdiction. This difficulty also arises from a particular viewpoint, that faculties are required relative to the individual. But even within that supposition there would be no more difficulty in this

[97] So also Conway (*op. cit.*, LXXX [1953], 307); but Gordon (*op. cit.*, p. 248) and Peinador (*op. cit.*, p. 282) do not regard the internal forum as implying jurisdiction. The latter writes: ". . . *in foro interno*, quod solum dicit relationem mutuam fidelis ac sacerdotis, de rebus ad animam pertinentibus agentium *in sua intimitate*."

[98] For example, Peinador, *op. cit.*, p. 285; Connell, *op. cit.*, p. 252; Bruch, *op. cit.*, p. 13; Ford, *op. cit.*, p. 65; Conway, *op. cit.*, LXXX (1953), 308; Bride, *op. cit.*, p. 204; Werts, *op. cit.*, p. 309; etc.

[99] Castellano, *op. cit.*, LXXVIII (1953), 399–400.

[100] "*Per se* enim iurisdictio fori interni occulte exercetur, in foro conscientiae et, ut in pluribus, inter praesentes" (*loc. cit.*).

matter than there is, for instance, in the matter of dispensations from fast or abstinence. The basic principle of canon 201 would apply, that jurisdiction can be directly exercised only upon a subject.[101] One would not be able to advise the general faithful in another territory where one has no faculties, whether by mail, telephone, or other person, not because these modes are inept but simply because the inquirer would not be his subject. Whether the confessor could, from another territory, send advice to a person in a diocese where he retains his faculties would depend on the further question whether the supposed jurisdiction is voluntary or judicial. That point might have to be more discussed than it has been by the proponents of the jurisdiction theory;[102] but as far as principles go, and the forestalling of abuses and confusion, the norms of canon 201, §§2–3 exist precisely for that purpose.[103]

On the other hand, it has been pointed out that in the case of children consultation of the confessor by their parents provides an even more effective safeguard of the law.[104] And for many sick people and others preoccupied at the hours most convenient for the confessor, some mediate method may be the only feasible one. There should be a very good reason for denying them this possibility.

The case of those who could not contact a confessor except, for instance, by telephone raises another intriguing problem about the confessor, whether the faithful can ever, by way of exception, take advantage of the concessions without the prescribed consultation. Some explicitly reject any exception to that necessity.[105] Others, by the absolute way in which they speak of it, seem to imply such a re-

[101] Canon 201, § 1: "Potestas iurisdictionis potest in solos subditos directe exerceri."

[102] Castellano, *loc. cit.*, writes: "Actus autem administrativi . . . non sunt solum declarationes voluntatis, sed etiam declarationes iudicii, i.e. 'pronuntiationes.' " But it would still be, I gather, "potestas non-iudicialis" in the sense of canon 201, § 3; cf. Castellano, "De decreto episcopali administrativo," *Monitor ecclesiasticus*, LXXVII (1952), 82–83, 79, no. 6.

[103] Canon 201, § 2: "Iudicialis potestas tam ordinaria quam delegata exerceri nequit in proprium commodum aut extra territorium, salvis praescriptis can. 401, § 1, 881, § 2 et 1637." § 3: "Nisi aliud ex rerum natura aut ex iure constet, potestatem iurisdictionis voluntariam seu non-iudicialem quis exercere potest etiam in proprium commodum, aut extra territorium exsistens, aut in subditum e territorio absentem."

[104] Moriarty, *op. cit.*, p. 24.

[105] Hürth, *op. cit.*, pp. 62–63; Verhamme, *op. cit.*, p. 170; Ford, *op. cit.*, p. 58; Conway, *op. cit.*, LXXX (1953), 306; Moriarty, *op. cit.*, p. 9.

jection.[106] A few allow one to act without consultation when an identical case recurs on which one has already been advised, supposing the impossibility of a new recourse.[107] Others, more broadly, permit the use of epikeia or of what is referred to as "presumed" approval, whenever one is at the same time certain of the application of the law to one's own case and unable actually to consult a confessor.[108]

Those who refuse to admit any exceptions do so either because they regard the confessor's judgment as an intrinsic condition of the valid use of the concessions, or, more commonly, because of the absolute language of the Instruction, or because of the danger of abuse. The others seem simply to be applying general principles of epikeia or of presumed permission.

The solution of this question depends more than ordinarily upon a precise determination of the point at issue. Thus it is not settled merely by applying the common principle that a dispensation cannot be presumed. No one maintains that the confessor does dispense. But neither does he grant a permission. Hence there is no proper appeal to presumed permission. Commentators do speak, however, by some sort of analogy, of presuming the confessor's mind, or approval, or consent, or judgment. Prescinding for the moment from the aptitude of the analogy, it would seem to lead rather to the conclusion that the consultation could not be dispensed with. For it is a familiar and obvious principle that permission cannot be presumed when express permission is prescribed.[109] Whether the prescript is grave or light is not the decisive element. A permission gravely required may, given the proper conditions, be presumed (e.g., in some matter of religious poverty); but when express permission is required, even a permission of light obligation may not. And it would be difficult to frame a clearer demand for actual consultation than the language of the Instruction:

[106] Bergh, *op. cit.*, p. 40; Bruch, *op. cit.*, p. 14.

[107] Regatillo, *op. cit.*, p. 175; Carpentier, *op. cit.*, pp. 407–8.

[108] Visser, *op. cit.*, pp. 13–14; Zalba, *op. cit.*, p. 353; Connell, *op. cit.*, p. 251; Genicot-Putz, *op. cit.*, p. 257; Werts, *op. cit.*, p. 308; Castellano, *op. cit.*, LXXVIII (1953), 401. The last two writers postulate an extraordinary case. Peinador allows exceptions to the extent that a priest without faculties could be consulted in defect of any confessor; cf. *op. cit.*, p. 43, note 18.

[109] See Rodrigo, *op. cit.*, n. 448; Michiels, *op. cit.*, II, 681; Vermeersch-Creusen, *op. cit.*, n. 187; Van Hove, *De privilegiis, De dispensationibus* (Commentarium Lovaniense, Vol. I, Tom. V; Mechlin: Dessain, 1939), n. 333.

"neque absque eiusdem consilio fideles non ieiuni sanctissimam Eucharistiam recipere possunt."[110]

More fundamentally, however, the aptitude of the analogy with presumed permission is itself open to question. When permission is required (as distinguished, for instance, from cases in which a dispensation is necessary), the object of the requirement is purely to assure that the person act dependently on the will of the superior. That dependence can be verified not only when the superior's will is expressly manifested but also when one acts in conformity with what one knows to be the superior's general or habitual intention. In such a case, given the necessary conditions, one is said legitimately to presume the permission. But if we can speak at all of an habitual judgment—perhaps it would mean that every confessor is presumed to judge according to the law—it would be an especially dubious concept when the very function of consultation is to examine the applicability of the law to particular cases. In presumed permission the individual judges the propriety of his act (and presumes only that the superior would sanction it), whereas the intention of this prescript is precisely to remove that judgment from the individual.

The apparent reason for reserving the evaluation of each case to a confessor is, of course, the complexity of the new law in general, not only in the prerequired conditions but also in the corresponding concessions and limitations—the definition of "liquids," for instance, the exclusion of alcohol, the limit of an hour's time (except for the infirm), and so on. The number of cases in which the ordinary faithful could handle all this themselves would be relatively small in comparison with the number in which they could not. In other words, the real point at issue here is that this is a prescript levied precisely to provide against a common danger. But laws which are made to meet a general danger, as canon 21 clearly states, do not cease to bind even when in a particular case the danger is not realized.[111] The obligation, therefore, does not fail when the final cause of the prescript is only negatively lacking in the individual subject. Hence, as all admit, the mere fact of knowing that one's case comes under the new law does not justify foregoing the prescribed consultation.

[110] *Inst.*, n. 11; cf. n. 2.

[111] Canon 21: "Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit."

But even laws motivated by a common danger, as any other positive laws, do not urge when the final cause ceases contrarily, that is, when (supposing the absence of the danger envisioned) the observance of the law would entail a positive harm or hardship disproportionate to the gravity of the obligation. One may, in other words, be excused from its observance, given a proportionate cause.[112]

In this understanding of the problem, the weight of the obligation of consulting a confessor does become relevant. It becomes, in fact, the norm for deciding whether the excusing hardship must be serious or something less. This obligation is, no doubt, grave in general, *ex genere suo*. The gravity of its material object, the Eucharistic fast, seems to make this evident. With some others, however, I think that this prescript of consultation does admit of parvity of matter, and specifically that such parvity is present when a qualified person certainly knows (for example, but not exclusively, from previous consultation on the same situation) that his case comes within the scope of the law.[113] The reason is that one measure of the obligation of any rule is the degree in which it is necessary or conducive to the end desired by the legislator. It would follow that when the person is sure of his situation and actual consultation is impossible, the reasons required to justify foregoing it, while they must be positive, need not be grave. For the application of the principle, the mere omission of Communion would not be sufficient by itself; that effect is intrinsic to this sort of law. Such an additional, extrinsic inconvenience would be present, however, if it were a question of omitting Communion on some special occasion, or with some group, where one's absence would be noted, or when the opportunity for Communion is relatively rare, etc. In such cases it could be said that adherence to the requirement of counsel would be not only ineffectual but also, to an extent, positively hurtful.

[112] Cf., e.g., Michiels, *op. cit.*, I, p. 440; E. Genicot, S.J., J. Salsmans, S.J., and A. Gortebecke, S.J., *Institutiones theologiae moralis* (17th ed.; Brussels: Edition Universelle, 1951), I, n. 147.

[113] Cf. Werts, *op. cit.*, p. 308; Visser, *op. cit.*, pp. 13–14; Connell, *op. cit.*, p. 248. Bruch allows that the omission is not *ipso facto* grave; cf. *op. cit.*, p. 14. Zalba seems to hold the same; cf. *op. cit.*, p. 353. Others consider the requirement always grave; so Ford, *op. cit.*, pp. 55–58; Castellano, *op. cit.*, LXXVIII (1953), 401. The latter, however, admits the possibility of going without actual consultation in a rare and extraordinary case. Fr. Ford regards the consultation as a jurisdictional act intrinsically necessary to the valid use of the concessions.

The application of this opinion is not, of course, without difficulty, particularly in its supposition that one knows the certain verification of the law in one's own case. We are not discussing the question from the pedagogical viewpoint of how to present such a doctrine without inviting a multitude of abuses, but from the speculative viewpoint of what is and what is not allowed. But if the premises can be found in reality, as they are (in seminarians, for instance), then the conclusion also should follow, somehow and sometimes, not only in theory but also in practice.[114]

Among those who would find it difficult to approach a confessor for his advice on the applicability of the law to their case would be a large number of persons, more or less habitually confined to bed, who might be able, however, to go to church for the actual receiving of Communion. Persons so confined, over a period of morally a month and supposing no imminence of recovery, could, according to the provisions of canon 858, §2, receive Communion once or twice a week after having taken something by way of medicine or liquid nourishment.[115] In some respects the concession of canon 858, §2 differs from the terms of the new law. It has been held, for instance, in the interpretation of the canon that the infirmity need not create a difficulty precisely in the observance of the fast,[116] as it must in the new concessions, and, in the allowances of the canon, there is no reference to the possible alcoholic content of the medicines.[117]

[114] There are, quite possibly, persons who apply too favorably the doctrine that they are, in certain circumstances, excused from hearing Mass on Sundays. We do not therefore deny the principle or make a deep secret of it.

[115] Canon 858, § 2: "Infirmi tamen qui iam a mense decumbunt sine certa spe ut cito convalescant, de prudenti confessarii consilio sanctissimam Eucharistiam sumere possunt semel aut bis in hebdomada, etsi aliquam medicinam vel aliquid per modum potus antea sumpserint."

[116] Cf. Cappello, *De sacramentis*, I (4th ed.; Marietti: Turin–Rome, 1945), n. 472.

[117] Most published commentaries have agreed that an alcoholic liquid, such as whiskey, could not be taken, under the new concessions, even if prescribed by a doctor as a specific remedy for some illness; e.g., J. Paquin, S.J., "Les remèdes alcoolisés et le jeûne eucharistique," *Sciences ecclésiastiques*, VI (1954), 67–71; Bruch, *op. cit.*, pp. 6–7; Connell, *op. cit.*, p. 462; Ford, *op. cit.*, p. 79; Conway, *op. cit.*, LXXX (1953), 312; Verhamme, *op. cit.*, p. 171, note 2; Madden, *op. cit.*, p. 145; etc. Many, however, allow medicines which have a partial alcoholic content; so Paquin, *loc. cit.*; Werts, *op. cit.*, p. 307; Ford, *loc. cit.*; Koerperich, *op. cit.*, p. 266; at least if the percentage is very small: Conway, *loc. cit.*; Bride, *op. cit.*, p. 253; Madden, *loc. cit.*; Connell, *loc. cit.*; Zalba, *op. cit.*, p. 353. Others do not admit even this; so Hürth, *op. cit.*, p. 60; Castellano, *op. cit.*, LXXVIII (1953), 403; Bergh, *op. cit.*, p. 39; Regatillo, *op. cit.*, p. 165.

But a number of commentators think that this paragraph of canon 858 has been abrogated by the new law or absorbed by it.[118] Since the canon has in fact been so interpreted as to include some cases not covered by the new law, it can be said to have been "absorbed" by the new law only if the latter has abrogated the old to the extent that it allowed those additional cases. More exactly, in the terminology of the Code, the question is whether the new law has been substituted (*obrogare*) for the canon.

According to canon 22, a subsequent law replaces a prior one when any of three conditions is fulfilled: if it says so expressly, if the later law is directly contrary to the earlier, or if the new one completely reorganizes the matter of the former.[119]

The Constitution *Christus Dominus* does not expressly repudiate canon 858, §2. Expressly it abolishes all "privileges and faculties,"[120] which, both in the proper sense of the words and in the light of the legislator's avowed intention of reducing to unity the multiplicity of indults, refers rather to concessions outside the Code than to the hitherto existing law. The Instruction speaks of the Constitution as largely confirming the substance of the former law, with specific reference to canon 808 and the first paragraph of canon 858.[121] Naturally the reference here is to the first paragraph, since what the document is at pains to confirm at this point is the obligation, not the exception. Hence the parallel reference to canon 808, which contains the obligation of the celebrant.

In providing, without specification of time, that the infirm may

[118] L. L. McReavy, *Clergy Review*, XXXVIII (1953), 75; Castellano, *op. cit.*, LXXVIII (1953), 393–94; Ford, *op. cit.*, pp. 115–16; Genicot–Putz, *op. cit.*, p. 44; Regatillo, *op. cit.*, pp. 174, 228. Others regard it as still in force: Paquin, *loc. cit.*; Madden, *op. cit.*, p. 144; Mahoney, *op. cit.*, pp. 430–31, 638–39. Conway, while favoring abrogation, allows it as doubtful; cf. *op. cit.*, LXXX (1953) 271–73.

[119] Canon 22: "Lex posterior, a competente auctoritate lata, obrogat priori, si id expresse edicat, aut sit illi directe contraria, aut totam de integro ordinet legis prioris materiam . . . ."

[120] *Const.*, p. 24: ". . . abolitis ceteris omnibus privilegiis ac facultatibus, quomodocumque a Sancta Sede concessis, ut ubique omnes hanc disciplinam aeque riteque servent." Cf. *Inst.*, n. 18: "omnes facultates et dispensationes."

[121] *Inst.*, prooem.: "Constitutio Apostolica . . . normas maxima ex parte quoad substantiam quoque confirmat Codicis Iuris Canonici (can. 808 et 858, § 1). . . ." Canon 808: "Sacerdoti celebrare ne liceat, nisi ieiunio naturali a media nocte servato." Canon 858, § 1: "Qui a media nocte ieiunium naturale non servaverit, nequit ad sanctissimam Eucharistiam admitti, nisi mortis urgeat periculum, aut necessitas impediendi irreverentiam in sacramentum."

enjoy the new concessions, the Constitution is indeed directly contrary to the canon's minimum requirement of a month. For those who qualify under the new law, therefore, there is no need of waiting a month. But to the extent that some cases which do not satisfy the conditions of the new law do qualify under the old, the paragraph in question is rather outside the scope of the new than in conflict with it. Here the prescript of canon 23 is pertinent: "leges posteriores ad priores trahendae sunt et his, quantum fieri possit, conciliandae."

More commonly the contention has been that the Constitution contains a total reconstruction of the matter of the canon. Certainly it is not a reorganization of the whole law of the Eucharistic fast; the basic principle is rather the contrary, that this remains as it was, apart from the exceptions listed in the Constitution.[122] Neither is it a total review of all the exceptions. No one doubts that the rules for viaticum and for the prevention of irreverence remain unchanged. In fact they are included in the confirmation of canon 858, §1.[123] It can scarcely be called, either, a revision of all other exceptions in the law; for, on the matter of the late hour, the journey, and difficult labor, the law contained no exceptions to be revised. To maintain that the Constitution abrogates canon 858, §2, one would have to say that the part of the document which treats of the infirm is a total reordering of that part of the Code which dealt with the infirm outside of danger of death. But that would be understanding the phrase "totam de integro ordinat legis prioris materiam" in a sense so narrow as to be applicable to any new law whatsoever which touched in any point upon the matter of the old. This is obviously quite the opposite of the norm's intention.

The practical conclusion would be that the abrogation of canon 858, §2 is at least reasonably doubtful and that, as a result, until the question may be authoritatively decided, the principle of canon 23 obtains: "in dubio revocatio legis praeexsistentis non praesumitur. . . ." And if the canon remains, of course, it remains as it was; it does not require reinterpretation and qualification in the light of a new and distinct law. This may prove, for some cases at least (supposing the

[122] *Const.*, I: "Ieiunii eucharistici lex, a media nocte pro iis omnibus vigere pergit, qui in peculiaribus condicionibus non versentur, quas per Apostolicas has Litteras exposituri sumus."

[123] Cf. *supra*, note 121.

conditions and limitations of the same canon), a solution to the perplexing problem of those for whom the doctor prescribes a small dose of whiskey or brandy as a specific for certain heart diseases.[124]

The evident and understandable caution with which the documents regulate the matter of alcohol in the new concessions becomes a source of difficulty in another context also, namely, in its limited permission previous to evening Mass. The pertinent text is that in which the Instruction clarifies the more general language of the Constitution, to the effect that alcoholic drinks customary at meals, with the exception of liquors, are permitted in moderation "inter refectionem, permissam usque ad tres horas ante Missae vel communionis initium."[125]

The most facile construction of the passage, with its singular "refectionem," would be that only one solid meal is permitted and that at this meal alcoholic drinks may be taken. Otherwise one faces the alternative either of permitting alcoholic drinks at all the permitted meals (and explaining why the document speaks of their allowance at "the" or "a" meal), or of finding a reason for limiting such drinks to one meal when the text equivalates permitted refection with the taking of alcoholic drinks ("inter refectionem permissam usque ad tres horas . . .").

But if the idea of a single meal is the easiest way to read the Instruction, it is the most difficult to reconcile with the text of the Constitution and the likely intention of the legislator. Commentators had almost unanimously shunned this interpretation even before the still more inviting language of the advance release in *Osservatore Romano* was amended in the official text of *Acta apostolicae sedis*.[126] This would

[124] Such an application of canon 858, § 2 was admitted by D. Jorio, *La comunione agl'infermi* (Rome: Pustet, 1931), n. 67, where "vino" and "cognac" are listed among the liquids. It is considered still permissible by Paquin, *loc. cit.*, Mahoney, *loc. cit.*, and Conway, *loc. cit.*

[125] *Const.*, VI: ". . . servato a sacerdote ieiunio trium horarum quoad cibum solidum et potus alcoholicos, unius autem horae quoad potus non alcoholicos." *Inst.*, n. 13: "[Sacerdos et fideles] possunt *inter refectionem*, permissam usque ad tres horas ante Missae vel communionis initium, sumere *congrua moderatione* alcoholicas quoque potiones inter mensam suetas (v. gr. vinum, cerevisiam, etc.), exclusis quidem liquoribus. Quoad potus autem, quos sumere possunt ante vel post dictam refectionem, usque ad unam horam ante Missam vel communionem, excluditur *omne alcoholicorum genus*."

[126] The earlier text read: "Ante vel post dictam refectionem sumere possunt (*exceptis omne genus alcoholicis*), aliquid per modum potus, usque ad unam horam ante Missam vel communionem."

be to establish a new and rather rigorous sort of fast day, a thing particularly unlooked for on Sundays and other religious or social solemnities on which the evening Mass would be most common.[127] More cogently, it would be juridically very odd if a point of such importance were to be insinuated merely *in obliquo*—"inter refectionem permissam"—as if it were something already well known, whereas it is certainly not obvious in the Constitution and is nowhere stated directly in the Instruction. Hence most commentators have accepted one or the other consequence of the supposition that more than one meal is permitted.

Not a few have preferred the alternative that alcoholic drinks are permitted as often as a meal is taken.[128] This would be supported by the fact that the Instruction, without further determination, joins with permitted refection the permission also of alcoholic drinks usual at meals. It has been observed too that, considering the purpose of the limitation, it would seem incongruous to permit their use three hours before Mass (at dinner), but not ten hours before (at lunch).[129] In this interpretation the problem of the singular "refectionem" would be met by reading not "the" meal, but "a" meal or "any" meal.[130]

Surely the more ordinary way of allowing alcoholic drinks at any of the permitted meals would have been to say, "inter refectiones permissas." Hence other commentators have accepted the singular as "the meal" and sought a reason for writing "refectionem" without meaning that only one meal was permitted. This they have found in the understanding that the intention of the language was not to limit the number of repasts at which solid nourishment is allowed, but the number at which alcoholic drinks may be taken; that is, only one—and specifically the principal meal of the day.[131]

[127] Thus Bride, *op. cit.*, p. 208. Cf. McReavy, *Clergy Review*, XXXIX (1954), 236–38; Mahoney, *op. cit.*, pp. 230–31; Gordon, *op. cit.*, p. 236, note 13; Genicot–Putz, *op. cit.*, pp. 53–54; Visser, *op. cit.*, p. 26; etc.

[128] McReavy, *loc. cit.*; Mahoney, *loc. cit.*; Gordon, *loc. cit.*; Bride, *loc. cit.*; Zalba, *op. cit.*, p. 356; Werts, *op. cit.*, p. 316; Moriarty, *op. cit.*, pp. 29–30. This opinion is implied, I judge, in the use of the plural, "meals," by Conway, *op. cit.*, LXXIX (1953), 307; Madden, *op. cit.*, p. 150.

[129] Mahoney, *loc. cit.*

[130] Thus McReavy, *loc. cit.*

[131] Visser, *op. cit.*, p. 26; Castellano, *op. cit.*, LXXIX (1954), 45, 49–50; Hürth, *op. cit.*, pp. 78–79; Ford, *op. cit.*, p. 108; Bruch, *op. cit.*, p. 17. Others do not speak so explicitly of the *principal* meal: Bergh, *op. cit.*, p. 41 (though the context seems to imply it); Genicot–Putz, *op. cit.*, pp. 53–54.

The difficulty with this view is that the Instruction does not say, as it easily could have, that such drinks are permitted at only one meal. What it speaks of as permitted, in the singular, is the meal ("inter refectionem permissam"). In other words, as was noted above, the point at issue is nowhere stated *in directo*, as one would certainly expect in a matter on which the documents show so much concern and are in general so explicit. And yet a singular meal is referred to *in obliquo*. The conclusion is inescapable, I think, that the Sacred Congregation is assuming, taking for granted, that there will be before the evening Mass only one repast at which the question of alcoholic drinks usual at meals will be relevant.

What situation does the Sacred Congregation have in mind, in which it would be normal to say that in "the" meal before evening Mass the drinks usual at such a meal are permitted? I suggest that the solution of the present problem lies in its relation to another question, the time-limit of the evening Mass; that is, the latest hour at which it may begin. The Constitution specifies the earliest hour as four o'clock in the afternoon.[132] It does not specify the latest hour. In allowing an "evening" Mass, however, it seems to imply some hour relatively early, as distinguished from what would be in the common estimation more properly night than evening.[133] The military faculty for evening Mass contained an outside limit of half-past seven o'clock.[134] The French indult of 1947, permitting "Missae vespertinae," was understood as an afternoon Mass.[135] The Constitution itself and the Instruction speak of "postmeridianis horis."[136] Moreover, in requiring

[132] *Const.*, VI: "... concedimus ut Missae celebrationem vespertinis, ut diximus, horis permittere queant [ordinarii locorum], ita tamen ut haec initium non habeat ante horam IV post meridiem ...."

[133] Of the relatively few commentators who discuss this question, Hürth (*op. cit.*, p. 75) and Castellano (*op. cit.*, LXXIX [1954], 37), while favoring some relative limit, do not attempt to designate any latest hour; Connell (*op. cit.*, p. 252) and Bruch (*op. cit.*, p. 15) suggest eight or half-past eight o'clock as the ordinary limit; others exclude any limit before midnight: Genicot–Putz, *op. cit.*, p. 52; Werts, *op. cit.*, p. 315; Ford, *op. cit.*, p. 104; Bride, *op. cit.*, p. 208, note 9, 212. The latter, however, recommends eleven o'clock as a practical limit.

[134] Bouscaren, *op. cit.*, II, 620.

[135] See *Nouvelle revue théologique*, LXX (1948), 159–60, where the term "l'après-midi" is used as equivalent to "horis vespertinis."

[136] *Const.*, p. 20: "Hoc praeterea animadvertendum est saepe hodie contingere ut frequentissimae populi multitudines ex alio ad alium locum postmeridianis horis ea de causa transgrediantur, ut religiosas celebrationes, vel coetus de re sociali habendos participent ...." Cf. *Inst.*, n. 13: "Sacerdotes, qui pomeridianis horis Missam celebrant ...."

that the Mass be not before four o'clock there is a suggestion that the tendency was expected to be rather toward the earlier hours than the later. Such, in fact, has been the tendency, at least in this country, where the time is commonly about five o'clock.

In this hypothesis, that the Sacred Congregation envisioned a Mass at about four, five, or six o'clock as the ordinary thing, it would be natural for it to speak of "the" meal which is permitted up to three hours before Mass, not indeed intending to exclude a breakfast also, but having in mind that meal at which the question of alcoholic beverages would normally arise, the noonday meal. The purpose of the comment would be to answer that question affirmatively: such drinks are allowed at that meal.

My objective here is not to prove that the new law does not allow a Mass late enough to admit of two meals, lunch and dinner (or vice versa), before the evening Mass. Neither is it to defend the proposition that the Instruction meant to allow alcoholic drinks only at one meal if the Mass should in fact be late enough for two. One would expect a more direct and unmistakable statement, if that were intended. My point is precisely that the document does not say anything at all on that matter, for the reason that it simply did not have that in mind. (It is important to remember in this connection that, by whatever technical term one may designate the authoritative value of the Instruction, it remains an explanation of the law and not the text of it. While one may legitimately seek the answer to any pertinent question in the exact formulation of the law itself, the same rigid analysis of language may not be applied to the cursory style of an exposition.)

The conclusion which I am anxious to draw from all this is rather that the Sacred Congregation was not defining that alcoholic drinks could be taken only at the principal meal of the day. Commentators who hold that the intention of the text under discussion was to limit to one the number of meals at which such drinks are allowed usually add that this means the principal meal, as if that were the only understanding of the term "refectio" which rendered intelligible the use of the singular number.[137] So far my point has been that the word is even more intelligible as an indistinct reference to the midday meal, whichever that might be.

[137] Cf. *supra*, note 131.

But there are additional reasons for concluding positively that the intention was not to require as a condition of this liberty that the meal in question be the principal meal of the day. Besides the fact that there is another word, "prandium," specifically apt to designate the principal meal, if that had been wanted, the term actually employed, "refectio," is used generically, now implying dinner, now explicitly for supper (precisely as distinguished from "prandium"), in the most closely parallel text available in the Code: "Nec vetitum est carnes ac pisces in eadem refectione permiscere; nec serotinam refectionem cum prandio permutare."[138] And when another word besides "prandium" is used for the principal meal of the day, it is not "refectio" but "comestio."[139] There is no evidence, therefore, in the expression "inter refectionem permissam" etc., that the Instruction meant to limit the use of alcoholic drinks exclusively to the principal meal.

On the contrary, in speaking of the drinks usually taken at table ("apud mensam suetas") the text suggests that the intention is a general one: not to deprive the faithful, in the meal before evening Mass, of those beverages which they normally would take at such a meal. But light drinks, as beer and wine, are as customary at a lunch as at a dinner, not only in this country but also abroad—perhaps more so abroad. This is particularly significant, I think, in view of the fact that, for a large number of people, the concession of taking such drinks only at dinner would be no concession at all, since dinner will very commonly not precede the evening Mass. It is not likely that the Holy See was issuing an exclusive favor for those cases or those regions in which dinner at noon happens to be the common practice.

Moreover, this understanding of the Instruction harmonizes better with the text of the Constitution. While it can be granted that the Sacred Congregation was specially empowered to interpret even extensively or restrictively, it should not be supposed to have done so any more than the language demands. But the Constitution, on this point, says only, "servato a sacerdote [et fidelibus] ieiunio trium horarum quoad cibum solidum et potus alcoholicos." It is clear, in the Instruction, that this freedom (as far as alcoholic drinks are con-

[138] Canon 1251, § 2. Cf. Gordon, *op. cit.*, p. 236, note 13.

[139] Canon 1251, § 1: "Lex ieiunii praescribit ut nonnisi unica per diem comestio fiat . . . ."

cerned) is limited to mealtime; its restriction to any particular meal would be a further limitation not warranted by the words of either document.

As far as the practical problem in this country goes, therefore, there does not seem to be any necessity of denying the use of alcoholic drinks, liquors excepted, at the noonday meal, whether it be the principal meal (dinner) or merely a lunch. In the more speculative supposition of a Mass late enough for both meals to have preceded, the question remains whether such drinks may be taken at both. The liceity of doing so does not seem to have been discussed at all in the Instruction. It would follow that it was not denied either.

A final consideration, also arising from the new permission of evening Mass, is the question whether, on Sundays and holy days of obligation, the faithful who are legitimately impeded from fulfilling the precept in the usual morning hours are obliged to attend in the evening. Whether or not any commentator has defended the negative position, the question is not infrequently asked; and it is not easily answered with that conviction and conclusiveness which is required (or should be required) in affirming the existence of a grave obligation.[140]

The difficulty is that while the evening Mass is a great boon to a number of people, allowing considerably greater freedom, for instance, in the arrangement of a holiday schedule, it can seem a little peculiar that it should at the same time impose on many others a moral burden from which they were hitherto excused. If the intention of the legislator in this, as in the other provisions of the new law, is benevolent, it should not have the effect of making the subjects' condition, juridically speaking, more onerous than before.[141]

Of course, if it were immediately evident that the very purpose of

[140] The obligation is affirmed by the following: Connell, *American Ecclesiastical Review*, CXXXI (1954), 34–35; Conway, *Irish Ecclesiastical Record*, LXXXI (1954), 209–12; Madden, *Australasian Catholic Record*, XXX (1953), 309–13; Bride, *Ami du clergé*, LXIV (1954), 25–26; Visser, *op. cit.*, p. 25; Genicot–Putz, *op. cit.*, p. 53; Castellano, *op. cit.*, LXXIX (1954), 47; Regatillo, *op. cit.*, p. 679; Mahoney, *op. cit.*, pp. 358–60. (The latter however, hesitated to urge the obligation.) As I have very much condensed and synthesized the arguments in the following discussion, I could not fairly identify the proponents in each case. Except for the final distinction to be made here, I agree with their conclusion, but suggest a slightly different approach.

[141] Reg. 61, *Regulae iuris in VI:* "Quod ob gratiam alicuius conceditur, non est in eius dispendium retorquendum."

the Holy See in allowing evening Mass was precisely to make it possible for those in question to fulfill their obligation, there could be no doubt of the obligation's existence. But neither the Constitution nor the Instruction explicitly states such a purpose—as, for instance, the indult granted to France in 1947 did declare.[142] In fact, the only motivation expressly mentioned by the Constitution is the benefit which would follow from the celebration of evening Mass in connection with gratuitous gatherings of a religious or sociological nature.[143] As for motivation, the opportunity itself of hearing Mass and receiving Holy Communion on the part of those who could not otherwise go would be sufficient reason for the concession, quite apart from the point of obligation.

Another approach is to deny the supposition, that the hearing of evening Mass involves any change in the juridical condition of the faithful. The language of canon 1248 attaches the obligation to the day itself, without distinction of time, and according to canon 1246 a feast day is computed from midnight to midnight.[144] Hence from the common law itself the precept can be satisfied whenever a Mass is available. The evening Mass, in other words, would be just an additional opportunity of fulfilling an obligation coextensive with the day. The difficulty with the argument is that this very opportunity is something at least beside the common law, if not contrary to it. While there is in the law no specification of the hours within which the obligation may be fulfilled, the limitation of the hours for the celebration of Mass does have the practical effect of limiting also, per accidens, the time within which the obligation may ordinarily be satisfied.[145] If, as a result of a relaxation of the time-limit for celebration, an opportunity is afforded part of the Christian community, as a peculiar favor in their regard, of satisfying at a later hour, it can scarcely be

[142] Bouscaren, *op. cit.*, III, 374: "... whenever a sufficient proportion of laborers who have to work in the morning or of public employees who are detained by their duties in the morning, have to attend such a Mass in order to satisfy their obligation."

[143] Cf. *supra*, note 136.

[144] Canon 1248: "Festis de praecepto diebus Missa audienda est...." Canon 1246: "Supputatio diei festi... facienda est a media nocte usque ad mediam noctem ...."

[145] Canon 821, § 1: "Missae celebrandae initium ne fiat citius quam una hora ante auroram vel serius quam una hora post meridiem."

denied that those who use this freedom are enjoying a privilege, all the essential elements of which seem to be present in such a situation.[146]

It is not true, however, universally speaking, that one is not obliged to use a privilege. The complete and exact rule of canon 69 is: "Nemo cogitur uti privilegio in sui dumtaxat favorem concesso, nisi alio ex capite exsurgat obligatio."[147] Hence it is argued that, even if there is a question of privilege here, either there is an obligation "alio ex capite" of using it, or that it is not "in sui favorem" but in favor of the local ordinary or the celebrating priest, or that it is not exclusively ("dumtaxat") in anyone's particular favor, but a modification of the law itself of canon 821, §1.

But none of these arguments is clearly decisive. Whether or not an obligation of using a privilege is present ("alio ex capite") when the privilege merely removes an impediment to the observance of a common law (as, in this case, apart from the limit of canon 821, §1, one could hear his Sunday Mass at any time of day) is a controversy centuries old.[148] The classic example is the question whether one who has an indult to hear Sunday Mass in his private oratory is obliged to do so when by reason of infirmity he could not go to church. That debate was not terminated by the Code.[149] During the last war, in fact, it was reputably held that even those soldiers for whom evening Mass was specially provided were not obliged to attend.[150] From the fact that the obligation can be fulfilled at any time of day, therefore,

[146] Cf. Rodrigo, *op. cit.*, nn. 847–48; Michiels, *op. cit.*, II, 491, 496–98; 501–8; Van Hove, "La notion du privilège," *Nouvelle revue théologique*, XLIX (1922), 13–14; E. Roelker, *Principles of Privilege* (Washington: Catholic University of America, 1926), pp. 10 ff. In particular, permanence or stability is not essential to privilege; cf. Michiels, *op. cit.*, p. 507; Roelker, *op. cit.*, p. 16.

[147] The situation would be clearly verified, for instance, if a cleric with a privilege to practice medicine (granted, let us say, as a means of personal support) came upon a dying person whose life he could save by his skill. The obligation would arise from the virtue of charity.

[148] Cf. De Lugo, *Tractatus de eucharistia*, D. XXII, S. II, nn. 12–17; Layman, *Theologia moralis*, L. IV, Tr. V, C. IV, n. 3; Diana, *Resolutiones morales* (Huguetan edit.), Tom. III, Tr. I, R. 102, p. 137; Suarez, *De legibus*, L. VIII, C. XXIII, nn. 7–8; etc.

[149] Cf. Michiels, *op. cit.*, II, 590–91; Van Hove, *De privilegiis*, n. 212; Roelker, *op. cit.*, pp. 94–95; J. Guiniven, C.SS.R., *The Precept of Hearing Mass* (Washington: Catholic University of America, 1942), pp. 147–48; J. Sanders, S.J., "Queries on Evening Mass and Communion," *Clergy Monthly*, XIII (1949), 25–26.

[150] *Apud* Sanders, *loc. cit.*

it does not immediately follow that it must be fulfilled whenever and however Mass is available. Secondly, even though those who assist at the Mass are not the immediate subject of the grant (in this case the immediate subject is the local ordinary), and though such assistance is not its immediate object (in this case the immediate object is the exceptional hour of celebration), the notion of privilege is verified in any subject who, by reason of the superior's special act with benevolent intent, enjoys a liberty or immunity which from the common law alone he would not have.[151] Nor, finally, has there been any general modification of the norm of canon 821, §1. Local ordinaries have simply been empowered to grant particular exceptions to the limitation of time.[152] Hence it is true, for any group who avail themselves of such concessions, that they are acting upon a departure from the common law made in their special regard.

Ultimately, therefore, the problem whether this is a question of a privilege which one might not be obliged to use coincides in reality with the determination of the legislator's motive in allowing such permission. For it is essential to a privilege that it be something granted with benevolent intent, "in favorem"; and the relaxation of one law in order to make possible, not merely easier, the fulfilment of another—which means to activate the burden of the latter—is not, in the sense of this context, a favor.[153]

It might help toward a clearer perception of the purpose of this concession to recall that the regulation of the hours for the celebration of Mass has varied considerably, in the course of time, without any direct reference to the obligation of assisting at it.[154] The latter is simply the principal act established by the Church for the sanctifica-

[151] Whether the ordinary's faculty or the priest's act of celebrating should be called privileges is another question. Of habitual faculties canon 66 says: "accensentur privilegiis praeter ius" (cf. Van Hove, *De privilegiis*, n. 157). The case of the celebrant seems to fit the notion of dispensation more than that of privilege; cf. Van Hove, "La notion du privilège," pp. 137–41.

[152] *Const.*, VI: "Si rerum adiuncta id necessario postulant, locorum Ordinariis concedimus ut Missae celebrationem vespertinis, ut diximus, horis permittere queant . . . ."

[153] Cf. Rodrigo, *op. cit.*, n. 847. Some privileges, of course, do indirectly and secondarily impose a burden; one, for instance, which might make manifestation of conscience obligatory in a particular religious institute (cf. canon 530, § 1). The notion of benevolent intent is verified in allowing the *institute as such* to follow its own distinctive spirit.

[154] Cf. Suarez, *De religione*, Tr. II, L. II, C. XV, n. 7: ". . . ad hoc praeceptum est quasi per accidens, quod missae dicantur tantum in tempore matutino."

tion of Sundays and feast days.[155] The former has been largely the product of customary practice, based upon the respective convenience of the faithful and the celebrant. For many centuries the time of the public Mass on Sundays and feast days was the third hour, that is, about nine o'clock in the morning.[156] There was too the requirement that the obligation be fulfilled in one's parish church.[157] This law seems to have been poorly observed, however, and at least after its gradual relaxation the faithful had considerable latitude in satisfying the precept at "private" Masses (in the monasteries, etc.), which were not limited, apparently, even to the morning hours.[158] But just as the nine o'clock Mass had been chosen as the most suitable for general attendance, so the afternoon hours were abandoned by custom, because of the hardship of the protracted fast for the celebrant.[159] Evidence of a lingering consciousness that the freedom of satisfying the obligation was not similarly constricted is the fact that the older canonists frequently observed, as modern manuals do not, that the precept could be satisfied at whatever time of day Mass was actually heard.[160]

[155] Cf. Suarez, *loc. cit.*; Guiniven, *op. cit.*, pp. 52–57; Bride, *op. cit.*, p. 25.

[156] Cf. J. Jungmann, S.J., *The Mass of the Roman Rite* (Missarum Sollemnia), translated by F. Brunner, C.SS.R., I (New York: Benziger, 1951), 247–48. On fast days Mass was at five or (later) three o'clock in the afternoon, and, from the eleventh century, at noon on other days ("dies profesti": neither feast nor fast).

[157] Guiniven, *op. cit.*, pp. 30–36; Jungmann, *op. cit.*, pp. 249–50 and notes 43–45.

[158] Gasparri, *De sanctissima eucharistia*, I, n. 98; Jungmann, *op. cit.*, p. 250.

[159] De Lugo, *De eucharistia*, D. XX, S.I, nn. 24, 41–42; Gasparri, *op. cit.*, n. 100. While the rubrics of Pope S. Pius V (P. V, C. XV, nn. 1–2) still referred to Mass "post Nonam" on fast days, it seems that by this time (1570) the practice was to anticipate the Office, with actual celebration at noon; cf. Jungmann, *op. cit.*, pp. 248–49.

[160] Cf. Suarez, *De religione*, Tr. II, L. II, C. XV, n. 7: "Dubitari ergo potest quomodo assignandum sit certum tempus, pro quo obliget [praeceptum]. Cui dubitationi non satisfaciet, qui dixerit obligare pro toto tempore ante meridiem, quia in toto illo potest praeceptum impleri; et non extra illud, quia solum illud est ad dicendam missam deputatum. Non, inquam, hoc satisfacit omnino . . . quia ad hoc praeceptum est quasi per accidens, quod missae dicantur tantum in tempore matutino. Nam si missa vel ex occurrenti occasione, aut necessitate, vel ex consuetudine recepta et approbata, vel ex privilegio dici posset hora secunda, vel tertia pomeridiana, satisfaceret huic praecepto, qui usque ad illud tempus auditionem missae differret. Igitur praeceptum de se indifferenter obligat ad audiendam missam in qualibet parte temporis illius diei, in quo inveniri possit." Similarly, Diana, *op. cit.*, Tom. II, Tr. I, R. 108, pp. 62–63; Leander, *Quaestiones morales theologicae*, P. III, Tr. II, D. I, Q. 26; Lacroix, *Theologia moralis*, L. III, P. I, Tr. III, n. 624; D'Annibale, *op. cit.*, III, n. 125. The principal adversary seems to have been

Necessarily, however, there is an indirect relation between the hours of celebration and the observance of the precept. In determining the former, adequate provision had to be made that morally all the faithful be able to sanctify the day in the prescribed manner. Thus, even while the nine o'clock Mass was the ordinary people's service, there are indications of additional Masses, both earlier and later, for those who could not attend at that hour.[161] And subsequently, with a plurality of churches and Masses available within the limits of dawn and noon, it was considered sufficient cause for exception if a later Mass was needed in order that the faithful might fulfil their obligation.[162] But on the whole the limit of noon, and finally of one o'clock, was sufficient, in the conditions of life then obtaining, to secure the common good, and it was not found necessary to empower ordinaries with a general faculty for permitting later hours, such as the Code contained in the matter of bination and extraordinary places.[163]

Since that time, however, radical changes in the economic pattern, particularly in the matter of round-the-clock and round-the-calendar activity, have made impediments to morning Mass more than relatively rare exceptions. Hence the Instruction of the Holy Office speaks of the common good demanding Mass at later hours, and instances in first place the large numbers now impeded during the morning hours of feast days.[164] It is this specific reference to the impediment

Pasqualigo (*apud* Leander, *loc. cit.*: "Sic ait: Quia autem audire missam subordinatur celebrationi: ideo etiam praeceptum audiendi Missam videtur subordinatum praecepto non celebrandi, transacta tali hora diei, atque ideo videtur obligare ad audiendam Missam intra illud tempus, intra quod de iure communi potest celebrari . . .").

[161] C. 51, D. I, *De consecratione* (Leo I): "Necesse est autem, ut quedam pars populi sua deuotione priuetur, si unius tantum missae more seruato sacrificium offerre non possunt, nisi prima parte diei conuenerint" (Richter-Friedberg, I, col. 1307). Cf. Regino Prumensis, *De ecclesiasticis disciplinis*, I, Inquisitio de his quae Episcopus vel eius Ministri . . . inquirere debeant; *Inquis.* 33: "Si tempore statuto, id est circa horam tertiam diei, missam celebret, et post haec usque ad medium diem jejunet, ut hospitibus atque peregre venientibus, si necesse fuerit, possit missam cantare" (*PL*, CXXXII, 188).

[162] Cf. Gasparri, *op. cit.*, n. 117; De Lugo, *op. cit.*, D. XX, S. I, n. 41.

[163] Canon 806, § 2: "Hanc tamen facultatem [binandi] impertiri nequit Ordinarius, nisi cum, prudenti ipsius iudicio, propter penuriam sacerdotum die festo de praecepto notabilis fidelium pars Missae adstare non possit . . . ." Canon 822, § 4: "Loci ordinarius aut, si agatur de domo religionis exemptae, Superior maior, licentiam celebrandi extra ecclesiam et oratorium . . . concedere potest iusta tantum ac rationabili de causa, in aliquo extraordinario casu et per modum actus."

[164] *Inst.*, p. 49: "Bonum enim commune aliquando sacrorum mysteriorum celebra-

of feast days, I believe, which clearly (if only by insinuation) indicates that besides the accessory value of an evening Mass on some extraordinary occasion, the Holy See did also envision it as a possible extension of the opportunity to satisfy the ordinary Sunday and feast day obligation on the part of those who could not do so within the normal limits.

But the Holy See has not itself determined the finality of any particular concession of evening Mass. It has empowered the local ordinaries to permit them, if and when Mass at that hour is necessary for one or another cause.[165] If, therefore, the ordinary judges that such a Mass is indicated in all or part of his territory because local conditions make it impossible for large numbers to satisfy the precept within the usual limits, the situation of the faithful concerned is no different juridically than that of those who attend a Mass of bination, or one held temporarily in the school hall while the church is being repaired. Persons who cannot go in the morning are as much obliged to go in the afternoon as when a church which formerly had Mass only at seven and ten o'clock begins to have another at twelve. The whole question of privilege, in such a case, is excluded by the motive.[166]

And this is presumably the case when regular evening Masses are scheduled in parish churches on Sundays and holy days, without specification of any particular cause. The same would apply when an ordinary Mass of that sort is incidentally made the occasion of some additional activity (a graduation, for example, or Holy Name Communion). But when the Mass is granted not precisely in consideration of the precept but expressly as a mode of solemnizing some extraordinary liturgical, social, or academic event, then the appeal to privilege is not clearly invalid. Either the faithful in general or the particular group in whose favor the concession may have been made could indeed elect to fulfil the law at that Mass.[167] But neither the

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tionem post meridiem expostulat: v. gr. pro quarundam industriarum opificibus, qui *festis quoque diebus* laboribus succedunt in vices; pro illis operariorum classibus, qui *matutinis festorum horis* occupantur, ut muneribus portuum addicti..." (emphasis added).

[165] *Const.*, VI: "Si rerum adiuncta id necessario postulant...."

[166] Cf. T. L. Bouscaren, S.J., "De Missa ex licentia ordinarii celebrata extra ecclesiam et oratorium," *Periodica*, XXVIII (1939), 52–58.

[167] Cf. Suarez, etc. (*supra*, note 160).

one nor the other would be obliged to compute it among the Masses provided for the discharge of the Sunday and feast day duty.

Of course, the Holy See can always settle, formally and definitively, any point in dispute. (It hardly seems necessary to explicitate, at each stage of a discussion, one's readiness to accept such decisions. That could be taken for granted.) In so doing, however, the Holy See does not take sides in the debate; it eliminates the doubt. It says what the law is, not what sense should be, or should have been, assumed in the presence of reasonable uncertainty. Pending those solutions, not only is the private commentator free to espouse the opinion which the established principles of interpretation seem to postulate; he is not free to do anything else. It is not his business to conjecture what answer is likely to be given, or to judge what the law really ought to be. The single duty of the private commentator is to apply to any disposition of authority the kind of interpretation which the authority itself, in its juridical system, has prescribed for interpretation in general and for that kind of enactment in particular.