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A HISTORICAL ACCOUNT OF THE CURRAN CONTROVERSY

MICHAEL SCOTT FEELEY*

The legal controversy surrounding the suspension of Father Charles Curran from teaching moral theology at the Catholic University of America raises new issues of Church-State jurisprudence. Neither dissent nor litigation is novel, but the combination is unusual when a Roman Catholic priest sues a Roman Catholic institution in civil court essentially over a question of ecclesiastical authority. For constitutional, contractual, and ethical reasons, disputes between Catholic clergy and religious superiors rarely come before a secular tribunal. Traditionally, the judiciary has been cautious of treading on Church territory where first amendment guarantees of freedom of religion apply.¹ Long before the Supreme Court ruled that the fourteenth amendment made the religion clauses applicable to the states,² courts recognized the sensitive nature of religious conflicts and the dangers inherent in adjudicating the delicate issues involved in intrachurch disputes.³

Moreover, the Roman Catholic Church has a well-known and complex system of government. By choosing to join the sacerdotal ministry,
each priest freely and knowingly entered the self-regulated institutional structure. Courts have accorded this private ordering a contractual status in which the Church handles its own matters internally, without interference or supervision from the secular bench. A distinction is made between cognizable civil issues and disputes involving the religious relationship between a priest and his ecclesiastical superiors; by restricting judicial review to the former, courts attempt to avoid constitutionally forbidden inquiry into religious matters. The difficulty lies in determining what are religious issues and what are cognizable civil claims.

In addition to the unwillingness of courts to review intrachurch dis-

4 In Watson, the Supreme Court stated: “All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.” 80 U.S. (13 Wall.) at 729.

A priest or minister of any church, by assuming that relation, necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office and in whose name he exercises his functions, and when he submits questions concerning rights, duties and obligations as such priest or minister to the proper church judicatory, and they have been heard and decided according to the prescribed forms, such decision is binding upon him and will be respected by the civil courts.

Baxter v. McDonnell, 155 N.Y. 83, 101-02, 49 N.E. 667, 671 (1898)(holding that priest had no cause of action against his bishop for salary payments); see also Rose v. Vertin, 46 Mich. 457, 9 N.W. 491 (1881)(holding that bishop is not liable to pay priest's salary on grounds that while bishop is priest's superior, he is not his employer and civil court cannot construe terms of canon law).

5 The Baxter court stated that a priest “can always insist, of course, that his . . . rights as an individual . . . shall be determined according to the law of the land, but his relations, rights and obligations arising from his position as a member of some religious body may be determined according to laws . . . enacted by that body for such purpose.” 155 N.Y. at 102, 49 N.E. at 671.

Recently, the Eighth Circuit dismissed a priest's suit against his bishop, which charged lack of canonical due process:

[The priest's] claims relate to his status and employment as a priest, and possibly to other matters of concern with the church and its hierarchy, and go to the heart of internal church discipline, faith, and church organization, all involved with ecclesiastical rule, custom and law. While there may be some secular aspects to employment and conceivably even to the priesthood or clergy, it is apparent that the priest or other members of the clergy occupies a particularly sensitive role in any church organization. Significant responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions.

Kaufmann v. Sheehan, 707 F.2d 355, 358-59 (8th Cir. 1983).

putes and the difficulty of the task, the clergy has generally refrained from bringing disputes before a secular tribunal. An ethos has prevailed against airing private differences in the public arena, especially in a forum based on radically different premises than those embodied in the ecclesial legal system. Civil resolution of these conflicts subjects the Church to judgment by authorities outside her self-contained structure and reflects poorly on the faith.  

The Curran controversy departs from past practice by asking the State to determine that the Chancellor of Catholic University, Archbishop James A. Hickey of Washington, D.C., does not have the authority to prevent Curran from teaching moral theology in light of the Vatican declaration that Curran is no longer “suitable nor eligible to exercise the function of a Professor of Catholic Theology.” Fundamentally, it is a question of power—power to control who teaches and what is taught in the area of Roman Catholic religious studies. More precisely, the issue focuses on how the civil courts will respond to challenges to the decisions and actions of the Church hierarchy regarding clergy teaching at Catholic institutions of higher learning. It is uncertain if the Curran controversy concerns an issue of civil contract or ecclesiastical obligation. The nature of the parties creates the difficulty; both have dual status. Curran is a priest of the Roman Catholic Church permitted to teach moral theology and a contractually employed tenured member of the faculty. Catholic University is the educational center of the National Conference of Catholic Bishops and a nonprofit corporation recognized by the District of Columbia. Since this is not a clear case of a priest defying his bishop but a dispute over contract terms, the outcome is not readily apparent. Curran ostensibly opposes Hickey in his role as Chancellor, not as Archbishop, and argues from civilly recognized documents, not religious law. Likewise, Hickey has invoked the powers granted the Chancellor by the Vatican approved Faculty Handbook/Bylaws and Canonical Statutes of the University. Since these official writings incorporate and presuppose ecclesiastical documents and religious beliefs, the case takes on special complexity.

Curran’s filed complaint contends that the University breached his employment contract on two counts: first, when the Chancellor suspended him from teaching any course in the Department of Theology pending the result of University proceedings on the withdrawal of his canonical mis-

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2 Two recent examples of clergy suing their bishop are Putnam v. Vath, 340 So. 2d 26 (Ala. 1978), in which the Alabama Supreme Court rejected a priest’s claim that he not be deprived of salary for priestly duties unless he received canonical due process before a church tribunal, and Reardon v. Lemoynne, 122 N.H. 1042, 454 A.2d 428 (1982), in which the New Hampshire Supreme Court ruled that the court could consider a suit by four nuns contractually challenging the non-renewal of their teaching contracts.
sion to teach in the name of the Church, and second, when the president of the University, William Byron, S.J., subsequently cancelled his three scheduled spring classes.  

The legal challenge, however, does not mask the real dispute which concerns the nature of authority and dissent and, in particular, the power of the Roman Catholic hierarchy to control the teachers and the teachings in Church-affiliated educational institutions. The Curran case exemplifies the tension between principles of academic freedom and fidelity to the Magisterium. It brings into sharp relief the debate over the purpose and character of Catholic universities in the American context.  

Curran seeks the aid of the civil courts to press his position on the right to dissent and the proper role of Catholic scholars in Church-affiliated colleges and universities. He characterizes the suit solely as a dispute over contract interpretation and asks the court not to allow the judgment of ecclesiastical authorities to be translated into legally binding decisions on a matter he argues is strictly secular. Regardless of the ecclesiastical avenues open to Curran and Hickey, the court must decide whether the case concerns a cognizable legal issue and, if so, how it will apply the common law to such a complex case.

The Curran affair has aroused heated passions on all sides without promoting a sufficient understanding of the investigative process or the actual facts of the case. By setting forth the sequence of communications and actions leading up to Curran’s filing of suit on February 27, 1987, this Article seeks to bring out the tone and attitude of the participants; to identify the complex underlying ecclesial, theological, and canon law issues; and to present the arguments and actions of the parties as they emerged in order to provide a concise yet full account of the controversy. A better awareness of the history of the dispute and the positions and actions of the parties may offer a basis for more informed discussion of the treatment of Father Curran and the issues raised by his suspension.

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9 The Sacred Congregation for Catholic Education’s proposed restrictions on Catholic universities have further inflamed the debate. For the text of the proposal, see Proposed Schema for a Pontifical Document on Catholic Universities, reprinted in 15 ORIGINS 706 (1986). For a negative reaction to the Schema, see Association of Catholic Colleges and Universities, Synthesis of Responses from Catholic College and University Presidents, reprinted in 15 ORIGINS 697 (1986); for a positive reaction, see Address by Msgr. George Kelly, Catholic University of America (Mar. 15, 1986), reprinted in 15 ORIGINS 704 (1986).
10 Curran could avail himself of internal church appeals procedures. The Bishop of Rochester, Curran’s diocesan, could recall him or laicization steps could be instituted.
11 For a presentation of the judicial doctrines governing the issue and an analysis of the suit, see Feeley, The Dissent of Theology: A Legal Analysis of the Curran Case, 15 HASTINGS CONST. L.Q. 7 (1987).
The Reverend Charles E. Curran is a priest of the Diocese of Rochester, New York, ordained in 1958. He began teaching moral theology at the Catholic University of America in 1965 and has been a tenured Ordinary Professor since 1971. From his first days at Catholic University, Curran has been a maelstrom of controversy for his theological views and the reaction these positions have provoked from University and ecclesiastical officials. Two serious attempts to remove Curran from the faculty occurred within three years of his joining the University. First, in 1967, the University's decision not to renew his contract to teach met with a campus-wide student and faculty strike, which forced the University to back down and promote Curran to Associate Professor. Second, upon the release of the papal encyclical *Humanae Vitae* condemning artificial contraception in 1968, Curran led a well-organized, public campaign against the pronouncement. The Board of Trustees initially planned to claim that such activity breached his employment contract, but the University decided not to force the point. A year-long University inquiry exonerated Curran and other faculty members who had engaged in the vocal public dissent.

Although Rome had begun to monitor Curran in 1966, several years passed before direct action was instituted against him. On July 13, 1979, Franjo Cardinal Seper, prefect of the Sacred Congregation for the Doctrine of the Faith, informed Curran that he had initiated an investigation into his writings after "having several of [Curran's] articles and books called to" the Congregation's attention. Cardinal Seper included sixteen...
pages of analysis “detailing the principal errors and ambiguities which have been found in the writings examined,” primarily concerning his position on dissent from non-infallible teachings of the Magisterium. The Observations discussed errors in Curran’s understanding of such dissent as demonstrated in his writings and errors in his views on issues within moral theology. Seper invited Curran to respond to these Observations. Curran wrote the Congregation a twenty-one page letter on October 26, 1979, objecting to the procedures of the investigation and setting forth his views on legitimate theological dissent from authoritative but non-infallible hierarchical teachings. The Congregation replied on May 20, 1980, to Curran’s procedural objections and concern over a let-

orthodoxy.

The fundamental observation to be made regarding the writings of Father Charles Curran focuses upon his misconception of the specific competence of the authentic magisterium of the Church in matters de fide et moribus . . . . Insofar as the individual theologian does not have reasons which appear to be clearly valid to him and which derive from his competence in the matter in question to suspend or refuse assent to the teaching of this authentic magisterium, he must heed its teaching, even while recognizing that it might in an exceptional case be mistaken, since it does not enjoy the guarantee of infallibility. But this suspension of assent does not provide grounds for a so-called right of public dissent, for such public dissent would in effect constitute an alternative magisterium contrary to the mandate of Christ given to the apostles and constantly exercised through the hierarchical magisterium in the Church.

Id. at 118.

Id. at 119-23.

Id. at 123-37. The Observations listed nine points of contention in Curran’s writings.

Letter from Curran to Seper (Oct. 26, 1979), reprinted in FAITHFUL DISSENT, supra note 12, at 142.

“First, I must publicly state that the procedures of the Sacred Congregation . . . are seriously flawed in terms of their protection of the rights of the individual involved. They fail to incorporate the elementary principles of due process which are accepted in contemporary legal structures.” Id. at 143-44. Curran also complained of the method of selective citations from his writings, especially without reference to his systematic work on the subject, Dissent In and For the Church, and the vagueness of what the Observations meant by “errors and ambiguities.” Id. at 145. He further registered his fear that he had already been “publicly judged and condemned” by a letter from Archbishop Hamer to Bishop Sullivan dated April 24, 1979 which was published in Catholic newspapers. Hamer, the Secretary of the Congregation for the Doctrine of the Faith, had written a congratulatory letter dated April 29, 1979 to Bishop Sullivan of Baton Rouge for refusing to let Curran use diocesan facilities to give a talk and for publicly clarifying various errors in Curran’s positions. Id. at 144.

Curran presented five questions on dissent and answered them in order to provide a basis upon which to begin a dialogue with the Congregation. Id. at 146-61.

[The method of inquiry] is not a trial but rather a procedure designed to guarantee a careful and accurate examination of the content of published writings by an author. Should this examination indicate the presence of opinions which seem to be in con-
letter from the Congregation's secretary, Archbishop Jerome Hamer, to Bishop Joseph Sullivan. Additionally, the response stated that, in connection with questions raised by Curran concerning the hierarchical Magisterium, the Congregation was reviewing his book, *Dissent In and For the Church.*

On February 8, 1981, Seper informed Curran that after examining his book, the initial Observations still remained pertinent and invited Curran to complete his response. Curran expressed his puzzlement to the Congregation on May 21, 1981, as to why it had not replied to the issues raised in Curran’s letter of October 26, 1979, particularly when there had been no response for fifteen months. In a letter of June 9, 1981, Seper acknowledged Curran’s substantial effort in preparing his October 26 response and explained that his response had “by no means been ignored or discounted; it does remain incomplete from the procedural point of view, however.” Congregational procedures require a complete examination of the theologian’s response to the points brought to his attention and, therefore, Seper asked again for detailed responses to each of the questions raised in the Observations.

Upon Cardinal Seper’s death, Pope John Paul II appointed Joseph Cardinal Ratzinger of West Germany as prefect of the Sacred Congregation for the Doctrine of the Faith. Curran sent a twenty-three page paper to the Congregation on June 21, 1982, in which he responded to the points raised in the original 1979 Observations. Ratzinger informed Curran on February 10, 1983 that his responses “have not proven satisfac-

8 Seper noted the letter was part of normal administrative procedure, was given no publicity by the Congregation, and did not affect the investigation. *Id.* at 166.
9 *Id.*
12 Letter from Seper to Curran (June 9, 1981), reprinted in *FAITHFUL DISSENT,* supra note 12, at 170.
13 *Id.*
14 Letter from Curran to Ratzinger (June 21, 1982), reprinted in *FAITHFUL DISSENT,* supra note 12, at 175.
tory”\textsuperscript{32} and sent him an eight page, second set of Observations of May 10, 1983, which was divided into three distinct sections: first, on the “notion of public dissent itself;” second, areas in which Curran “clearly and publicly dissented from the Church's Magisterium;” and third, “issues which still remain unclear.”\textsuperscript{33} Curran wrote a sixteen page letter to Cardinal Ratzinger on August 10, 1983,\textsuperscript{34} questioning again the quality of the dialogue, addressing the first part of the May 10 Observations on dissent, and asking the Congregation to state its position on the norms and criteria which govern dissent within the Church before true dialogue can continue.\textsuperscript{35}

After a series of communications between Curran, Ratzinger, and the Chancellor of Catholic University, Archbishop James A. Hickey of Washington,\textsuperscript{36} Ratzinger sent Curran a letter on April 13, 1984, in which the Cardinal briefly stated the Congregation's position on dissent,\textsuperscript{37} and set

\begin{itemize}
\item Dissent:
  \begin{itemize}
  \item With a defense of personal or private dissent from the “authoritative, non-infallible hierarchical Magisterium,” Fr. Curran justifies public dissent;
  \item While in theory and in print, Fr. Curran acknowledges the authoritative role of the Magisterium, in practice he rarely, if ever, cites the Magisterium's position except to criticize it, and effectively treats it as one might treat the opinion of any single theologian;
  \end{itemize}
\item Issues where there is clear dissent:
  \begin{itemize}
  \item Artificial contraception;
  \item Indissolubility of marriage;
  \item Abortion and euthanasia;
  \item Masturbation, pre-marital intercourse, homosexual acts, direct sterilization, artificial insemination;
  \end{itemize}
\item Issues which remain unclear:
  \begin{itemize}
  \item Is Fr. Curran certain that the Magisterium is wrong on those issues about which he dissentes?;
  \item Theory of Compromise;
  \item New Testament “ideal;”
  \item Frequency of dissent a cause to change the Magisterium’s position;
  \item Physicalism, biologist.
  \end{itemize}
\end{itemize}

\textit{Id.} at 200-01.

\textsuperscript{32} Letter from Ratzinger to Curran (Feb. 10, 1983), \textit{reprinted in Faithful Dissent, supra} note 12, at 196.

\textsuperscript{33} Letter from Ratzinger to Curran (May 10, 1983), \textit{reprinted in Faithful Dissent, supra} note 12, at 197. The second set of Observations provided a summary of points under each of the three sections:

1. Dissent:
   \begin{itemize}
   \item With a defense of personal or private dissent from the “authoritative, non-infallible hierarchical Magisterium,” Fr. Curran justifies public dissent;
   \item While in theory and in print, Fr. Curran acknowledges the authoritative role of the Magisterium, in practice he rarely, if ever, cites the Magisterium’s position except to criticize it, and effectively treats it as one might treat the opinion of any single theologian;
   \end{itemize}

2. Issues where there is clear dissent:
   \begin{itemize}
   \item Artificial contraception;
   \item Indissolubility of marriage;
   \item Abortion and euthanasia;
   \item Masturbation, pre-marital intercourse, homosexual acts, direct sterilization, artificial insemination;
   \end{itemize}

3. Issues which remain unclear:
   \begin{itemize}
   \item Is Fr. Curran certain that the Magisterium is wrong on those issues about which he dissentes?;
   \item Theory of Compromise;
   \item New Testament “ideal;”
   \item Frequency of dissent a cause to change the Magisterium’s position;
   \item Physicalism, biologist.
   \end{itemize}

\textit{Id.} at 200-01.

\textsuperscript{34} Letter from Curran to Ratzinger (Aug. 10, 1983), \textit{reprinted in Faithful Dissent, supra} note 12, at 211 (including Curran's second response to the Observations).

\textsuperscript{35} \textit{Id.} at 222.

\textsuperscript{36} See \textit{Faithful Dissent, supra} note 12, at 223-26.

\textsuperscript{37} The Congregation has made clear its position regarding public dissent in its explicit citation in the Observations of \textit{Lumen Gentium} n.25, in which religious assent is required of all the faithful for the authentic teaching of the Pope, even if that teaching is not “ex cathedra.” The Observations state, moreover, that “to dissent even pri-
September 1, 1984 as the final date by which Curran must forward his "complete reply to the Observations." Curran sent his twenty-three page final response to Ratzinger on August 24, 1984. The correspondence contained three parts. In the first, Curran reviewed the history of the case to support his claim that the Congregation was stalling on addressing the criteria for dissent; in the second, he reiterated his claim that the Congregation has failed to provide a clear position on dissent; in the third, he discussed the specific theological points on which the Congregation has sought clarification. Curran concluded by restating his "dissatisfaction with the process" and objecting to being singled out for Vatican action when so many other moral theologians shared similar or far more radical views.

On October 10, 1985, Joseph Cardinal Bernardin, Archbishop of Chicago and chairman of the Board of Trustees of Catholic University, and Archbishop Hickey delivered to Curran a letter dated September 17, 1985 from Ratzinger. The letter stated that the Congregation was "in a position to bring this inquiry to a conclusion" and that Pope John Paul II had confirmed the results of the investigation on June 28, 1985. Ratzinger referred to Canon 752 of the Code of Canon Law as a summation of the doctrine on the assent of faith and to Sapientia Christiana as theologically requires personal certitude that the teaching of the Church is incorrect, and notes its concern that "to further dissent publicly and to encourage dissent in others runs the risk of causing scandal to the faithful, and to assume a certain responsibility for the confusion caused by setting up one's own theological opinion in contradistinction to the position taken by the Church."


Id. at 228.


Id. at 229.

Id. at 225.

Letter from Ratzinger to Curran (Sept. 17, 1985), reprinted in Faithful Dissent, supra note 12, at 248.

Id.

"Pope John Paul II promulgated the revised Code of Canon Law in 1983, replacing the previously existing 1917 Code. Codex Iuris Canonici is the official law of the Latin rite of the Roman Catholic Church.

The official wording of Canon 752 is: "Non quidem fidei assensus, religiosum tamen intellectus et voluntatis obsequium praestandum est doctrinae, quam sive Summus Pontifex sive Collegium Episoporum de fide vel moribu enuntiant, cum magisterium authenticum exercent, eti definitivo actu eandem proclamare non intendant; christifideles ergo devitare curent quae cum eadem non congruant." The approved British translation of the Canon reads:

While the assent of faith is not required, a religious submission of intellect and will is to be given to any doctrine which either the Supreme Pontiff or the College of Bishops, exercising their authentic magisterium, declare upon a matter of faith or morals,
particular application of the doctrine to teachers of Catholic theology in an ecclesiastical faculty. He asserted that the Church has a right to control what is taught in her name:

In order to guarantee this teaching, the Church claims the freedom to maintain her own academic institutions in which her doctrine is reflected upon, taught and interpreted in complete fidelity. This freedom of the Church to teach her doctrine is in full accord with the students' corresponding right to know what the teaching is and have it properly explained to them. This freedom of the Church likewise implies the right to choose for her theological faculties those and only those professors who, in complete intellectual honesty and integrity, recognize themselves to be capable of meeting those requirements.\(^4\)

Ratzinger briefly reviewed the ethical teachings from which the Congregation believed Curran dissented\(^4\) and then invited him "to reconsider and to retract those positions which violated the conditions necessary for a professor to be called a Catholic theologian."\(^4\) He emphasized that a situation could not be allowed to continue "in which the inherent contradiction is prolonged that one who is to teach in the name of the Church in fact denies her teachings."\(^4\)

On December 9, 1985, Curran made a preliminary response to Hickey in order to "pinpoint as accurately as possible the differences," as Curran saw them, between the Congregation and himself.\(^5\) Curran made three

\(^1\) even though they do not intend to proclaim that doctrine by definitive act. Christ’s faithful are therefore to ensure that they avoid whatever does not accord with that doctrine.


\(^3\) Pope John Paul II, Sapientia Christiana, Apostolic Constitution on Ecclesiastical Universities and Faculties (Apr. 15, 1979); see also infra notes 80, 109-13 and accompanying text.

\(^4\) Letter, supra note 42, at 248.

\(^5\) Specifically, artificial contraception, direct sterilization, abortion, euthanasia, masturbation, pre-marital intercourse, homosexual acts, and divorce. Id. at 249-50.

Curran asserted in his March 11, 1986 press statement: "The September 17 letter from Cardinal Ratzinger to me lists the issues on which I dissent from non-infallible church teaching. It is true that I dissent on these issues, but my positions have always been carefully nuanced, and they are often in basic agreement with the non-infallible hierarchical teaching." Furthermore, Curran has consistently maintained that he does not "disagree with any dogmas or defined truths of Catholic faith." Press Statement of Curran (Mar. 11, 1986), reprinted in 15 Origins 666 (1986).

\(^6\) Letter, supra note 42, at 248.

\(^7\) Id.

\(^8\) Id.

\(^9\) Id.

\(^10\) Letter from Curran to Hickey (Dec. 9, 1985), reprinted in Faithful Dissent, supra note
points. First, he noted that the September 17 letter emphasized his teaching and he pointed out that he had not taught a course in sexual ethics in at least ten years. Second, he contended that the dispute with the Congregation centered on the assent of faith and challenged Ratzinger's use of Canon 752; concomitantly, Curran defended the position that "dissent from such noninfallible teaching means that one is no longer a Catholic theologian."

Third, he clarified the nature of the issues on which he dissented and noted that the differences are narrower than Ratzinger's letter implied. He noted his fidelity to discussing and explaining with respect and clarity the Magisterium's positions on the issues in question. Finally, Curran rejected a tentative compromise offer from Hickey in which Curran would agree to teach only doctoral students. Curran had suggested as a compromise in his October 10 meeting with Hickey and Bernardin that he would not teach the course in sexual ethics in the Department of Theology at Catholic University, but would remain a tenured professor in the Department and that the Congregation might issue a document pointing out the specific issues where Curran deviates from the Magisterium.

12, at 253.

"Id. Curran also noted that he had no plans to do so in the "foreseeable future." Id.

Curran developed this point in a separate letter included in the preliminary response:

However, my major problem is the assertion that the assent of faith is in any way involved in the differences between myself and the Congregation. I have always maintained that my positions in no way involve a denial of the assent of faith. I am dealing with noninfallible teachings which call for the obsequium religiosum. In my previous correspondence over the last six years the Congregation has agreed that the differences between us concern the area of noninfallible teaching and the obsequium religiosum.

FAITHFUL DISSENT, supra note 12, at 260.

Ratzinger stated that the Congregation was not "implying that the assensus fidei was always required" and made clear that Canon 752 recognized explicitly the distinction between the assensus fidei and the obsequium religiosum. Letter from Ratzinger to Hickey (Nov. 11, 1985), reprinted in FAITHFUL DISSENT, supra note 12, at 251.

Curran explained and developed persuasively the necessity and accuracy of recognizing the distinction between assensus fidei and obsequium religiosum in his Address to the College Theology Society (May, 1986), reprinted in 16 ORIGINS 180-81 (1986).

"Id. Curran stated: "The September 17 letter apparently accepts the criterion that any theologian who dissents from noninfallible church teaching can no longer be considered a Catholic theologian. In my judgment such a criterion is theologically false and pastorally disastrous for the life of the church." Curran reiterated his disappointment with the dialogue between the Congregation and himself and expressed his willingness again to accept the guidelines laid down by the U.S. bishops in their 1968 pastoral letter, "Human Life in Our Day." Letter, supra note 51, at 255.

15 ORIGINS 771 (1986).
Ratzinger informed Curran in January of 1986 that the Congregation would be willing to meet informally with him if he requested such a meeting and agreed to certain pre-conditions. On January 28, 1986, Curran asked to meet with the superior of the Congregation and on March 8, 1986, the unofficial meeting took place in Rome with Ratzinger, three members of the Congregation, Curran, and Curran's theological counsel and mentor, Father Bernard Haring. A brief joint press release stating that the meeting had occurred was issued in Rome on March 10, 1986. Curran held a press conference on March 11, 1986 in Washington, D.C., in which he detailed the history of his correspondence with Church authorities and set forth his defenses, outlined his ethical positions, and professed himself a loyal Roman Catholic. Various past presidents of the Catholic Theological Society of America and the College Theological Society issued a statement of support for Curran a few days after the press conference, which was later signed by over 750 American and Canadian theologians. Bishop Matthew Clark of Rochester, Curran's ordinary, defended Curran's character and questioned the implications and wisdom of any Vatican action against the priest. Hickey and Bishop James Malone, president of the National Conference of Catholic Bishops, each issued statements supporting the Holy See's right to safeguard Catholic teaching but calling for an acceptable resolution to the controversy with respect to Curran's interests.

Curran formally responded to Ratzinger's invitation to rescind his positions in an April 1, 1986 letter to the Cardinal. Curran refused to

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59 Three points of understanding were prerequisites to the meeting. First, Curran had to request it; second, no press statements before or during the Rome meeting could take place, but a joint statement would be made afterwards; third, the meeting was purely informal and outside the investigatory process which was concluded. Press Statement, supra note 47, at 667.

60 Letter from Curran to Ratzinger (Jan. 28, 1986), reprinted in FAITHFUL DISSENT, supra note 12, at 260. Curran also asked that he be allowed to bring counsel to the meeting. The request was granted.

61 For Curran's recounting of the meeting, see FAITHFUL DISSENT, supra note 12, at 37-40.

62 The statement read:

Father Charles Curran has requested to be received by the superiors of the Congregation for the Doctrine of the Faith for a meeting regarding his positions on moral theology. The meeting took place Saturday, March 8, 1986. The conversation was sincere and useful. In conformity with the "Ratio Agendi," the congregation has been in correspondence with Father Curran, but the above was an informal meeting outside of the procedural regulations of the congregation.


63 Press Statement, supra note 47, at 666.

64 FAITHFUL DISSENT, supra note 12, at 282.

65 Id. at 279.

66 15 ORIGINS 691, 693 (1986).

67 Letter from Curran to Ratzinger (Apr. 1, 1986), reprinted in FAITHFUL DISSENT, supra
retract his theological views and repeated his offer not to teach a course in sexual ethics and to have the Congregation issue a statement pointing out his deviations from official teaching in return for remaining a tenured professor in the Department of Theology at Catholic University. He defended the manner in which he presented the Church's teachings and his own proposed views. Curran received Ratzinger's reply, dated July 25, from Hickey on August 18. The Congregation declined Curran's compromise offer and rebutted Curran's complaints that the Congregation had never informed him of the identity of his "accusers" and had denied him the opportunity for counsel. Ratzinger answered that the Congregation "based its inquiry exclusively on your published works and on your personal responses to its Observations. In effect, then, your own works have been your 'accusers' and they alone." On the charge of denial of counsel, the Cardinal noted that the inquiry was conducted on a documentary basis, which allowed Curran to take whatever counsel he desired and that Curran in fact had consistently done so. Ratzinger wrote that Curran's admitted and continuing theological dissent, particularly in light of his status as Professor of Theology in an ecclesiastical faculty at a pontifical university, required the Congregation, whose mandate is to promote and safeguard Catholic teaching on faith and morals throughout the world, to act on his "repeated refusal to accept what the Church teaches." Consequently, Ratzinger informed Curran that the Sacred Congregation for the Doctrine of the Faith, in agreement with the Sacred Congregation for Catholic Education, "sees no alternative now but to advise the most Reverend Chancellor [Hickey] that you will no longer be considered suitable nor eligible to exercise the function of a Professor of Catholic Theology." Pope John Paul II confirmed the content and procedure of the decision on July 10, 1986. Rome's investigation of Curran

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note 12, at 265.

66 In addition, Curran thanked the Cardinal for the March 8th meeting and expressed appreciation for Ratzinger's "explicit recognition of the fact that I have never denied any dogmas or truths of the faith." Id. at 266. He again stated his opinion on the poor quality of the dialogue throughout the inquiry and defended his criteria for dissent from non-infallible hierarchical teachings. Curran once more noted that he was being singled out for positions widely held among theologians. Id. at 267.

67 "I have always discussed and explained the official hierarchical teaching in these areas with great respect. As mentioned earlier my positions are at times in substantial agreement with these official teachings. Likewise, I have carefully pointed out where my proposals are more tentative and probing." Id.

70 Letter from Ratzinger to Curran (July 25, 1986), reprinted in FAITHFUL DISSENT, supra note 12, at 267.

71 Id. at 269.

72 Id. at 270.

73 Id. (emphasis added).

74 Id.
ended with this determination. On August 22, 1986, a Vatican spokesman announced that “no further steps are contemplated” against Curran and Bishop Clark made clear that Curran remained a priest in good standing of the Diocese of Rochester.

After Rome completed its process, the focus shifted to the University to determine the consequences of the Vatican decision that Curran would “no longer be considered suitable nor eligible to exercise the function of a Professor of Catholic Theology.” Hickey, as Chancellor of Catholic University, released a statement on August 18, in which he supported the Congregation’s decision and said: “In view of the Holy See’s declaration and in accordance with the statutes of Catholic University, I have initiated the withdrawal of Father Curran’s ecclesiastical license to teach Catholic theology. Father Curran will enjoy the right to the procedures of due process set forth in the statutes.” On August 19, Father William J. Byron, S.J., the President of the University, announced that Curran was no longer eligible to remain as a member of the Department of Theology.

Curran responded at a press conference held on August 20. He noted that Hickey had imposed a September 1 deadline by which Curran must invoke the statutory process to fight the withdrawal of his canonical mission to teach. If he did not invoke the procedure, Hickey would automatically revoke the mission. Curran further reported that Hickey said the answer to whether or not he would still be permitted to teach in a department other than the Department of Theology could be given only by the Board of Trustees. Curran called into dispute the application of

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77 Statement of Bishop Clark (Aug. 18, 1986), reprinted in FAITHFUL DISSERT, supra note 12, at 286.
81 Sapientia Christiana and the 1917 Codex Iuris Canonici, as well as other Vatican documents, require each teacher of religious subjects to have a canonical mission (missio canonica) from the competent ecclesiastical authority, which authorizes the person to teach in the name of the Church. For a full historical treatment of the missio, see R. Wehage, The Canonical Mission for Teaching: Article 27 of the Apostolic Constitution Sapientia Christiana (JCL Dissertation, Catholic University of America, 1983); see also E. Dalay, The Needed Mandate To Teach, in 45TH PROCEEDINGS OF THE CANON LAW SOCIETY OF AMERICA 114 (1983)(brief historical summary).
82 The 1983 Codex Iuris Canonici replaced the missio canonica with mandatum in Canon 812. The effect of the substitution of the mandatum for the missio canonica is uncertain and hotly disputed. For a discussion of this new Canon, see infra note 130.
83 Id.
the Canonical Statutes of the Ecclesiastical Faculty to him.\textsuperscript{83} He stated:

I have written that the existing canonical statutes are themselves a violation of academic freedom. Also in 1982 I wrote an official letter to the University asserting that these statutes do not apply to me since my tenured contract with the University predates these statutes and the University cannot unilaterally add anything to my contractual obligations.\textsuperscript{84}

Curran restated how minor his differences with the Vatican sexual teachings actually were, reasserted his opinion on dissent, and decried the investigative process.\textsuperscript{85} He explained his theological position and reaffirmed his loyalty and commitment to the Roman Catholic Church.\textsuperscript{86}

On August 29, Curran informed Hickey that he intended to assert "all my academic and legal rights to remain a professor of theology at the university, including all my 'due process rights' under the statutes of the university."\textsuperscript{87} He again asked Hickey to clarify whether the withdrawal of the canonical mission, if it should occur, would operate "to terminate my professorship in the department of theology and my professorship at the university."\textsuperscript{88} This question remained unresolved.

On November 11, with the approval of Curran, Hickey formally requested the Academic Senate of the University to establish an ad hoc committee as stipulated by the Canonical Statutes to hear the case con-

\textsuperscript{83} The Canonical Statutes of the Ecclesiastical Faculties of the Catholic University of America (approved by Academic Senate, January 22, 1981; by Board of Trustees, January 31, 1981; by Congregation for Catholic Education, December 21, 1981). The revised text was approved by Academic Senate, September 20, 1984; by the Board of Trustees, November 28, 1984; and submitted to the congregation for Catholic Education, December 3, 1984 [herein-after Canonical Statutes].

\textsuperscript{84} Press Statement, supra note 79, at 206.

\textsuperscript{85} Id. at 205-06.

\textsuperscript{86} Id.


The Canonical Statutes, see supra note 83, enumerate the procedure for withdrawal of the canonical mission. Statute V, 8.1 states: "After the grant of the canonical mission or permission to teach, the Chancellor may withdraw the mission or permission only for the most serious reasons and after providing information regarding specific charges and proofs." 8.2 states: "If requested by the member of the Faculty, the procedures of due process (Faculty Handbook, Part II, Section 4, Art. 24) shall be employed. The procedures are for dismissal for cause initiated by the President, which are applicable mutatis mutandis to withdrawal of the canonical mission when initiated by the Chancellor." The procedures for dismissal in the Faculty Handbook/Bylaws provide for a detailed process by which an ad hoc committee conducts hearings and reports to the President. The final decision rests with the Board of Trustees who must give careful consideration to the Committee's recommendation, which includes remanding the matter to the committee if the Board does not agree with its decision. The Board must reserve final judgment until after studying the committee's reconsideration.

\textsuperscript{88} Letter, supra note 87, at 234.
cerning withdrawal of the canonical mission to teach. Hickey honored Curran's position that the committee hearings be deferred until after Curran returned from a sabbatical in January of 1987.

By letter on December 19, Hickey informed Curran that he proposed to suspend Curran from teaching in the ecclesiastical faculty of the University during the pendency of the proceedings for withdrawal of the canonical mission. The Chancellor acknowledged that a final decision on the withdrawal of the canonical mission awaited the outcome of the University procedures initiated in accordance with the Canonical Statutes, but Hickey noted:

At this time, however, I am unaware of any basis to permit you to retain your canonical mission “to teach in the name of the church” when the Holy See has expressly declared that you are “not suitable nor eligible to teach Catholic theology.” It is difficult to conceive of a more “serious reason” to withdraw the canonical mission, or a “more serious or pressing case” for suspension.

The Canonical Statutes stipulate the procedures for suspension and Hickey's letter conforms to the requirements. Statute V, 9.1 states: “In more serious or pressing cases, the Chancellor, with the concurrence of a majority of the episcopal members of the Board, may suspend the member of the Faculty from teaching in an Ecclesiastical Faculty during the period of investigation.” Hickey wrote that the episcopal members of the Board of Trustees agreed with the proposed suspension. Before a suspension can occur, statute V, 9.2 mandates: “The member of the Faculty will first be given a warning with an opportunity to respond in due time.” Hickey reiterated his request that Curran voluntarily refrain from teaching pending the conclusion of the proceedings or respond in writing to the proposal for suspension within two weeks. The Chancellor specifically asked Curran to respond to “the central question in this inquiry: How can you be permitted to retain your canonical mission ‘to teach in the name of the Church’ when the Holy See has expressly declared that you are ‘not suitable or eligible to teach Catholic theology’?” Hickey also wrote of his compliance with statute V, 9.3 which states: “The Chancellor will not proceed to the suspension without first explaining his reasons, with the obligation of confidentiality, to the President of
the University, to the respective Dean and Chairman, and to the member of the Faculty and seeking their opinion about the gravity of the situation.\textsuperscript{97} Curran responded in a letter dated January 7, 1987.\textsuperscript{98} He disagreed that there is "any justification whatsoever" for suspending him from teaching while awaiting the upcoming hearings.\textsuperscript{99} Curran stated that the Canonical Statutes by their own explicit terms apply only to the ecclesiastical faculties of the University and not to the non-canonical degree granting programs within the Department of Theology. He asserted that he is "lawfully entitled" to teach in the non-ecclesiastical section of the Department and that suspension from the ecclesiastical portion of the Department is both unwarranted and the timing suspect.\textsuperscript{100} Curran argued that suspension from teaching bears in no way on the Vatican decision on his status as a Catholic theologian since Rome based the judgment wholly on his past writings, not his teaching performance.\textsuperscript{101} He questioned the timing of the proposed suspension as effectively prejudicing the ad hoc committee and the Board of Trustees on the issue of the withdrawal of the canonical mission.\textsuperscript{102} To Hickey's central question of how he could be permitted to retain the canonical mission when the Holy

\textsuperscript{97} Canonical Statutes, supra note 83, at 9.
\textsuperscript{99} Id.
\textsuperscript{100} To the extent that your proposed action is intended to prevent me from teaching anywhere in the department of theology, I believe that it is without any basis in the canonical statutes. Those statutes make it plain that they apply only to the "ecclesiastical faculties" of the university, and they also explicitly state that there is a "non-ecclesiastical" portion of the department of theology (i.e. the non-canonical degree programs) to which they do not apply. I am ready, willing, able, and, I believe, lawfully entitled to teach in the non-ecclesiastical portion of the department of theology. To the extent that your proposed action is intended to prevent me from teaching in the ecclesiastical portion of the department of theology, I submit that it is unwarranted and that the timing of it is suspect.
\textsuperscript{101} Id. at 570-71.
\textsuperscript{102} In your letter, you assert that the sole ground for my suspension is that set forth in Cardinal Ratzinger's letter. In that letter, Cardinal Ratzinger concluded that because of my writings I am no longer eligible or suitable to teach Catholic theology. Nowhere does he assert that I am an incompetent teacher, that I have neglected or failed in my teaching responsibilities, that my teaching would be a danger to anyone. His sole dispute with me relates to my past writings. As I have said to you on a number of occasions, most of Cardinal Ratzinger's difficulty with me concerns my writings in areas of sexual ethics, and I have not even taught such a course in more than a decade. Thus, if your only basis for suspending me is Cardinal Ratzinger's letter, and if, in turn, his position is based entirely on my writings, you can have no legitimate basis for suspending me from teaching the courses officially announced for the spring 1987 semester.
\textsuperscript{102} Id. at 572.
\textsuperscript{103} Id.
See had declared him no longer suitable or eligible to teach Catholic theology, Curran responded:

The Answer is simple. I am a tenured professor in an American university governed by a specific set of binding rules and procedures and by a presumably independent board of trustees. My canonical mission has not been withdrawn and, if I am successful in my defense in the upcoming hearings, may never be withdrawn. In such a case, I will be permitted to continue my teaching activities at the university. Surely you must agree that due process means at least that much. Your proposed action, and the "central question" that you say is posed by it, simply presumes the outcome of the upcoming hearings. I am unable to share your presumption.

Curran noted that suspension is the most extreme step possible against "a professor in the American academy short of dismissal" and he urged Hickey to reconsider the action particularly since the Vatican had not objected to his teaching performance and his scheduled courses do not directly deal with the issues disputed by Rome. Two days later, by letter dated January 9, 1987, Hickey suspended Curran from teaching in an ecclesiastical faculty until completion of the statutory process determining whether his canonical mission would be revoked. The letter explained that the action complied with the procedures set forth in Canonical Statutes section V, 9. Hickey reviewed three letters he received in answer to his December 19 letter soliciting responses on the proposed suspension pursuant to section V, 9.3 of the Canonical Statutes. Curran, Dean Cenker of the School of Religious Studies, and Chairman Power of the Department of Theology advised against suspension. Hickey forwarded the letters to the episcopal members of the Board of Trustees and conferred with the bishops on the issue of suspension. The episcopal board members agreed with Hickey that suspension was warranted. Hickey noted that the ecclesiastical faculties of

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103 Id.
104 Id.
106 Section V, 9.3 of the Canonical Statutes, see supra note 83, at 9, provides that the Chancellor must explain his reasons for suspension and seek the opinion of the University President, the respective Dean and Chairman, and the professor in question. Hickey did so on December 19, 1986. See Press Statement of Curran (Jan. 12, 1987), reprinted in 16 ORIGINS 574 (1987).
107 Dean Cenker's letter to Hickey, dated December 29, 1986, urged against action and noted that "the gravity of the situation will only be increased with the proposed suspension." Fr. Power wrote in his letter of December 22 to Hickey that he saw "no acceptable warrant for this suspension." Press Statement, supra note 106, at 574.
108 Letter, supra note 105, at 573. "Those canonical statutes, which contemplate the withdrawal of the canonical mission for 'most serious reasons,' see section V, 8.1, also provide expressly for suspension in 'more serious or pressing cases.' See section V, 9.1. In my judgment, and in the judgment of the episcopal members of the board, this is such a case." Id.
Catholic University enjoyed a special relationship with the Holy See, which includes adherence to norms established by Rome. The Canonical Statutes of the University, in accordance with the papal document *Sapientia Christiana*, require those who teach in the name of the Church in an ecclesiastical faculty to have a canonical mission or permission to teach from the Chancellor. Hickey referred to article 26, 1 and 2 of *Sapientia Christiana* to underscore the role and duties of a teacher in the ecclesiastical faculties of Catholic University. Hickey then re-

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109 Section I, 7 of the Canonical Statutes, *supra* note 83, at 2, specifically enumerates which Church documents bind the ecclesiastical faculties: “The Faculties observe the decisions of the Second Vatican Council affecting higher education, in particular the pastoral constitution *Gaudium et spes* 53-62 and the declaration *Gravissimum educationis*, as well as the Code of Canon Law, canons 815-821, and the apostolic constitution *Sapientia Christiana* (April 15, 1979), together with the related *Ordinationes* (April 29, 1979). . . .” Section I, 8 states: “Norms affecting ecclesiastical faculties which are found in the ecclesiastical legislation of the Second Vatican Council or the Apostolic See are not repeated in these Statutes.”

*Sapientia Christiana* is the current Apostolic Constitution on Ecclesiastical Universities and Faculties. Pope Paul VI ordered a commission to prepare a new constitution in light of the Second Vatican Council, and several years of study and consultation ensued. Pope John Paul II promulgated the document on April 15, 1979. It replaced the previous educational constitution, *Deus Scientiarum Dominus*, which Pope Pius XI established in 1931.

110 Article 27.1 of *Sapientia Christiana*, *supra* note 45, states:

Those who teach disciplines concerning faith or morals must receive, after making their profession of faith, a canonical mission from the Chancellor or his delegate, for they do not teach on their own authority but by virtue of the mission they have received from the Church. The other teachers must receive permission to teach from the Chancellor or his delegate.

The Canonical Statutes of Catholic University include procedures for granting the canonical mission or permission to teach when a faculty member is initially appointed a member of an ecclesiastical faculty. Section V, 3 states:

Upon the completion of procedures for the initial appointment of a member of an Ecclesiastical Faculty, the President of the University forwards to the Chancellor the application and dossier, including all relevant informations and expressions of opinion regarding the appropriateness of the candidate’s appointment, for the conferral of the canonical mission, in this case of those who teach disciplines pertaining to faith or morals, or for permission to teach, in the case of those who are not Catholics or who teach other disciplines. (See *Sapientia Christiana* 26.1; *Ordinationes* 18).

Section V, 4 states:

The Chancellor grants the canonical mission to teach in the name of the Church or the permission to teach. The Chancellor will not deny the canonical mission or permission to teach without prior consultation with the members of the Board of Trustees who are also members of the National Conference of Catholic Bishops (By-Laws II, 1), the President of the University, and the cognizant Committee(s) on Appointment and Promotions. The obligation of confidentiality is to be respected by all parties.

111 *Sapientia Christiana*, *supra* note 45, at article 26 reads:

1. All teachers of every rank must be marked by an upright life, integrity of doctrine, and devotion to duty, so that they can effectively contribute to the proper goals of an
counted the long process of investigation, correspondence, and meetings by which the Congregation for the Doctrine of the Faith arrived at its judgment. Rome’s determination caused Hickey to initiate the process for withdrawal of Curran’s canonical mission to teach. Hickey defended the timing of the proposal to suspend Curran from teaching before the ad hoc committee of the University made its recommendation on the grounds that the highest doctrinal body of the Church had already made its determination with the concurrence of the Sacred Congregation for Catholic Education (which governs ecclesiastical faculties) and the approval of the Pope. Hickey wrote that Curran had provided “no conceivable basis on which a decision could be reached to permit you to retain your canonical mission to teach in the name of the church, when the highest authorities of the church have expressly and finally declared that you are not suitable to teach Catholic theology.” He could not imagine a more “serious reason” to withdraw the canonical mission or a “more serious pressing case” for suspension.

Ecclesiastical Faculty.

2. Those who teach matters touching on the faith and morals are to be conscious of their duty to carry out their work in full communion with the authentic Magisterium of the Church, above all, with that of the Roman Pontiff.

These provisions are based on the Second Vatican Council’s Dogmatic Constitution on the Church, Lumen Gentium, 25: AAS 57 (1965).

The Sacred Congregation for the Doctrine of the Faith is the highest doctrinal body in the Roman Catholic Church. It operates, as all curial congregations, under the ultimate and absolute authority of the Pope.

Article 5 of Sapientia Christiana, supra note 45, states: “The canonical erection or approval of Ecclesiastical Universities and Faculties is reserved to the Sacred Congregation for Catholic Education, which governs them according to law.”

It is interesting to observe that the prefect of the Congregation is William Wakefield Cardinal Baum, the former Archbishop of Washington and Chancellor of Catholic University, who dealt personally with Curran while still heading the Washington archdiocese.

You have questioned the timing of my proposed action, asking why I have waited until now to propose your suspension when your disagreement with church teachings has been known for some time, and at the same time asking why I do not await the decision of the ad hoc committee. The answer to your question should be apparent. For more than seven years, this matter has been under investigation by the Sacred Congregation for the Doctrine of the Faith. It was entirely appropriate that I, as chancellor of the university, await the decision of the congregation, the highest doctrinal body in the Catholic Church, before initiating action to withdraw or suspend your canonical mission to teach in the name of the church. Now that that congregation, the Sacred Congregation for Catholic Education and the Holy Father himself have reached a final judgment that you are not suitable or eligible to teach Catholic theology, it is entirely appropriate that proceedings to withdraw your canonical mission be initiated.

Letter, supra note 105, at 573.

Id.

Id.
Hickey further noted he had planned to have the ad hoc committee meet during the fall, but Curran requested through counsel that the proceedings be delayed until after he returned from sabbatical. Hickey had hoped to avoid the issue of suspension by conducting the hearings before Curran returned from sabbatical to teach. By honoring Curran’s request, this course of action was no longer possible. Hickey asserted that he intended the suspension “neither to interfere with the ad hoc committee’s proper function nor to prejudice your case before the committee.” He reaffirmed that a final decision on withdrawal of the canonical mission would await the conclusion of the full statutory procedures, but that the seriousness of the case required suspension. Since Curran had refused to voluntarily refrain from teaching until the matter was resolved, Hickey suspended him from teaching in an ecclesiastical faculty pending the outcome of the proceedings.

Curran responded on January 9, 1987, the same day he received the Chancellor’s letter of suspension. Curran contended that he was eligible to teach in the non-canonical degree granting portion of the Department of Theology even if Hickey had authority to suspend him from the canonical part. Curran argued that the preamble of the Canonical Statutes limit their scope to the canonical degree granting program and, hence, the statues do not provide procedures for suspending him from teaching in the non-canonical section.

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117 Id. at 573-74. The letter stated that Curran’s counsel (Cravath, Swaine & Moore) had informed the university counsel on November 6, 1986 that he would not oppose a formal request to the Academic Senate to establish the ad hoc committee in conformity with the Canonical Statutes. On November 11, 1986, Hickey made the request.

118 Id. at 573.

119 Id. at 574.

120 Id.

121 Hickey informed Curran that he would receive full salary and benefits in accordance with section V, 9.4 of the Canonical Statutes which reads: “A member of a Faculty so suspended will continue to receive full salary and benefits as long as the procedure for dismissal is not completed.”


123 Canonical Statutes, supra note 83, section I. The preamble and general statute I state: Among the Schools of The Catholic University of America, the following have the canonical status of ecclesiastical faculties: The School of Philosophy, the Department of Canon Law (School of Religious Studies), and the Department of Theology (School of Religious Studies). These Faculties, however, are not exclusively ecclesiastical; they also have other academic programs which do not have canonical effects and to which these Statutes do not apply.

A footnote appended to this section states: In these Statutes, the term “Faculties” is used exclusively to refer to these three academic units of the University, that is, to the three corporate bodies of teachers (who may be members of a Faculty, as defined in the Statutes, or associates of a Faculty) and students. In other documents the same term is used to refer to the
In a letter dated January 13, Hickey rejected Curran's interpretation of the preamble as unsupported by the wording. The crux of Hickey's position involves the nature of the faculty of the Department of Theology. He wrote:

The Canonical Statutes do not provide that there are two separate bodies of teachers for the ecclesiastical and non-ecclesiastical programs. To the contrary, there has always been a single body of teachers in the department of theology, and that single body of teachers has been responsible for the ecclesiastical and non-ecclesiastical programs of study.

He noted that the same courses, including the ones Curran planned to teach, could satisfy both degree program requirements and that this had been the case before and after the adoption of the Canonical Statutes. Hickey concluded: "In short, there are non-ecclesiastical programs in the department of theology, but there are no non-ecclesiastical teachers." Therefore, he reasoned that every member of the Department of Theology required a canonical mandate or permission to teach and came under the strictures governing ecclesiastical faculties. Furthermore, Hickey rejected Curran's position that he could teach the theology courses if he informed the students in the ecclesiastical degree programs that his course could not be taken for credit. Hickey made explicit his position that Curran not teach the proposed courses under any circumstances and requested assurance of Curran's compliance by noon the next day. The Chancellor added:

several Schools of the University or to the body of teachers (members or associates) of those Schools.
Statute I, 3 reads: "The Faculties are governed by the general policies and regulations of the University, with specific allowance for the matters governed by these Statutes or by the norms of the Apostolic See pertinent to ecclesiastical programs of study."

As you note, the preamble to the canonical statutes provides that "[t]hese faculties . . . are not exclusively ecclesiastical; they also have other academic programs that do not have canonical effects and to which these statutes do not apply." The footnote to this provision makes clear that the word faculties is used to refer to "these three academic units of the university," not to "the body of teachers . . . of those schools." In other words, these three academic units offer two separate academic programs—ecclesiastical and non-ecclesiastical—and that the requirements for the non-ecclesiastical degree programs are not stated in the canonical statutes. In that sense, these academic units are "not exclusively ecclesiastical."

Letter, supra note 122, at 591.

Hickey wrote: "Such a course of action would be inconsistent with the canonical statutes, with the structure of the department of theology and with my own intentions in suspending you." Id.
THE CURRAN CONTROVERSY

If you are unwilling to give me this assurance, then I must request that you state your reasons—again by 12:00 noon tomorrow—why I should not proceed to exercise my authority under Canon 812 to revoke, suspend or deny the required mandate to teach theological disciplines, based upon the judgment of the Holy See.\footnote{130 Id. Canon 812 replaced the requirement of a canonical mission with the requirement of a mandate. It is an entirely new provision with little history. The authoritative wording in the 1983 Codex iuris Canonici reads: “Qui in studiorum superiorem institutis quibuflibet disciplinas tradunt theologicas, auctoritatis ecclesiasticae competentis mandatum habeant oportet.” The official English translation reads: “Those who teach theological subjects in any institute of higher studies must have a mandate from the competent ecclesiastical authority.”}

Shortly after noon on January 14, the Executive Vice-President of Catholic University sent a letter to Curran informing him that the University’s president had given authorization to cancel the three theology courses Curran proposed to teach in the spring semester.\footnote{131 Curran wrote: “It is clear from the statutes that the chancellor has no statutory authority over the non-ecclesiastical degree programs of the university. You implicitly admit this by threatening to invoke Canon 812 as the basis of your asserted authority over non-ecclesiastical degree programs and their professors.” Id. \footnote{132 Were I to press at this time to teach these courses at the university, meanwhile appealing to the civil court for what I believe to be the correct interpretation of the} In a letter to Hickey dated January 14, Curran objected to the action and to the statutory interpretation Hickey articulated in his January 13 correspondence to Curran.\footnote{133 Shortly after noon on January 14, the Executive Vice-President of Catholic University sent a letter to Curran informing him that the University’s president had given authorization to cancel the three theology courses Curran proposed to teach in the spring semester.} Curran noted that the University’s actions precluded his teaching the scheduled courses. He decided not to press at that time his claimed right to teach the cancelled courses for two reasons: first, his concern for students who wished to take the courses; and second, the grave

\footnote{133 Curran wrote: “It is clear from the statutes that the chancellor has no statutory authority over the non-ecclesiastical degree programs of the university. You implicitly admit this by threatening to invoke Canon 812 as the basis of your asserted authority over non-ecclesiastical degree programs and their professors.” Id.}
potential consequences of the threat to invoke Canon 812, including its implications for Catholic higher education, and its stultifying effect on the Church. Furthermore, Curran expressed concern about the inappropriateness of using this issue as the test case for challenging the Canon's applicability in the United States. While choosing not to challenge legally the University's action at that time, Curran explicitly preserved his option to do so at a later date: "In so deciding, I waive no rights under canon or civil law to seek redress for the wrong that has been done to me by the cancellation, over my objection, of my courses." By threatening to invoke Canon 812, Curran accused Hickey of evidencing his intention that Curran be prohibited from teaching any theological courses at the University regardless of the outcome of the University investigation on the withdrawal of his canonical mission. Curran contended that if the decision had already been made, the ad hoc committee members should be informed that it would be a "charade" to go through the whole statutory process.

As you know, invocation of this canon would threaten the academic freedom and autonomy of Catholic institutions of higher learning in the United States. Decisions about hiring, promotion, tenuring and dismissing of faculty members would be made by church authorities who are external to the academic community. This denial of academic freedom would have serious consequences for academic accreditation, government funding and a host of other issues important to higher education in the United States.

While a denial of academic freedom and institutional autonomy would work great harm to Catholic higher education in the United States, it is also my belief, as you know, that academic freedom for Catholic theologians and within Catholic institutions of higher learning is important for the far more serious reason that it is necessary for the growth and ultimate good of the Catholic Church itself.

In view of these far reaching implications for the church and for Catholic higher education in the United States, I believe it would be irresponsible for you to invoke Canon 812 over the issue of a temporary suspension from teaching pending the completion of the statutory process here at the university. I would not want to provoke your use of this canon in what is not the primary issue under dispute. Should the canon ever be invoked by you, which I and many others in the United States would deeply regret, let it be invoked and challenged only over the most basic issues.

Your threat to invoke Canon 812 to prevent my teaching temporarily pending the
Curran filed suit on February 27, 1987 in the Superior Court for the District of Columbia.139

RECENT DEVELOPMENTS

The court granted continuances in order to allow the parties to pursue private resolution of the dispute. Curran accepted an appointment at Cornell University for the 1987-1988 academic year as Visiting Professor of Catholic Studies.

A seven-member inter-disciplinary faculty committee, under the chairmanship of Catholic University Law Professor Urban A. Lester, investigated the question of withdrawal of Curran's canonical mission. In October of 1987, the committee endorsed the withdrawal of the canonical mission provided that Curran “remain a tenured faculty member” and “continue to function as a professor in the field of his competence, namely as a professor in the area of moral theology and/or ethics,” but not within Vatican-accredited programs. The Board of Trustees meeting of January 26, 1988 rejected linking removal of the mission to offering alternative employment to Curran. The committee responded on February 16 with a reaffirmation of their report and the necessity of conditioning withdrawal on continued tenure in an area of Curran’s professional expertise.140

On April 5, District of Columbia Superior Court Judge Bruce B. Beaudin ruled on the University’s motion to dismiss Curran’s suit on the grounds that the controversy concerned a matter of church law and should not be reviewed by a civil court. Judge Beaudin agreed that the court could not examine issues of canon law but found that Curran’s “claim is based on an employment contract governed by the civil law and contract principles of the District of Columbia.”141 On April 12, the trustees voted to revoke Curran’s canonical mission and bar him from the Theology Department but noted that the action did not affect Curran’s tenure. The University announced it would enter into discussions with

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hearing on the “canonical mission” issue suggests that, regardless of the outcome of that hearing, you intend to invoke Canon 812 to prevent my teaching permanently any theologically related courses here at the university. If that is your intention, it seems to me that you have an obligation so to inform the faculty members who are willing to give of their time and effort to serve on the hearing committee. Not to do so would be less than honest. If the outcome has been foreordained they have a right to know beforehand that the entire process would be a charade.
Curran for an alternative teaching assignment within his field of competence. Although it appeared that an agreement had been reached to transfer Curran to the Sociology Department as Professor of Christian Social Thought, Curran broke off negotiations on May 17. He had agreed to avoid issues of sexuality and human reproduction but refused to sign a statement promising to refrain from teaching Catholic theology at the University. In addition, Curran rejected the University's stipulation that students in the Department of Theology and Canon Law and in the School of Philosophy would not be permitted to take his courses for credit and that his courses would not satisfy core requirements of the Department of Religion and Religious Education. Curran announced he would press his civil suit. For the 1988-1989 academic year, Curran is Brooks Visiting Professor of Religion at the University of Southern California.

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143 Hyer, Curran to Sue Catholic University, Washington Post, May 18, 1988, at B1, col. 2.