

## THE INDISSOLUBILITY OF MARRIAGE: REASONS TO RECONSIDER

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*[The present teaching of the Catholic Church on the doctrine of indissolubility of marriage has a complex history. It is based upon scriptural, sacramental, ethical, and canonical materials. Here the authors examine two questions: (a) is the teaching capable of change, and (b) is the evidence from the tradition adequate to support the present teaching? They conclude that indissolubility of a ratum et consummatum marriage is a doctrinal teaching open to revision by the magisterium, and that existing arguments are not sufficient to reject all proposals for alteration of the teaching.]*

**M**ARITAL BREAKDOWN is a common experience in our culture but no less a tragedy for its frequency. The Catholic community by its teaching, preaching, and pastoral practice attempts to walk a fine line upholding the dignity and permanence of marriage while expressing understanding for, and care of, those who experience the pain of divorce. Through its teaching that marriage is one of the privileged sacramental events in the lives of people, the Church underlines the depth of meaning that human love incarnates and the significance of committed love between a man and woman. The variety of marriage preparation materials and programs sponsored by the Church demonstrates the care that the Christian community extends to couples as they make ready not just for their wedding day but the lifelong marriage to follow.

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Faced with high rates of civil divorce, the Catholic Church in the United States has responded with creativity and practicality. It has invested impressive energy, personnel and resources in establishing a most effective tribunal system. The evolution of matrimonial jurisprudence and the hard work of tribunal personnel have made it feasible for people to obtain annulments in situations when previously it would have been unlikely. The vast numbers of Catholics who are divorced and civilly remarried have prompted pastoral strategies that offer reconciliation and full eucharistic participation, though not formal approval of their marital status. The variety of pastoral approaches is generally, if not precisely, lumped together under the heading of "internal forum solutions" and include both hardship and conflict cases not resolvable in the external forum of a juridical proceeding.<sup>1</sup>

These efforts to respond to the situation of the divorced and remarried are not without controversy. Several years ago three German bishops proposed an internal forum strategy for divorced and remarried Catholics who wished to participate in the Eucharist.<sup>2</sup> Their suggestion was criticized for its failure to take into account that "if the divorced are remarried civilly, they find themselves in a situation that objectively contravenes God's law." The indissolubility of the first marriage makes any subsequent marriage a contradiction to "that union of love between Christ and his church which is signified and effected by the eucharist."<sup>3</sup> In short, the suggested pastoral solution was rejected because present magisterial teaching on the indissolubility and unity of marriage necessarily views any second marriages following a sacramental and consummated first marriage to be an objective contradiction to God's moral law as long as both of the original spouses are still alive. Consequently, couples in such a situation may not receive the

<sup>1</sup> We follow the customary distinction in this article between cases (conflict) where a valid marriage probably did not exist although this is not provable in the external forum of a tribunal and those cases (hardship) where a marriage presumably existed but is now broken down. Conflict cases need not be seen as challenges to Catholic teaching on indissolubility but only as illustrations of how difficult it is to devise juridical processes capable of satisfying all appeals for annulment. Hardship cases, on the other hand, are understood as challenges to indissolubility when a second marriage occurs. In this article we presume the issue is the divorce and remarriage of hardship cases because it is the teaching on indissolubility that we examine.

<sup>2</sup> We have reviewed that proposal and the responses generated by it in a previous article. See Kenneth R. Himes, O.F.M., and James A. Coriden, "Notes on Moral Theology: Pastoral Care of the Divorced and Remarried," *Theological Studies* 57 (1996) 97-123.

<sup>3</sup> Congregation for the Doctrine of the Faith, "Reception of Communion: Divorced and Remarried Catholics," *Origins* 24 (October 27, 1994) 337-41, at 339.

Eucharist, according to the Congregation for the Doctrine of the Faith (CDF).

Critics of pastoral solutions that offer eucharistic sharing to the divorced and remarried believe that the noble intention of care notwithstanding, no pastoral approach can be offered that is against God's will.<sup>4</sup> The Church is not free to accept just any resolution of the plight of the divorced and remarried since the divinely willed unity and indissolubility of marriage prevents the approval of a pastoral strategy that welcomes to the eucharistic table those living as husband and wife who are in an irregular marital union. Good pastoral care must be supported by sound theology.

Gaps between the formal teaching of the Church and its pastoral care are neither new nor always unhealthy. The practice of pastors in assisting the faithful to live the gospel is a source of theological reflection and, in the course of history, can contribute to the revision and refinement of formulations of the faith. However, a great distance between pastoral care and official teaching is problematic and indicative of either inadequate teaching or unwise ministerial practice. We believe the pastoral care of the divorced and remarried in the present situation has reached the stage where honesty requires a reconsideration of the continued divide between the Church's teaching on indissolubility and the pastoral strategies of its ministers.

In this article we examine the doctrinal teaching on indissolubility and ask if the present formulation of the teaching remains persuasive and ought to be taught as either definitive dogma or definitive doctrine.<sup>5</sup> By asking this question, however, we do not wish to be seen as advocates of divorce. The teaching of the Catholic Church that marriage between baptized persons is a sacrament that should entail a permanent and faithful union of love between husband and wife is a wise and much needed message in the modern world. In a culture such as that in the United States it is an important witness to maintain the unity and permanence of marriage. Our view is that those goods can be upheld even if the norm prohibiting remarriage after a first consummated sacramental marriage is no longer treated as exceptionless.

<sup>4</sup> Throughout this article the term "divorced and remarried" will be used to designate Catholics who are civilly divorced and remarried without church recognition, not those Catholics who have gone through a civil divorce as part of an annulment process that has left them free to marry in the Church or those divorced persons now free to remarry due to the subsequent death of their first spouse.

<sup>5</sup> A balanced and clear presentation of the distinction between authoritative Catholic doctrine and those dogmas and doctrines of the faith judged definitive is found in Richard Gaillardetz, *Teaching with Authority* (Collegeville: Liturgical, 1997) 101–28. In his usage the terms definitive dogma and definitive doctrine correspond respectively with the kinds of teaching listed in canon 750, paragraphs one and two of the present *Code of Canon Law*.

### WHAT IS AT STAKE IN THE DISCUSSION?

We initiate this discussion of the teaching on the indissolubility of marriage with eyes wide open. We are keenly aware of the immense human costs of broken marriages, both individual and social. Recent studies have illustrated the harm divorce causes to the persons immediately affected, to the spouses themselves, especially the women, to the children, as well as to those further removed, grandchildren, extended family, and local communities. The entire social fabric is stretched and torn by “the plague of divorce”:<sup>6</sup> the systems of employment, education, welfare, and child care. Even patterns of delinquency and criminal conduct are affected by the family disruption associated with divorce. We are under no illusions about what is at stake here.<sup>7</sup>

The divorce rate in the United States increased dramatically from 1960 to 1980, and has declined only slightly since then; some say “it has leveled off at a high level.” It can be said that there is still roughly a 50-percent chance of divorce, meaning “that half of all marriages are expected to end in divorce before the marriage breaks up through death.”<sup>8</sup> We have no evidence that the divorce rate for marriages involving Catholics differs from these national data in any significant measure.<sup>9</sup>

We raise questions about the teaching on indissolubility in order to help

<sup>6</sup> *Gaudium et spes* no. 47.

<sup>7</sup> As Kevin Kelly comments on why divorce is against God’s will: “God is not offended by us except insofar as we harm ourselves and other people. Marriage breakdown and divorce is evil because of the human hurt and suffering caused by it. It offends God because people precious to him are being harmed and are hurting each other. That is why it is a human tragedy” (*Divorce and Second Marriage: Facing the Challenge* [London: Collins Liturgical Publications, 1982] 39).

<sup>8</sup> The National Marriage Project, *The State of Our Unions, 1999: The Social Health of Marriage in America* (New Brunswick, N.J.: Rutgers University, 1999) 21–23.

<sup>9</sup> Barbara Dafoe Whitehead’s book, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family* (New York: Random House, 1996) drew upon several recent studies to trace the complex cultural and ethical elements which have coincided to produce our lamentable “culture of divorce.” She concluded her study with a set of suggestions on how to dismantle the destructive social force of the divorce culture (182–95). Judith Wallerstein and her colleagues have published a 25-year longitudinal study of the children of divorce. They followed 131 children as they experienced their parents’ divorces and then grew into adulthood with the anxieties, fears, anger, and distrust instilled in them by those ordeals. The book confronts “up close” the aftermath of divorce as it affects children even as adults. The children of divorce suffer the most in adulthood (299). These authors, too, offered some ideas to ameliorate the personal and social hardships caused by our divorce culture (Judith Wallerstein, Julia Lewis, Sandra Blakeslee, *The Unexpected Legacy of Divorce: A Twenty-five Year Landmark Study* [New York: Hyperion, 2000] 302–16).

our Church witness more effectively to the sacredness and permanence of marriage and to enhance its pastoral care of families. The Church's public witness and pastoral strategies will be more effective if they are squarely based on doctrine that is clear, consistent, and realistic. Jesus' prophetic words about matrimonial commitment need to be heard in today's troubled world.

Church teaching must be in continuity with the Scriptures and the long Christian tradition, but it must also take seriously the genuine human experience of married life. The Church is committed to thoughtfully reading "the signs of the times,"<sup>10</sup> the human condition in all its dimensions. Teaching that resonates with human experience gains credibility, it is more readily perceived and accepted. Such teaching will ground firmer convictions about marriage and family, and about the care that they call forth from our faith communities. A clear and coherent message about the permanent commitment of marriage is more persuasive, more likely to be trusted.

### WHAT IS THE CHURCH'S TEACHING?

Catholic teaching on the permanence of marriage has been shaped and molded over the centuries, and it continues to be further nuanced and interpreted today. The teaching is fraught with qualifications and exceptions, while never losing the radical resonance of Jesus' own words, spoken as his adversaries attempted to entrap him within the opposing sides of the divorce debate between rabbinic schools.:

Have you not read that at the beginning the Creator made them male and female and declared, "For this reason a man shall leave his father and mother and cling to his wife, and the two shall become as one?" Thus they are no longer two but one flesh. Therefore let no one separate what God has joined (Matthew 19:4-6).

Early Christian writers also insisted on the permanence of marriage, but with many differences and nuances. They most often spoke in moral terms: "forbidden to take another partner," "partnership may not be sundered," "sinful to remarry," "remarriage not permitted," "commits adultery."<sup>11</sup>

The language of "indissolubility" related to marriage is not biblical, nor

<sup>10</sup> *Gaudium et spes* no. 4.

<sup>11</sup> Theodore Mackin, *Divorce and Remarriage* (New York: Paulist, 1984) 112-65, 187-223. Ambrose of Milan used the expression "it is not permitted to dissolve any marriage" if the marriage was "of God." But he concluded that marriage to a non-Christian was not of God, and therefore could be dissolved. It was his interpretation of the Pauline exception of 1 Corinthians 7 (ibid. 157-61). Edward Schillebeeckx reaches the same conclusion about the moral language used by the Fathers. See *Marriage: Human Reality and Saving Mystery*, trans. N. D. Smith (New York: Sheed and Ward, 1965) 141, 394.

is it patristic. It was not the usual language of classic medieval canonists, or of the councils of the Middle Ages. It was not used in the treatment on marriage in the 15th-century *Decretum pro Armenis* of the Council of Florence which officially taught the doctrine of the seven sacraments.<sup>12</sup>

In fact, the first time that the term “indissoluble” was employed in this context in official teaching was at the 16th-century Council of Trent in the doctrine and canons on the sacrament of marriage.<sup>13</sup> The council asserted that Adam (in Genesis 2:23–24) pronounced marriage to be a perpetual and indissoluble bond (*nexum*). The council denied that a spouse could dissolve the bond of marriage “on the grounds of heresy, irksome cohabitation, or continued absence,” or that it was dissolved by the adultery of one of the spouses (here great care was taken not to condemn the practice of the Eastern churches which permitted remarriage in cases of adultery). The council also affirmed that an unconsummated marriage is dissolved by solemn religious profession. After Trent the term “indissoluble” was almost always linked to the “bond” (*vinculum* or *nexum*) of marriage.<sup>14</sup> It is juridical language, legal terminology, not the language of moral obligation.

As the teaching on the indissolubility of the bond (*vinculum*) was articulated by Pope Pius XI in 1930 “this inviolable stability, although not in the same perfect measure in every case, belongs to every true marriage,” a perpetual and indissoluble bond which is not subject to any civil power.

And if this stability seems to be open to exception, however rare the exception may be, as in the case of certain natural marriages between unbelievers, or amongst Christians in the case of those marriages which though valid have not been consummated, that exception does not depend on the will of men nor on that of any merely human power, but on divine law, of which the only guardian and interpreter is the Church of Christ. However, not even this power can affect for any cause whatsoever a Christian marriage which is valid and has been consummated, for as it is plain that here the marriage contract has its full completion, so by the will of

<sup>12</sup> November 22, 1439; the decree stated that the bond of marriage is perpetual (*matrimonii vinculum . . . perpetuum sit*), and that one of the goods of marriage was its indivisibility (*indivisibilitas matrimonii, propter quod significat indivisibilem coniunctionem Christi et ecclesie*) (*Decrees of the Ecumenical Councils*, ed. Norman Tanner [Washington: Georgetown University, 1990] 1.550).

<sup>13</sup> Session 24, November 11, 1563, doctrinal section and canons 5, 6, and 7; Tanner, *Decrees* 2.753–55.

<sup>14</sup> For example, Benedict XIV in the constitution *Dei miseratione* (November 3, 1741) used indissoluble to qualify both *foedus* and *nexum*. *Fontes Codex Iuris Canonici* 1, 318; Pius IX in the *Syllabus of Errors* (December 8, 1864) spoke of the bond of marriage being indissoluble (*Iure naturae matrimonii vinculum non est indissolubile, . . .*) no. 67, Denzinger-Bannwart-Rahner, *Enchiridion symbolorum* 1767.

God, there is also the greatest firmness and indissolubility which may not be destroyed by any human authority.<sup>15</sup>

*Gaudium et spes*, the Pastoral Constitution on the Church in the Modern World (December 7, 1965), contains Vatican II's most serious and extensive teaching on marriage. It changed the definition of marriage (as noted below in "The Conciliar Shift") and employed covenantal (*foedus*) language rather than contractual terms to describe it. It affirmed the indissolubility of marriage, but it based it on the marital covenant, the intimate union of persons and activities, the mutual giving of the two persons as well as the good of their children. Here it is their *union* which is called indissoluble (no. 48). In the next section it is *married love* which is indissolubly faithful (no. 49). And finally, in the section on the fruitfulness of marriage (no. 50) we are reminded that *marriage* retains its indissolubility, even when it is childless. The council, while affirming the life-long permanence of marriage moved away from the legal language of the indissolubility of the *bond*.<sup>16</sup>

Pope Paul VI's postconciliar encyclical on *Humanae vitae* spoke of conjugal love as "faithful and exclusive until death," but did not use the language of indissolubility.<sup>17</sup>

The most extensive teaching document on marriage and family since Vatican II was John Paul II's apostolic exhortation "On the Family" issued after the 1980 International Bishops' Synod. It attributed indissolubility to the *conjugal communion*, and to *marriage*, but not to the *bond*. The indissolubility of marriage is "rooted in the personal and total self-giving of the couple" and "required by the good of the children."<sup>18</sup>

As the teaching is captured in the 1983 *Code of Canon Law* for the Latin Church, "the consent of the parties makes marriage" and indissolubility is an essential property of marriage (cc. 1057, 1056). "From a valid marriage there arises between the spouses a bond (*vinculum*) which by its nature is

<sup>15</sup> Encyclical letter On Christian Marriage, *Casti connubii* (December 31, 1930), nos. 31–35; *Acta apostolicae sedis* 22 (1930) 550–54. Pietro Gasparri, *Tractatus canonicus de matrimonio* (Vatican City: Vatican, 1892, rev. ed. 1932), spoke of "aliqua firmitas" of the marriages of unbelievers, and "*matrimonii vinculum ipso naturali iure esse aliquo modo indissolubile*," meaning that civil authority could not grant divorces to its subjects, 1.10; 2.1123.

<sup>16</sup> In the Decree on the Apostolate of the Laity (October 28, 1965), no. 11 there is a passing reference to laypersons' duty "to manifest and prove by their lives the indissolubility and sanctity of the bond of marriage."

<sup>17</sup> *Humanae vitae* (July 25, 1968), no. 9; *AAS* 60 (1968) 486–87.

<sup>18</sup> *Familiaris consortio* (November 22, 1981), no. 20; *AAS* 74 (1982) 102–4. No. 84 on the pastoral action in regard to the divorced who have remarried refers repeatedly to the indissolubility of *marriage*, not of the marriage *bond* (186).

perpetual and exclusive” (c. 1134).<sup>19</sup> The canons here speak of all marriages, whether between Christians or non-Christians.

The canonical discipline provides for the dissolution of marriages in cases of nonconsummation or of conversion to the Christian faith: “the Roman Pontiff can dissolve a non-consummated marriage between baptized persons or between a baptized party and a non-baptized party” (c. 1142), and “A marriage entered into by two non-baptized persons is dissolved by means of the Pauline Privilege in favor of the faith of the party who has received baptism by the very fact that a new marriage is contracted by the same party” (c. 1143).<sup>20</sup>

Finally, the canons state that a valid marriage between baptized Christians (called *ratum*), “if the spouses have performed between themselves in a human fashion a conjugal act which is suitable in itself for the procreation of offspring” (then it is called *ratum et consummatum*), “can be dissolved by no human power and by no cause, except death” (cc. 1061, 1134). This is the “greatest firmness and indissolubility” (*Casti connubii* no. 35) attributed to sacramental and consummated marriages; many authors call it “absolute” or “radical” indissolubility.<sup>21</sup>

<sup>19</sup> The corresponding canon (776.2) in the 1990 *Code of Canons of the Eastern Churches* omits mention of the bond (*vinculum*).

<sup>20</sup> The canons provide for the extension of the “Pauline Privilege” to the situations of polygamous or polyandrous converts: “When he receives baptism in the Catholic Church, a nonbaptized man who has several non-baptized wives at the same time can retain one of them after the others have been dismissed, if it is hard for him to remain with the first one. The same is valid for a nonbaptized woman who has several non-baptized husbands at the same time” (c. 1148; the second paragraph of the canon makes provision for the needs of the dismissed wives). An Instruction from the Congregation for the Doctrine of the Faith, *Ut notum est* (December 6, 1973); *Canon Law Digest* 8, 1177–84 provides for the dissolution of nonsacramental marriages in favor of the faith by the Roman pontiff, even in the case where there is no conversion, but the favor is to the faith of a Catholic party whom one of the nonbaptized parties now desires to marry. This is the “Petrine Privilege” alluded to below (“Modern Papal Actions”). The development of this 20th-century phenomenon is described by John Noonan, *The Power to Dissolve: Lawyers and Marriages in the Court of the Roman Curia* (Cambridge, Mass.: Harvard University, 1972) 366–92. New procedural norms for the dissolution of the bond of marriage in favor of the faith (*Potestas ecclesiae*) were issued by the Congregation for the Doctrine of the Faith on April 30, 2001. As with the 1973 norms, these were sent out to the bishops and eparchs, but not published in the *AAS*. The centuries-old provision, which was defended at the Council of Trent (Sessio XXIV, c. 6, canons on marriage, November 11, 1563), that a nonconsummated marriage was dissolved by solemn religious profession (c. 1119 of the 1917 *Code*) was simply omitted from the 1983 *Code*. The only reason suggested for the omission was that such dissolutions are rare and could be left to the Holy See (*Communicationes* 5:1 [1973] 80).

<sup>21</sup> “Intrinsic indissolubility” means that the parties themselves are not able to



The dissolutions related to conversion and baptism are obviously based on Paul's advice to the church at Corinth (1 Corinthians 7:12–16), "if the unbeliever wishes to separate, however, let him do so" as interpreted by Ambrosiaster, possibly John Chrysostom, Theodore of Canterbury, Hincmar of Rheims, and later canonists to mean that the Christian partner was then free to remarry.<sup>22</sup>

The extrapolation of that "Pauline Privilege" to the Roman pontiff's authority to dissolve nonsacramental marriages in "favor of the faith" is based on the actual exercise and subsequent justification of papal power. It is frequently attributed to the "power of the keys" to bind and to loose (Matthew 16:19).<sup>23</sup>

The dissolutions of nonconsummated marriages stem from the medieval

withdraw from or renounce the marriage once they have entered into it. "Extrinsic indissolubility" refers to the inability of another authority, civil or ecclesial, to dissolve or undo the union. John Paul II, in his annual address to the Roman Rota (January 21, 2000), forcefully affirmed that not even the power of the Roman pontiff can dissolve a ratified and consummated marriage: "It seems quite clear then that the nonextension of the Roman pontiff's power to ratified and consummated marriages is taught by the church's magisterium as a doctrine to be held definitively, even if it has not been solemnly declared by a defining act" (*Origins* 29 [February 10, 2000] 553–55, at 555).

<sup>22</sup> George Joyce, *Christian Marriage: An Historical and Doctrinal Study* (New York: Sheed and Ward, 1948; orig. ed. 1933) 471–77. Other writers of the patristic period seemed to think that the separation did not sanction a second marriage for the Christian partner, e.g. Tertullian, Augustine, Cyril of Alexandria, and Theodoret of Cyrrhus. The doctrine and discipline of the "Pauline Privilege" was elaborated in the 12th century. J. Kowal, "Nuove 'Norme per lo scioglimento del matrimonio in favorem fidei'," *Periodica* 91 (2002) 459–506. The writings of "Ambrosiaster" were mistakenly attributed to Ambrose of Milan until the 16th century.

<sup>23</sup> Indeed, in his January 2000 address to the Rota (n. 21 above), John Paul II quoted Pius XII affirming that "other marriages (i.e., other than ratified and consummated marriages) can be dissolved not only by virtue of the pauline privilege, but also by the Roman pontiff in virtue of his ministerial power." John Paul II also refers to it as the pope's "vicarious power," that is, as Vicar of Christ on earth. This power is understood, not in the sense of Innocent III (1198–1216) of power over all humanity in all matters, spiritual and temporal, but in the sense of Robert Bellarmine's perfect society which is endowed with all of the ministerial or vicarious power necessary for its salvific mission, limited to certain spiritual sectors of the Church's activity. See J. Kowal, "Nuove Norme" 474. Umberto Betti, one of the small group of theologians and canonists who reviewed the newly drafted Code with the pope before it was issued in 1983, narrates his objection to John Paul II that this "extra-ecclesial power is yet to be proven." The proposed canon 1150, which recognized the power of the Roman pontiff to dissolve the marriage of two nonbaptized persons neither of whom intended to receive baptism, was as a result omitted from the *Code*. Betti claimed that the practice lacked juridic stability (because it was so recent) and that it lacked a sure theological basis (cited above *ibid.* 482).

debate about what precisely makes marriage. The canonists and theologians of the 12th century debated whether it was solely the consent of the parties, or whether the subsequent carnal copulation (*copula carnalis*) also played an essential role in forming the marriage. The decision by popes Alexander III (1159–1181) and Innocent III (1198–1216), made in the context of disputed marriages, held that, as in the Roman Law tradition, consent makes the marriage.<sup>24</sup> The marriage between Christians was a sacrament after their consent was legitimately exchanged. But their union was not completed, finalized, perfected, until it was consummated by sexual intercourse.<sup>25</sup>

The Church's doctrine on the indissolubility of marriage has evolved over the centuries into a very complex composite. It retains echoes of the prophetic voice of Jesus, but it has been shot through with exceptions, privileges, and dispensations based on theologically questionable authority. Combine this confusing doctrine with the practice of church courts which each year issue tens of thousands of annulments of marriages which they find to have been invalid from the beginning, and the Church's witness to the permanence of marriage is weakened. Then add the hundreds of thousands of marriages of Catholics entered into each year which are canonically invalid because of the lack of canonical form, marriages that may be declared null by the person who investigates their freedom to remarry.<sup>26</sup> The result is that the Church's witness to the permanence of the marital covenant is badly blurred.

### CAN THE TEACHING CHANGE?

The Catholic tradition has undergone significant evolution in its teaching on marriage. Yet, as we shall discuss, the existing position is now treated in some quarters as if further revision is not possible. However, the International Theological Commission's (ITC) 1978 statement on marriage in-

<sup>24</sup> After all, the marriage of Mary and Joseph had to be defended as valid and real.

<sup>25</sup> Until the first act of marital intercourse the spouses were not yet "one flesh," as the medievals understood Genesis 2:23–24. And the humanity of Christ shared the same human flesh as his beloved Church (Ephesians 5:22–33); Christ and the Church were also one in flesh. Also Saints John the Evangelist, Alexis, Macharius, Thecla, and Etheldreda were all called to the vowed life after giving matrimonial consent but before coming together with their spouses, as their respective legends held (Joyce, *Christian Marriage* 452–64). Until it was consummated, the marriage could be dissolved either by one of the parties entering religious life and taking solemn vows or by intervention of papal authority (*dispensatio super rato*; the present process is in cc. 1697–1706 of the *Code*).

<sup>26</sup> Canons 1066, 1067; see the 1984 interpretation by the now Pontifical Council for the Interpretation of Legal Texts, *AAS* 76 (1984) 747.

cluded an important caveat about the Council of Trent's declaration on marriage in canon seven. At Trent the bishops were focused on refuting the teaching of the Reformers, especially Luther, in his denial of the Church's authority over marriage. That was the proper subject of the teaching and the ITC accepts this narrow reading of Trent's aim. "It cannot be said then that the council had the intention of solemnly defining marriage's indissolubility as a truth of faith."<sup>27</sup> Nor is there reason to believe that Trent saw the teaching as definitive doctrine.

In its interpretation of Trent the ITC was in accord with an influential series of essays published by Piet Fransen on interpreting Trent.<sup>28</sup> Fransen showed that the participants at Trent were well aware of the varying viewpoints regarding indissolubility held by patristic and medieval theologians as well as the different practice of the Greek Church. The Council Fathers had no desire to include all this in their anathema and were focused on Luther. Trent's position in this regard was consistent with the Council Fathers of Lyons II (1274) and Florence (1439) where the Latin and Greek churches discussed reunion. At neither of those gatherings was the indissolubility of marriage treated as irreversible or definitive teaching by the attendees. At no point did the divergence of teaching on indissolubility stand as an obstacle to reunion even though the Latin delegates at Florence wanted to discuss it. The refusal by the Greeks on this score did not impede the pursuit of reunion.<sup>29</sup>

Walter Kasper, in his reading of Trent's decree, agrees with the position of Fransen. "The only intention was to come to a decision in the controversy that had been raging at the time between the Catholic Church and the Lutherans. Controversies within the Catholic Church itself were, however, left open." Kasper cites Joseph Ratzinger and Karl Lehmann as being in accord with Fransen and he also names Hubert Jedin as arriving at similar findings from his own perspective.<sup>30</sup> In the United States, Lawrence

<sup>27</sup> International Theological Commission, "Propositions on the Doctrine of Christian Marriage," *Origins* 8 (1978) 235–39, at 238.

<sup>28</sup> Fransen's doctoral dissertation was on Trent's teaching on marriage and he followed it with a number of essays developing that topic. Many were published during the 1950s in the German Jesuit journal *Scholastik*. A listing of these articles can be found in the first footnote of his essay "Divorce on the Ground of Adultery – The Council of Trent (1563)," in *The Future of Marriage as Institution*, ed. Franz Böckle, *Concilium* 55 (New York: Herder and Herder, 1970) 89–100, at 89. This latter article provides a clear and succinct summary of Fransen's arguments and conclusions developed in the earlier articles. Several of the articles from *Scholastik* have been translated and published in *Hermeneutics of the Councils and Other Studies* (Leuven: Leuven University, 1985).

<sup>29</sup> Mackin, *Divorce and Remarriage* 374–77.

<sup>30</sup> Walter Kasper, *Theology of Christian Marriage* (New York: Seabury, 1980) 98 n. 87.

Wrenn, Charles Curran, Francis Sullivan, and Michael Lawler have all reached conclusions similar to Fransen regarding Trent's position.<sup>31</sup>

More recently, Ratzinger has retreated from his previous position. As head of the CDF he was in correspondence with Charles Curran concerning legitimate areas of disagreement in theology.<sup>32</sup> In a 1986 letter, Ratzinger claimed that Trent defined the indissolubility of marriage as belonging to "the patrimony of the Faith" and beyond challenge.<sup>33</sup> He seemed to be returning to an earlier opinion expressed by Louis Billot<sup>34</sup> which had not found significant support from other scholars at the time or since, as the ITC statement demonstrates. In his response to Ratzinger, Curran remarked it was widely acknowledged among Catholic theologians that "the teaching of the Council of Trent does not exclude as contrary to faith the practice of 'economia' in the Greek church."<sup>35</sup> On this point we believe it was demonstrably the case that Curran is correct in his assertion.

A second claim regarding the authority of the teaching on indissolubility is that it has been defended in papal encyclicals by both Leo XIII in *Arcanum divinae sapientiae* and Pius XI in *Casti connubii*. Leo's argument for indissolubility was a natural law argument that will be considered later

<sup>31</sup> Lawrence Wrenn, "Marriage – Indissoluble or Fragile?" in *Divorce and Remarriage in the Catholic Church*, ed. L. Wrenn (New York: Newman, 1973) 134–49, at 140; Charles Curran, *Ongoing Revision in Moral Theology* (Notre Dame: Fides, 1975) 96–97 and *New Perspectives in Moral Theology* (Notre Dame: University of Notre Dame, 1976) 269; Francis Sullivan, *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium* (New York: Paulist, 1996) 131–34; Michael Lawler, "Divorce and Remarriage in the Catholic Church: Ten Theses," *New Theology Review* 12/2 (1999) 48–63, at 56.

<sup>32</sup> The exchange may be found in Charles Curran, *Faithful Dissent* (Kansas City: Sheed and Ward, 1986) 267–76, esp. 269 and 272. An article pertinent to Ratzinger's claim for the definitive nature of the teaching on marital indissolubility by virtue of the authority of the ordinary universal magisterium is Richard Gaillardetz, "The Ordinary Universal Magisterium: Unresolved Questions," *Theological Studies* 63 (2003) 447–71.

<sup>33</sup> Curran, *Faithful Dissent* 269.

<sup>34</sup> Louis Billot, *De ecclesiae sacramentis* (Rome: Gregorian University, 1929) 440.

<sup>35</sup> Curran, *Faithful Dissent* 272. See also the interesting comment by J. M. Kuntz that the Decree on Ecumenism of Vatican II "indirectly . . . seems to sanction the practice of divorce and remarriage in the Eastern Churches" where it states in no. 16 that "this sacred Synod solemnly declares that the Churches of the East, while keeping in mind the necessary unity of the whole Church, have the power to govern themselves according to their own disciplines, since these are better suited to the temperament of their faithful and better adapted to foster the good of souls." As Kuntz observes, "The Fathers of Vatican II could hardly have been ignorant of the long-standing practice of the Orthodox Churches in this matter of divorce." (J. M. Kuntz, "Is Marriage Indissoluble?" *Journal of Ecumenical Studies* 7 [1970] 333–37, at 336–37).

in this article. In his letter Pius simply cites canon 1118 of the 1917 *Code*.<sup>36</sup> In effect, the pope presumed the teaching and did not argue for it or give any additional weight to the teaching other than what it possessed by virtue of being in the *Code*. The same can be said for Pius XII's commentary on the canon in his 1941 allocution to the Roman Rota, recognized as the most extensive papal commentary on canon 1118.<sup>37</sup>

We believe, contrary to Ratzinger, that it is not plausible in the face of the data to assert that the present teaching of marital indissolubility is a matter to be considered as definitive dogma or definitive doctrine. Certainly it is authoritative Catholic doctrine and to be acknowledged as such, but that does not rule out further development and reform. Our reading of the history, influenced by Fransen and others, shows that there is freedom to change the present teaching if there are good reasons. That is the heart of the matter—whether or not there are good reasons to change the teaching. In what follows we offer several considerations that suggest the teaching on indissolubility ought to be revised in order to admit of exceptions even in cases of *ratum et consummatum* unions.

### QUESTIONING THE PRESENT TEACHING

“The early church’s tradition, based on the teaching of Christ and the apostles, affirms the indissolubility of marriage, even in cases of adultery.” This statement of principle by the ITC reflects an important aspect of the Catholic position on indissolubility, namely, that it is based on the teaching of Jesus and has been honored from the beginning of the Church. This is so “despite certain texts which are hard to interpret and examples of indulgence—the extension and frequency of which is difficult to judge—toward persons in very difficult situations.”<sup>38</sup> It is evident that a substantive argument for maintaining the teaching on indissolubility is fidelity to an ancient tradition based on the Scriptures. We agree that no change in the teaching should be considered unless a careful examination suggests that change is congruent with the tradition.

#### Biblical Evidence

Despite differences on some matters, there are important points supported by a broad consensus among Catholic biblical scholars when discussing the five New Testament texts dealing with Jesus’ attitude toward divorce (Mark 10:1–12; Luke 16:18; Matthew 5:32 and 19:1–12; 1 Corinthi-

<sup>36</sup> The canon stated that a valid, ratified and consummated marriage cannot be dissolved by any human power or cause.

<sup>37</sup> Pope Pius XII, *Già per la terza volta*, AAS 33 (1941) 424–25.

<sup>38</sup> ITC, “Propositions” 238 (see n. 27 above).

ans 7:10–11).<sup>39</sup> It is impossible to reconstruct the exact words of Jesus, though scholars affirm that Jesus opposed divorce and considered remarriage to be adultery.<sup>40</sup> Yet, Paul permits divorce in the case of marriage between believer and unbeliever when the marriage is an obstacle to peace and sanctification. Furthermore, whatever is made of the precise meaning of *porneia*, Matthew's text presents some kind of exception to the absolute prohibition of Jesus. The five accounts diverge and the divergence is itself significant for the disparities reflect not different sayings of Jesus but various traditions subsequent to Jesus that emerged from the situations of the New Testament churches.

The Synoptics' teaching on divorce ought not be taken out of context and read as legal norms or even as moral maxims. As John Donahue notes: "the sayings on divorce all appear in those contexts where Jesus is teaching his disciples the meaning of the kingdom."<sup>41</sup> Jesus is portrayed in Matthew 5 as teaching a radicalized Torah such that a lustful look is described as adultery (5:27–28), and Mark's version is situated between the teaching on self-mutilation rather than scandal and the command to forsake riches, power, and prestige in order to follow Jesus. The context suggests the

<sup>39</sup> Among the many exegetes who have written on this topic we include the following representative voices in this overview: Raymond Collins, *Divorce in the New Testament* (Collegeville: Liturgical, 1992); Mary Rose D'Angelo, "Remarriage and the Divorce Sayings Attributed to Jesus," in *Divorce and Remarriage: Religious and Psychological Perspectives*, ed. William Roberts (Kansas City: Sheed and Ward, 1990) 78–106; John Donahue, "Divorce – New Testament Perspectives," in *Marriage Studies: Reflection in Canon Law and Theology*, vol. 2, ed. Thomas Doyle (Washington: Canon Law Society of America, 1982) 1–19; Joseph Fitzmyer, "The Matthean Divorce Texts and Some New Palestinian Evidence," *Theological Studies* 37 (1976) 197–226; George MacRae, "New Testament Perspectives on Marriage and Divorce," in *Divorce and Remarriage in the Catholic Church*, ed. Lawrence Wrenn (New York: Paulist, 1973) 1–15; Jerome Murphy-O'Connor, "The First Letter to the Corinthians," in *The New Jerome Biblical Commentary*, ed. Raymond Brown, Joseph Fitzmyer, Roland Murphy (Englewood Cliffs, N.J.: Prentice-Hall, 1990) 798–815; PHEME PERKINS, "Marriage in the New Testament and Its World," in *Commitment to Partnership: Explorations of the Theology of Marriage*, ed. William Roberts (New York: Paulist, 1987) 5–30; Bruce Vawter, "Divorce and the New Testament," *Catholic Biblical Quarterly* 39 (1977) 528–42.

<sup>40</sup> For example, J. Fitzmyer and G. MacRae believe the Lukan text to be closest to the actual words of Jesus while R. Collins argues for Matthew 5:32, minus the exceptive clause as closer to the original statement. Nonetheless, all agree that Jesus opposed divorce. In whatever form it was passed along, Paul certainly knew of an absolutist tradition handed down from Jesus. Recall that Paul based his position opposing divorce "not because it constitutes in some way a form of adultery nor because it is contrary to the creative will of God. Rather, he rejects divorce simply on the authority of Jesus the Lord himself" (Collins, *Divorce in the New Testament* 225).

<sup>41</sup> Donahue, "New Testament Perspectives" 5.

statements on divorce are to be understood as prophetic and radical, as “symbolic ways of affirming that the demands of the kingdom touch the most intimate aspects of human life.”<sup>42</sup> To isolate the divorce sayings from the setting in which they are placed by the Evangelists is to make one illustration of the radicality of the reign of God uniquely normative.<sup>43</sup>

The New Testament divorce texts should not be read as an impossible ideal from which couples are readily excused. Such an approach loses the eschatological witness of the teaching. To hear the message of Jesus that the reign of God is breaking into human history evokes a commitment from his followers to incarnate the reign, to live differently because of God’s future drawn near. Judaism in the time of Jesus exhibited a fair degree of pluralism and some strands had become too accommodating to divorce. Jesus clearly opposed this development.<sup>44</sup> No doubt part of his concern was compassion for those harmed by divorce, especially the women who were put out of their homes.<sup>45</sup>

Recognizing the eschatological flavor of the divorce sayings helps to explain Jesus’ citation of Genesis. With the inbreaking of God’s reign the pristine state of creation was to be restored, it would once more be as the Creator intended. Originally, God wanted male and female to fashion a union, one flesh. It is the union of love between woman and man that imaged God, divorce frustrated that imaging. Thus, divorce was not part of the original intent of God for creation. To live in the reign of God entailed restoring the relationships of all creatures to the plan of God the creator, and for man and woman this meant to return marriage to being an image of God who is love.

Part of what supported the Christian witness to the reign of God was life within a community of disciples who expected an imminent end of the world and a transformation of the created order. As that expectation changed and as the Christian message was spread to cultures and settings unforeseen by Jesus there was a necessary period of adaptation and alteration. When reflecting upon the way of discipleship and its implications for marriage and divorce the early Church no doubt drew upon various memories of Jesus. The eschatological prophet who proclaimed an absolute opposition to divorce also manifested great compassion for those caught in

<sup>42</sup> Ibid.

<sup>43</sup> Kasper also opposes turning Jesus’ teaching into merely a strict moral standard. “No, his words here are a prophetic, messianic and effective affirmation of God’s saving activity and an invitation to make use of the possibility offered by God” (*Theology of Marriage* 48).

<sup>44</sup> Daniel Harrington, *The Gospel of Matthew*, Sacra Pagina vol. 1 (Collegeville: Liturgical, 1991) 274–75.

<sup>45</sup> Donald Senior, *Matthew*, Abingdon New Testament Commentaries (Nashville: Abingdon, 1998) 213–16, esp. 216.

difficult circumstances. Publicans and prostitutes were shown forgiveness and understanding even as Jesus taught the need for radical commitment to the Good News. It is not hard to imagine the early Church finding in Jesus' example an argument for acceptance of those whose marriages did not succeed. Certainly, nowhere in the Gospel accounts do we find Jesus condemn the divorced. As John Donahue observes, when compared "with other aspects of Jesus' ethical teaching such as his polemic against legalism, his warnings about the danger of wealth, or his teaching on nonviolence and forgiveness of enemies, what Jesus said about divorce is surprisingly meager."<sup>46</sup>

In examining what Jesus did say we must be careful not to read later categories into the language and teaching of the Lord. We cannot presume that Jesus, in his prohibition of divorce, had present Catholic teaching on indissolubility in mind. If we are to suppose that Jesus was proclaiming what the Church at the present time teaches, he would have had to mean that no divorce is possible once the couple has been baptized, given consent according to the proper canonical form, and engaged subsequently in sexual intercourse. If he meant anything else, then present Catholic teaching is not in accord with Jesus' prohibition of divorce. Yet the two conditions that make marriage indissoluble in the mind of the Church, that it be both sacramental and consummated, are never mentioned anywhere by Jesus or the New Testament authors.<sup>47</sup>

It is far more likely, as exegetes propose, that the historical Jesus taught that divorce was against God's will and that people ought not engage in the practice. This is the meaning of the Lord's teaching: divorce is wrong and *ought* not occur, not divorce is wrong and *cannot* occur. Jesus was providing a prophetic challenge as to how life is to be lived in the reign of God. Under God's reign men and women do not divorce, nor do people take oaths, nor do they give scandal, take up arms, neglect their children, seek power and possessions or do myriad other things that weak and fallible persons have done in the course of history. With that perspective in mind, Kasper suggests, "the Church from the very beginning understood Jesus' words not as a kind of article of law, but as prophetic and messianic words."<sup>48</sup>

Jesus did not offer a universal law nor was he making a metaphysical pronouncement about the nature of the marriage bond. By using the illus-

<sup>46</sup> Donahue, "New Testament Perspectives" 2.

<sup>47</sup> "One cannot introduce in the New Testament the distinction between a sacramental marriage and a nonsacramental marriage. In the Synoptic passages there is no hint of the possible sacramentality of marriage. On the contrary, the argument for the indissolubility of marriage in the Markan source is derived from the order of creation. . . ." MacRae, "Perspectives on Marriage and Divorce" 8.

<sup>48</sup> Kasper, *Theology of Marriage* 51.



tration of marriage, he was proclaiming how life in God's reign transforms all human existence. This interpretation explains why Paul, while fully aware of the saying of Jesus about divorce,<sup>49</sup> did not hesitate to offer his own pastoral advice when dealing with marriage problems in the Corinthian community. Likewise Matthew, however *porneia* is understood, introduced his own refinement to the teaching of Jesus. These authors did not understand themselves to be distorting Jesus' teaching but explaining how disciples might be faithful within circumstances not included in the Messiah's description of God's reign.

It may be argued that Paul's distinction in 1 Corinthians involved a difference between marriage among the baptized and nonbaptized; thus, by implication at least, creating a basis for the Church's different treatment of sacramental and nonsacramental marriages. But, as George MacRae explained the Pauline teaching: "It is not the nature of the marriage which determines its permanence, but the commitment of the partners."<sup>50</sup> If the non-Christian partner is willing to work at the marriage the Christian must do so as well. For Paul the marriage before conversion is as lasting as the marriage after conversion as long as the partners have the right disposition. It is not the marriage that changed but the partners. The so-called Pauline Privilege whereby a distinction is made regarding nonsacramental marriages is a decision by the later Church not the Apostle to the Gentiles.<sup>51</sup>

This survey of Catholic exegetes testifies that the process of interpreting Jesus' teaching is so closely tied to the Scriptures as we know them, that there is no teaching of Jesus apart from the Church. Therefore, it is not possible to assume "that what scholarly research points to as Jesus' own utterance is necessarily any more determinative for the church than what are apparently the interpretations of him by his followers."<sup>52</sup> The adaptations of Paul and Matthew are inspired teaching, just as are the words of

<sup>49</sup> 1 Corinthians 7:10–11.

<sup>50</sup> MacRae, "Perspectives on Marriage and Divorce" 8.

<sup>51</sup> Donahue argues that Paul's theological basis for approving the exception to the teaching of Jesus is rooted in "his understanding of the total Christ event. He allows for divorce (and presumably remarriage) in those situations where disharmony and absence of faith destroy that union where sanctification is to occur. Such a marriage spawns a situation of slavery which is in opposition to his gospel of Christian freedom and creates a state without that peace which is to characterize the vocation of the Christian." See "New Testament Perspectives" 14. Extending Donahue's reading of Paul, perhaps the Pauline Privilege is not the narrow exception addressing only that of a Christian conversion following a prebaptism marriage but the situation of a marriage that cannot witness to the fruits of life in Christ. Thus, a marriage in which one partner is truly abusive, and where there is no reasonable hope for change, permits the abused partner to divorce in order to experience Christ's gifts of peace and freedom.

<sup>52</sup> MacRae, "Perspectives on Marriage and Divorce" 11.

Jesus.<sup>53</sup> In short, it is hard to disagree with the conclusion that “by preserving the variety of sayings that were used in the early communities, the New Testament itself manifests the early communities’ belief that the authority of the Spirit permitted them to modify and to apply these sayings of the Lord.”<sup>54</sup> The teaching of Jesus is not the same as the teaching of the early Church and the teaching of Jesus is certainly not identical to Roman Catholic teaching. Present church teaching is not a violation of the biblical witness but it cannot claim to be the sole position warranted by the Bible.

### The Development of the Tradition

It is not our intent to provide a full narrative of how marriage developed in the Catholic tradition. Others provide such accounts in great detail.<sup>55</sup> But, as with the biblical evidence, our aim is to point out elements within the Church’s tradition that raise questions about the present teaching on indissolubility. The early Church understood that Jesus had taught a new attitude toward divorce, that a husband and wife were obliged to remain faithful for life and the community of faith had the duty to proclaim this teaching. The detail of that proclamation has varied, however, as the complexity of life brought about new pastoral questions. The situations in

<sup>53</sup> This is an important point to recall in considering the early history of marriage in the West. Jerome, because he presumed the Matthean exception to be the actual words of Jesus, had to explain the teaching while defending the ban on divorce. His solution was to insist that what was being considered in the exceptive clause was not divorce, and certainly not remarriage, but separation from bed and board without divorce. There is, of course, no basis for such an assumption and a notion of permanent separation without divorce would have made no sense to a first-century Jew. This case of eisegesis was influential, however, in Augustine’s treatment of the Gospel text and, in turn, in the early Church’s practice in the West. One can only speculate what might have been different had Jerome, as we do today, understood the passage as an example of the Christian community’s freedom and ability to adapt Jesus’ teaching to new settings and situations. See Mackin, *Divorce and Remarriage* 187–223.

<sup>54</sup> D’Angelo, “Sayings Attributed to Jesus” 79.

<sup>55</sup> Theodore Mackin’s three volume series on “Marriage in the Catholic Church” covers the historical development from several perspectives. In addition to the 1984 volume *Divorce and Remarriage*, see *What is Marriage?* (New York: Paulist, 1982) and *The Marital Sacrament* (New York: Paulist, 1989). The works by Edward Schillebeeckx, George Joyce, and John Noonan, cited above, all provide valuable historical insights as does James Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago, 1987). We also referred to A. Esmein and R. Génestal, *Le mariage en droit canonique* (Paris: Recueil Sirey, 1929); Jean Dauvillier, *Les temps apostoliques (1er siècle)* (Paris: Sirey, 1970) 363–415; Jean Gaudemet, *L’Église dans l’Empire Romain (IVe-Ve siècles)* (Paris: Sirey, 1958) 515–48. These last two works are vols. 2 and 3 in the series *Histoire du droit et des institutions de l’Église en Occident*, ed. Gabriel Le Bras and Jean Gaudemet.

Corinth and then the Matthean community are early illustrations of this process. But the process of interpreting the obligation of lifelong fidelity did not stop with the first century.

Of course, there was no systematic law regulating marriage in the early Church. Marriage among Christians was carried out according to the laws and customs of the society in which they lived. This was the case well into the ninth century. Church authorities were not indifferent to marriage in their communities since married life, like other important aspects of life, was meant to be lived in accord with the gospel. "This is why the initial interventions of the Church in the marriage of Christians were firstly of a pastoral nature."<sup>56</sup> The concern was to remind a couple of their obligation to fidelity and that divorce was to be rejected. While these obligations were widely taught the pastoral practice was not uniform. By the fourth century we have evidence that two bishops, Basil of Caesarea and John Chrysostom in Constantinople, made judgments that some second marriages were permitted after a divorce.

In Basil's case the exceptive clause of Matthew was the main justification. Understanding *porneia* as adultery, he allowed the innocent spouse abandoned by the adulterer to divorce and remarry. Indeed, it became common in the East to require separation from one's spouse if adultery was committed. In another case Basil seemingly accepted the abandoner back into the community after a long period of penance, without requiring the cessation of the second union and reconciliation with the original spouse. For John Chrysostom it is less certain he permitted remarriage but he clearly endorsed the idea of divorce, seeing adultery as cause for dissolution of a marriage.<sup>57</sup> Due to their influence it is safe to assume that the teachings of these venerable Fathers of the Church were followed by other bishops in the East, and it is evident that their example provided encouragement for the evolution of the present practice in the East where an

<sup>56</sup> Roch Pagé, "Marriage: Sacrament of Love or Sacrament of Bond?" *Studia Canonica* 34 (2000) 5–21, at 9. According to Pagé we can view the history of Christian marriage as a three-fold set of interventions by the Church in married life. The second occurred in the fourth to fifth centuries and it was primarily liturgical, not in the sense of a "religious wedding" at this early stage but the growth in the custom of seeking a blessing in addition to the civil ritual. A third set of interventions were juridical, the early acceptance of Roman law's definition of consent as establishing marriage, protections against incest and prepuberty marriages, sanctions imposed on those who violated moral norms in marriage and then, most importantly, the claim at Lateran II in the 12th century that clerical marriages were invalid and, again, in the 16th century at Trent that marriages not in accord with canonical form were invalid (ibid. 10–11).

<sup>57</sup> Jerome's interpretation of Matthew 5:32 as referring to separation but not dissolution of the marriage did not gain support from authorities in the East.

innocent spouse is free to divorce and remarry after abandonment or adultery.<sup>58</sup>

One of the circumstances affecting marriage practice in the East was the ongoing centrality of the authority of the state in the East. Unlike the situation with the collapse of Roman imperial authority in the West, which allowed the development of the Church's claim to jurisdiction over marriage, "it did not enter the minds of Greek canonists in the Middle Ages to question the competence of the imperial authority in the area of matrimonial legislation."<sup>59</sup> This meant that theologians and pastors in the East grappled with civil law that permitted divorce. As the Eastern tradition evolved, great emphasis was put on opposing divorce by mutual consent even while permitting divorce for a legitimate reason. Exceptions to the general opposition to divorce hearkened back to the Matthean exceptive clause and the precedents established by the Cappadocians and others.<sup>60</sup> Over time the idea of a legitimate reason for divorce drew upon analogies to the two generally accepted events that ended marriage: analogies to death (permanent insanity, disappearance, abandonment) or analogies to

<sup>58</sup> The important citations for Basil are the *Moralia* (Rule 73, chaps. 1–2) and three letters to Amphilochius (188, 199, 217). The former is found in St. Basil, *Ascetical Works*, trans. Monica Wagner, The Fathers of the Church 9 (New York: Fathers of the Church, 1950) 189–90 and the latter in St. Basil, *Letters 186–368*, trans. Agnes Clare Way, The Fathers of the Church 28 (New York: Fathers of the Church, 1955) 4–24, 47–62, 105–17. For Chrysostom the important texts are *The Treatise on Virginity*, *Homilies on Matthew* (17, 62) and *Homilies on I Corinthians* (19, 26, 29). They are found in John Chrysostom, *On Virginity, Against Remarriage*, trans. Sally Rieger Shore; intro. Elizabeth Clark, Studies in Women and Religion 9 (New York: E. Mellen, 1983) 1–128; *The Homilies of John Chrysostom on the Gospel of Matthew*, trans. George Baronet, The Nicene and Post-Nicene Fathers 10, gen. ed. Philip Schaff (New York: Charles Scribner's Sons, 1908) 115–23, 381–86; *The Homilies of John Chrysostom on the Epistles of Paul to the Corinthians*, trans. Talbot Chambers, The Nicene and Post-Nicene Fathers 12, gen. ed. Philip Schaff (New York: Charles Scribner's Son, 1905) 105–11, 148–57, 168–75. Two clear succinct treatments of their writing can be found in Mackin, *Divorce and Remarriage* 147–49, 152–55 and Michael Lawler, *Marriage and Sacrament: A Theology of Christian Marriage* (Collegeville: Liturgical, 1993) 85–87.

<sup>59</sup> Peter L'Huilier, "The Indissolubility of Marriage in Orthodox Law and Practice," in *Catholic Divorce: The Deception of Annulments*, ed. Pierre Hegy and Joseph Martos (New York: Continuum, 2000) 108–26, at 116.

<sup>60</sup> John Erickson suggests that the exception in Matthew is "understood not as a derogation from the prohibition to divorce but as its logical and necessary corollary. Adultery is the antithesis of marriage as it was established 'from the beginning': the perpetual union of one man and one woman." Adultery, therefore, dissolves a marriage because it is the negation of true marriage. "Eastern Orthodox Perspectives on Divorce and Remarriage," in *Divorce and Remarriage: Religious and Psychological Perspectives*, ed. William Roberts (Kansas City: Sheed and Ward, 1990) 15–26, at 19.

adultery as an attack on the moral foundation of marriage (secret abortion, endangerment of spouse's life, forced prostitution).<sup>61</sup>

It is because the Eastern Church's approach to marriage emerged in this organic manner from what was perceived as a scriptural foundation, with the authority of figures like Basil and John Chrysostom supporting it, that the Greek bishops in A.D. 1439 at the Council of Florence responded to a papal request to abolish divorce with the answer "that marriages in the East were only dissolved with valid reasons."<sup>62</sup> For whatever combination of reasons—religious, political, even military—the desired reconciliation between East and West was not blocked by this stance of the Greeks. The bishops at Florence did not seek to impose the Latin discipline upon the Eastern churches. This same healthy respect for the teaching and practice of marriage in the East—once again mixed with political, economic, and military concerns—led the bishops at Trent to devise the carefully worded anathema aimed at Luther but not the Orthodox.

So in the Christian East the well-known practice of *oikonomia* became common. The appeal to *oikonomia* "arises when there is an apparent conflict between the claim of law and the call of the Christian spirit."<sup>63</sup> This practice is not so vague that it can be employed as an endorsement of a practice opposing Christian truth. *Oikonomia* cannot be used to contradict dogma for revealed truth places limits on *oikonomia*. As Ladislav Orsy writes: "Dogma should not be wronged in the process, but this Orthodox rule cuts the other way too: whenever there is no dogma, the use of *oikonomia* . . . should not be impeded."<sup>64</sup>

It is not only the East that underwent significant development in its teaching on marriage.<sup>65</sup> Although the West emerged with a different stance regarding indissolubility the route taken to arrive at this destination has had numerous twists and turns. Besides clear evidence in the East other examples exist in the West of what Lawrence Wrenn calls the "fragility-

<sup>61</sup> Ibid. 22. Clarence Gallagher reaffirms the distinctly different approach taken to divorce and remarriage in the Eastern churches (*Church Law and Church Order in Rome and Byzantium* [Burlington, Vt: Ashgate, 2002] 73–79, 180–81, 203, 220–21).

<sup>62</sup> L'Huillier, "The Indissolubility of Marriage in Orthodox Law" 116.

<sup>63</sup> Ladislav Orsy, "In Search of the Meaning of Oikonomia: Report on a Convention," *Theological Studies* 43 (1982) 312–19, at 313.

<sup>64</sup> Ibid. 319.

<sup>65</sup> We do not wish to leave the impression that all developments within the Orthodox tradition on marriage are unproblematic. In Russian Orthodoxy, during the 16th and 17th centuries, a degree of permissiveness developed that countenanced even divorce by mutual consent. How such a practice can be reconciled with the thrust of both traditions, East and West, to promote the value of permanence and fidelity in marital love is not readily discernible. See L'Huillier, "The Indissolubility of Marriage in Orthodox Law" 118.

illicite tradition.”<sup>66</sup> There are penitential books of the seventh and eighth centuries from England and Ireland that allowed for divorce and remarriage in a variety of difficult situations, e.g. one spouse entered a monastery freeing the other to remarry; a married slave gained freedom and was permitted to remarry if the other spouse remained enslaved; the spouse of a person held hostage or taken as plunder was free to remarry if the missing person was unlikely to return.<sup>67</sup> But it was not only monk-confessors who made pastoral judgments when dealing with marital breakdown. In the eighth century Gregory II advised Boniface that in dealing with a man whose wife was no longer well enough to engage in sexual intercourse it was permissible for him to remarry as long as he did not neglect to provide material support for his first wife.<sup>68</sup>

While the East took the path of *oikonomia* the West developed a substantial body of law and jurisprudence on marriage which followed the thought of the indissolubility-invalidity tradition. Yet a few illustrations show how complex and gradual was the West’s path from a straightforward claim that marriage is indissoluble to the present teaching that only a *ratum et consummatum* marriage is indissoluble.

Familiar to any student of Catholic teaching on marriage is the so-called Pauline Privilege whereby the Apostle declared a spouse, converted to Christianity after first having entered into marriage with another non-Christian, is not bound by the relationship if the unconverted spouse is not reconcilable to the new baptismal vocation of the Christian spouse. The Christian spouse is free to remarry and the second marriage dissolves the first. This pastoral judgment was not, despite its origins in ancient Corinth, widely used in the first centuries of Catholicism. Indeed, it was Clement III in the 12th century who was the first to grant the privilege in the way it is understood today, as granting freedom not only to separate but to remarry because the first marriage is dissolved.<sup>69</sup> And so the claim to indissolubility was no longer extended to nonsacramental marriages.

<sup>66</sup> Wrenn, “Marriage: Indissoluble or Fragile?” 140. Wrenn means by this designation that school of thought which maintains that marriage is not indissoluble but fragile, and that second marriages are judged illicit because prohibited, not invalid because impossible.

<sup>67</sup> Ibid. 141–42. These examples are drawn from the Penitentials of Cummean and Theodore as quoted in Wrenn.

<sup>68</sup> Ibid. 138.

<sup>69</sup> Augustine and others prior to Clement III accepted that Paul permitted separation for the sake of the newly baptized person peacefully living the faith but did not view this as also permission for remarriage. The first marriage was not dissolved in Augustine’s judgment. See “Adulterous Marriages,” Book 1, chaps. 19–22, in *Marriage and Virginity*, trans. Ray Kearney, ed. David Hunter, The Works of St. Augustine I/9, gen. ed. John Rotelle (Hyde Park, N.Y.: New City, 1999) 154–57. Clement was following the opinion of Gratian in the Decretals who had proposed

Besides the papal citation of the Pauline Privilege there is the less ancient claim to the Petrine Privilege or dissolution of marriage by the papal power of the keys.<sup>70</sup> During the 16th century the missionary expansion into Africa and the Indies brought new pastoral dilemmas. Polygamous males who sought baptism were faced with choosing which wife would be their sole wife following entry into the Church. In those cases where the first wife was known that was the marriage to be considered valid. But in cases where there was no recollection of which wife was first the male was permitted to pick the wife with whom he wished to begin a monogamous marriage. The pope, Paul III, dissolved the marriage with the unknown first wife in order for the new marriage consent to be valid. The basis was that no prior sacramental marriage had been involved. Decades later Pius V affirmed his predecessor's action with the added twist that the husband could choose the wife he preferred if she were willing to be baptized along with him, even if the first wife was known. In both cases we find the novelty that the pagan wife neither departed nor refused to maintain the marriage yet the Christian husband had the right, in effect, to dismiss the pagan wife for another he preferred. Later, Gregory XIII in 1585 addressed the difficulty of those unfortunate victims of slavery who, taken from their spouse and eventually baptized, were desirous to enter into a second marriage in their new setting. And what of the first spouse from the pagan marriage? The pope ruled that no inquiry need be made into the willingness of the pagan spouse to stay in the marriage, as the Pauline precedent required, but the newly baptized was free to remarry and the first marriage was dissolved.<sup>71</sup>

### Modern Papal Actions

It might be argued that such developments in the tradition were to be expected in the first few centuries following the systematization of canonical discipline and clarification of the sacramental nature of marriage that occurred in the High and Late Middle Ages. But the developments continued well beyond this period; indeed, one of the most substantive devel-

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that the marriage of pagans had validity but not indissolubility since it was not a sacramental marriage.

<sup>70</sup> Though debated among historians and scholars we believe that the cases to be reviewed are such an extension of the Pauline precedent that there is a difference in kind between them. Hence the designation Petrine Privilege to denote that the real legitimation of the dissolution is not Paul's precedent but the power of the papacy.

<sup>71</sup> The account of this chapter in Catholic marriage is drawn from Mackin, *Divorce and Remarriage* 395–401. Lawler also tells the story in a clear way, see *Marriage and Sacrament* 92–93.

opments is due to a series of cases that took place in the United States in the 20th century. In 1924 in response to a petition in Helena, Montana, Pius XI granted a dissolution of marriage to an unbaptized man, civilly divorced from his baptized Episcopalian wife, who wished to be baptized and marry a Catholic woman.

A case in Monterey-Fresno diocese in 1947 added a new element when Pius XII dissolved the marriage between a Catholic man and unbaptized woman although the couple had been given a dispensation for disparity of cult to marry in the first place. After a civil divorce the unbaptized woman wished to marry another Catholic man and become Catholic herself. The justification for this was, as with the Helena case, “the privilege of the faith” whereby a nonsacramental marriage was dissolved for the sake of permitting a second, sacramental marriage, even though in the second incident the Church had granted a dispensation for the nonsacramental marriage to occur. Another case in Monterey-Fresno pushed the development of papal power even further by granting a dissolution of the first marriage in circumstances similar to the 1947 case with the difference that it was the Catholic spouse who petitioned for the dissolution so that a second marriage with a fellow Catholic could take place.

Finally, in what may be considered the most radical extension of papal prerogatives regarding marriage there was a 1959 dissolution involving an unbaptized male civilly divorced from a Protestant woman. The marriage, therefore, was nonsacramental. In this instance, however, the petitioner wished to be free to marry a Catholic woman while not receiving baptism himself. Thus, the second marriage would not be sacramental either. Yet the dissolution of the first marriage was granted despite the lack of any expectation this might induce the petitioner to seek baptism. These examples were not the end of such exercises of papal power over all nonsacramental marriages since other cases were decided in a similar way for a decade. Then in 1970 the American bishops were informed of a decision that in the future all “privilege of the faith” cases would require that the second marriage be a sacramental one. However, in 1973 an instruction from the CDF was published with guidelines that permitted the second marriage to be nonsacramental.<sup>72</sup>

It is evident that Catholic teaching on indissolubility has been adapted to permit papal dissolutions of any marriage that is not sacramental (not to ignore its claim to dissolve nonconsummated, sacramental marriages as

<sup>72</sup> For accounts of these cases we have relied upon Noonan, *Power to Dissolve* 368–404; Curran, *New Perspectives in Moral Theology* 219–20; and Mackin, *Divorce and Remarriage* 14–15. Mackin provides the procedural norms of the 1973 CDF statement, 17 no. 10. An updated set of norms was issued in April 2001 but not made public; see n. 20 above.



well). Several points deserve to be underscored. First, this story is an ongoing one and there is no evident reason, given the developments as recent as a few decades ago, to presume the narrative now ends with no further development possible in the future; the extent of the Church's power to dissolve marriages remains an open question. Second, given the fact that the vast majority of marriages taking place around the world are nonsacramental then, in accord with the Church's present teaching, most marriages are not indissoluble.<sup>73</sup>

Thirdly, the Church finds itself in the awkward position of claiming it has more power over the marriages of non-Christians, not just non-Catholics, than it has over marriages which occur according to its own sacramental practice. The awkwardness increases with the realization that, in effect, "baptism becomes a ground for divorce."<sup>74</sup>

### Lessons from the Past

What are we to make of the Church's tradition in this matter? Certainly the tradition has been neither uniform nor constant. Kasper warns against "confusing individual pieces of traditional evidence with tradition in the dogmatic sense."<sup>75</sup> That is, he rightly claims that tradition in the latter sense is about the agreed-upon assessment of various strands of evidence. The ITC's position is similar, admitting diversity on indissolubility in the early Church but asserting that the dominant view was always the wrongfulness of divorce and proscription of remarriage if one's spouse still lived.<sup>76</sup>

We point out several items by way of response. First, the diversity of authorized teaching and practice extends beyond the early Church to at least the Middle Ages and, if one includes the witness of the Eastern churches, continues up to the present day. The fact that the Western

<sup>73</sup> Since Christians makes up less than one-fourth of the human family and all Christians do not marry other Christians it is safe to assume that the percentage of sacramental marriages is less than 25%. This means that three-fourths of the world's marriages are dissoluble. Seen in a global context one might ponder what is the meaning of the Church's claim that there is a natural indissolubility of marriage.

<sup>74</sup> Edward Schillebeeckx, "Christian Marriage and the Reality of Complete Marital Breakdown," in *Catholic Divorce*, ed. Hegy and Martos, 82–107, at 87.

<sup>75</sup> Kasper, *Theology of Marriage* 58. Yet Kasper also concludes after reviewing the history of the teaching that "a policy similar to the practice of 'tolerance' and 'leniency' that emerges from many documents of the early church and similar to (although not identical with) the practice of the Eastern church" may be desirable (70).

<sup>76</sup> ITC, "Propositions" 238 (see n. 27 above).

Church was in union with the Eastern Church for a longer period of time than we have been separated suggests we ought to value their ongoing witness to the meaning of the gospel. Especially so, since on this particular question, the West has never formally denounced the East's teaching or practice.

Second, the teaching has been in a constant state of development and it is presumptuous to think that, in the absence of any dogma on indissolubility, substantive revision is now impossible. We agree that the variety of positions espoused within the broad history of the Church is not in itself a reason to change the teaching but the variety does support our claim that the teaching can change and is not a settled matter. There are a number of questions raised by the tradition that are difficult to explain if we believe the Roman Catholic Church's teaching on indissolubility is sure and certain. How to explain the many concessions granted to persons not only in the first millennium but in the 20th century? Why has the position on second marriage in the Eastern churches not been clearly and explicitly dismissed? Why did Trent make a very limited and nuanced judgment in its anathema? As Ladislav Orsy has observed, "if the hypothesis of the church having the radical power to dissolve the bond is accepted, all these [questions] are easily explained."<sup>77</sup>

Finally, an important area for development of the tradition on marriage is sacramental theology because we are becoming ever more aware of the extent of the Church's authority over the sacraments. It is "increasingly apparent from historical research that the church has throughout its life significantly altered, re-arranged, expanded and contracted its sacramental life in the most far-reaching and essential ways."<sup>78</sup>

The existing teaching on *ratum et consummatum* marriage as being radically indissoluble is not the same teaching as that of the historical Jesus. It is the much later teaching of his Church. Power to reform that teaching "is the same agent that introduced the teaching in the first place, namely, the magisterial Church."<sup>79</sup>

<sup>77</sup> Ladislav Orsy, *Marriage in Canon Law* (Wilmington, Del.: Michael Glazier, 1988) 277.

<sup>78</sup> Michael Himes, "The Current State of Sacramental Theology as a Background to the New Code," *Canon Law Society of America: Proceedings of the Forty-Second Convention* (Washington: Canon Law Society of America, 1981) 60–77, at 71–72. The author goes on to say: "The relationship of Confirmation to Baptism, the content of Holy Orders, the extraordinary history of the sacrament of Reconciliation, are a few among many indicators of the authority which the church has exercised over its own sacramental life" (*ibid.*).

<sup>79</sup> Michael Lawler, "Blessed Are Spouses Who Love, For Their Marriages Will be Permanent: A Theology of the Bonds in Marriage," *The Jurist* 55 (1995) 218–42, at 239.

## THE BOND OF MARRIAGE

The most commonly cited reason in the Roman Catholic tradition for opposing divorce and remarriage is the claim that even if a couple separate and no longer share a life together the marital bond persists.<sup>80</sup> This understanding of marriage was sensible when the context for thinking about marriage was contractual but is less persuasive if one views marriage from within a covenantal context. Marriage as a contract for the exchange of certain rights may not be violated as long as neither partner fails the other by exchanging those contractual rights with a third party. When viewed as a covenant, marriage asks not the minimum (do not betray me) but the maximum (be devoted to me). And so the demise of shared life and affection is rendered problematic by the standard of a marital covenant even if that were not the case under the contractual model.<sup>81</sup> The Church has not fully grasped all the implications of this sea change in the way we understand marriage as covenant today.

<sup>80</sup> See for example the teaching found in the *Catechism of the Catholic Church*: “From a valid marriage arises a bond between the spouses which by its very nature is perpetual and exclusive” (no. 1638, directly quoting c. 1134). And “Thus the marriage bond has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved” (no. 1640).

<sup>81</sup> That this is not an overly negative reading of the contractual model is evident when one considers the following example designed by Mackin. Because the object of contractual consent according to the old Code was the right to sexual acts a couple could have married with an agreement never to exercise the right. (Recall this is how commentators described the marriage of Mary and Joseph as a true marriage while Mary could remain a virgin.) Further, the spouses need not even live together since the right to cohabitation was not part of the marriage contract. And this refusal to cohabit could be unilateral on the part of one spouse. To take the argument to its extreme, it is possible under the contractual model for the couple never to meet if they had legitimate proxies provide the consent in a ceremony before a cleric. To show that this hypothetical case is not as farfetched as it seems, Mackin cites a case from the 1930s in which a young male appealed for an annulment of a marriage in which the couple exchanged consent but never consummated the marriage and after ten years still had not lived under the same roof. The Rota denied the petition in December of 1942, so the union was deemed a valid marriage. The marriage was later dissolved by Pius XII in accord with the power of the keys since although a valid sacramental marriage existed it had not been consummated. *Divorce and Remarriage* 456 and 499–500 n. 1. An even more extreme hypothetical case is the famous one proposed by the Italian canonist Jemolo where a man marries a woman for the purpose of carrying out a vendetta against the wife’s family. See Wrenn’s discussion in “Refining the Essence of Marriage,” in Lawrence Wrenn, *The Invalid Marriage* (Washington: Canon Law Society of America, 1998) 202–18, at 202–5.

### Background to a New Understanding

As is widely known, the Catholic view of marriage has been recast in recent times. According to Schillebeeckx, the roots of that rethinking in the West go back to when Romanticism emerged in the late stages of the Enlightenment as a reaction to the rationalism of its earlier phase. Sexuality came to be seen as an expression of interpersonal love and such interpersonal and mutual love “began to be valued as the very essence of marriage.”<sup>82</sup> The point is not that we lacked romantic love until the 18th century, but only in modern times did interpersonal love “come to be regarded as a structural principle of married life.”<sup>83</sup>

In the West there were social changes that led to cultural shifts in the view of marriage. Industrialization and urbanization altered the role that marriage played in the economy. Marriage was sought for its own internal goods of companionship, intimacy, and love while less importance was given to its financial benefits. The trend toward separating family life and the working world, thereby lessening the functional value of marriage, has increased steadily in the West with more recent movements for women’s equality and social mobility providing even fewer economic and class structure motivations for marriage. Today people marry for the sake of being together, and it is the establishment of a relationship of mutuality, intimacy, and love that is the dominant purpose of marriage. As a consequence marriage without love, marriage where the relationship of the spouses has completely broken down, poses a new dilemma for Catholic teaching.<sup>84</sup>

More than in the past, the challenge is sharper when the question is posed: what does it mean to say a marriage perdures even though the marital relationship has totally disintegrated?

### The Conciliar Shift

In the pastoral constitution *Gaudium et spes*, the Council Fathers of Vatican II placed marriage in this new context. No longer was marriage

<sup>82</sup> Schillebeeckx, “Christian Marriage and Marital Breakdown” 90.

<sup>83</sup> Schillebeeckx, *Marriage: Human Reality and Saving Mystery* xxii.

<sup>84</sup> We do not wish to see the legitimate focus on the interpersonal relationship of the couple be interpreted in a one-sided manner. Personalism is not individualism. Marriage is not a private act but one which requires social recognition and support or else the marriage suffers. Social recognition permits a couple to function as such in a community. There remains an inescapable social dimension to marriage so that cultural customs and civil laws are not foreign to the discussion of marriage. Our purpose in emphasizing the change in marriage’s social role is nicely stated by Schillebeeckx, when he writes that the social norms “are not deduced from some previously given and fixed human nature, but they are the fruit of a culture-creating community that is always searching for new ways to be human in the midst of ever-evolving socioeconomic situations” (See “Christian Marriage and Marital Breakdown” 92).

described as having primary and secondary ends with the *bonum proles* ranked higher than the *bonum coniugum*. Marriage was treated as “an intimate partnership of life and love” entered into by means of a covenant (not contract) in which the “partners mutually surrender themselves to each other.”<sup>85</sup> Gradually, this way of perceiving marriage found its way into the jurisprudence of the Church and into the revised Code of Canon Law<sup>86</sup> despite the resistance of those who argued that because *Gaudium et spes* was a “pastoral” document it ought not be used for doctrinal change.

In the council’s treatment of marriage the consent that creates marriage entails not an exchange of rights but a gift of the whole self to one’s spouse and the reception of the spouse’s self-donation. Rights and obligations still exist but they cannot exist apart from the conjugal relationship, somehow independent of the personal relationship between the holders of these rights and obligations. This personal consent, that is irrevocable, creates a covenant.<sup>87</sup> Seen in a personalistic way marriage is now defined primarily as a relationship between two persons who pledge themselves to live a life of faithful unity. It is more than friendship or other important human relationships for in the marital relationship it is understood that the entire life of both people are to be related to one another; it is a partnership of all of life (*totius vitae consortium*).<sup>88</sup>

Once the personalist rendering of marriage was accepted a variety of questions arose, none more important than what happens to the bond if the marriage breaks down? How can a marriage with a nonexistent marital relationship still exist by virtue of an enduring bond? In what does the marital bond consist? Since the conciliar shift in the description of marriage, how is it possible for the Church to maintain that the bond of marriage remains when the marriage has ceased? The present time remains a period of transition in the life of the Church as it adapts to the insights of the council. Due to the gap between the old and new definitions of marriage and the incomplete transition to the personalist rendering of marriage, the Church continues with inadequate teaching and law in this area. Three examples suffice to demonstrate the failure so far of the Church to assimilate fully the conciliar insights.

<sup>85</sup> *Gaudium et spes* no. 48.

<sup>86</sup> Wrenn usefully contrasts the 1917 and 1983 Codes on marriage. See “Canon 1095: A Bird’s Eye View,” in *Invalid Marriages* 184–201, at 196–99.

<sup>87</sup> “The intimate partnership of married life and love . . . is rooted in the conjugal covenant [*foedus coniugale*] of irrevocable personal consent” (*Gaudium et spes* no. 48).

<sup>88</sup> A succinct treatment of Vatican II’s personalist reading of marriage is Klaus Lüdicke, “Matrimonial Consent in Light of a Personalist Concept of Marriage: On the Council’s New Way of Thinking about Marriage,” *Studia Canonica* 33 (1999) 473–503, esp. 482–89.

### ***Frater-Soror Relationships***

In the 1981 apostolic letter *Familiaris consortio* there is a comment on the impermissibility of the divorced and remarried to receive Holy Communion. Those who remain in such canonically irregular unions but are desirous of full eucharistic participation are advised that in order to do so they must repent of their marriage's failure and live in such a way as to not contradict the norm of indissolubility. "This means, in practice, that when for serious reasons, for example, for the children's upbringing, a man and a woman cannot satisfy the obligation to separate, they 'take on themselves the duty to live in complete continence, that is, by abstinence from the acts proper to married couples.'"<sup>89</sup>

According to the papal advice no violation of the teaching on indissolubility occurs as long as the second couple abstains from sexual intimacy. How is it that the first marriage is not contradicted, the first spouse not betrayed, by a relationship in which all marital affection, trust, emotional intimacy, financial support, intellectual and spiritual sharing is now directed to a third party? In the conciliar treatment of marriage interpersonal love, mutuality, and intimacy are as much a part of the nature of marriage as sexual intercourse. So why can all the qualities of the marital relationship be exercised in the second relationship, save sexual intercourse, and the first marriage not be contradicted?

The answer is to note the pope's description of sexual intimacy as pertaining to those "acts proper to married couples." All the other elements of the marital relationship are apparently not "proper" to marriage, that is, nonessential. What the papal position reveals is the lasting influence of the contractual model in which it was the right to sexual intercourse that was exchanged in marriage consent. But this seems to miss the point of the personalist revision describing marriage as a "partnership of all of life" (*totius vitae consortium*). From the former contractual perspective the *frater-soror* relationship possessed some plausibility. In the new context this remedy is far less persuasive.<sup>90</sup>

<sup>89</sup> John Paul II, *Familiaris consortio* no. 84.

<sup>90</sup> Mackin comments that the unfulfilled prospect of the shift from the contractual model to the conciliar viewpoint is due in part to the assumptions that both Paul VI and the Roman courts used in addressing certain cases in the early post-conciliar period. Many of the opinions emanating from Roman courts assumed that marriage is first of all a juridical entity, namely a bond that cannot be dissolved, and that any nonjuridical elements—such as love, partnership of life, intimacy in relationship—are not essential to marriage. These latter traits can diminish and even disappear and so were not considered as being essential to marriage because their disappearance would pose a difficulty for teaching that marriage is indissoluble. In other words, the logic that was employed first declared marriage indissoluble and then it was stipulated that any proposed element of marriage that might disappear

### Rethinking Consent

The 1983 Code of Canon Law reflects an immense effort to incorporate the conciliar teaching. Yet, here too, a whole new set of pastoral and legal dilemmas have arisen in trying to maintain the traditional teaching and practice regarding the indissolubility of *ratum et consummatum* marriages. One concern is that as the view of marriage moves from a contract involving the exchange of sexual rights to marriage as the creation of a partnership in the whole of life the grounds for judging competency to marry change. In the former case the physical capacity for sexual intercourse open to procreation was the necessary ability. But in the latter viewpoint the issue of capacity for marriage introduces elements of psychic maturity. If the focus is on procreation the threshold for capacity to marry is low; if the focus is on the marital relationship, however, the threshold for capacity is higher.

Today, a large number of annulments are granted under the rubric of lack of due discretion. That is, the judgment is made in retrospect that the reason a marriage failed is that one or the other partner lacked the initial psychological capacity to sustain a truly marital relationship.<sup>91</sup> So the inability to initiate an intimate partnership of all of life is a ground for saying no marriage ever existed.<sup>92</sup> Yet the destruction of an intimate partnership of all of life is not adequate ground for saying the marriage no longer exists. The criteria for determining a marriage's existence in a request for annulment is not the criteria for determining marriage's existence in seeking a divorce. In the first case the more personalistic view of marriage has been allowed to shape the jurisprudence while in the second case the Church has reverted back to juridical claims of a bond existing independent of the marital relationship.

### Rethinking Consummation

In addition to a reconsideration of the nature of *ratum* in marriage there has been much written on how we are to understand *consummatum*. In the traditional view consummation was attained by the first act of coitus following the exchange of consent. The logic was clear, if marriage is a contract involving the spouses' exchange of rights to their bodies then the deal was sealed upon the first exercise of the right. However, if marriage is a covenant of love between two persons involving the creation of a consor-

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could not, therefore, be a necessary element. As a result the church reverted back to the idea of marriage as contract, with a juridical bond that exists independent of the marital relationship (*Divorce and Remarriage* 509–15).

<sup>91</sup> See c. 1095.

<sup>92</sup> See Wrenn, "Canon 1095: A Bird's Eye View" esp. 189–99.

tium of intimacy it is less clear that one act of sexual intercourse is an appropriate symbol of consummation.

Consummation denotes the completion of something or bringing something to fulfillment. One act of coitus was adequate to bring to completion the legal contract of marriage since the contracted goods were exchanged in that one act. Can that be plausibly maintained once we understand marriage as a covenant of intimacy and sharing in all aspects of life? Is it plausible to treat the first act of sexual intercourse after the wedding ceremony as the definitive completion of the marital covenant of total self-giving?

Of course, there is less precision to the notion of consummation once we move away from the canonical standard of coitus. How does one measure when the partnership in life is consummated? This is an important question from a canonical standpoint. The quest for legal clarity, however, ought not lead the Church to accept a reductionist description of the full human experience of marriage.<sup>93</sup>

Where we find ourselves at present is that the council affirmed a new description of marriage, its nature and its ends, yet we continue to coerce the reality of marriage into traditional juridical categories that no longer fit.<sup>94</sup> For now, it is useful to remember the teaching that any nonconsummated marriage, even a valid sacramental marriage, can be dissolved by an exercise of the Petrine ministry. If we cannot presume that the older standard for consummation is adequate it is probable that, even by existing teaching, many more sacramental marriages are dissoluble than previously thought.<sup>95</sup>

### The Reality of the Bond

Although a personalist understanding of marriage leads to a revised understanding of *ratum et consummatum* it causes even more deep-seated difficulties for the traditional notion of the marriage bond itself. In Catholic theology, according to Kasper, “the impression has sometimes been given

<sup>93</sup> “It turns out that the traditional concept of consummation is not very helpful for thinking about indissolubility from a human point of view” (Schillebeeckx, “Christian Marriage and Marital Breakdown” 96).

<sup>94</sup> It is true that the new understanding renders the human experience of marriage in less precise and measurable terms than may be desirable for canonists to determine its reality. Perhaps this should be viewed as an indication that non-judicial processes are better suited for dealing with the reality of marriage. For some suggestions see James A. Coriden, “The Tribunal as Last Resort,” *The Jurist* 59 (1999) 60–77.

<sup>95</sup> Lawler has succinctly and clearly explored the complexities of consummation in the personalist understanding of marriage. See “Blessed Are Spouses Who Love” 232–37.



that the bond of marriage is a kind of metaphysical hypostasis that is placed above marriage in the concrete.”<sup>96</sup> He recommends that we avoid this error by ceasing to talk of the bond as an “objective reality” and speak of it “rather as in accordance with the personal sphere of marriage.” The reality of the marriage bond, like the reality of any sacrament, must be firmly rooted in a human reality.

Over the years the human matrix of marriage has been variously described, but at Vatican II it was characterized as the intimate sharing of life in a loving partnership. If that relationship between the spouses has broken down in a total and irretrievable manner then to what is indissolubility attached? What is the reality that possesses the quality of indissolubility? The answer according to present teaching is the bond of marriage. But what is this bond? Can it exist apart from the human reality of the spousal covenant? Ladislav Orsy, like Kasper, asks if the bond is some “new physical reality, independent from the persons” and answers that it cannot be. In his words, “one could not even conceive what such a physical reality could be.” Nor, he continues, is there any evidence for a bond existing in the order of grace. Nor has the tradition ever described the bond as a “sacramental character” as with baptism. For Orsy the only option is that the marriage bond “signifies a relationship.”<sup>97</sup>

Michael Lawler has explained the significance of this claim, using traditional Scholastic philosophy.

The essence of substance is to be in itself, *esse in se*; the essence of accident is to be in another in which it inheres, *esse in alio tamquam in subiecto inhaesionis*. Relation is not a substance, an *esse in se*, . . . therefore, it does not have autonomous existence. Relation is an accident, an *esse in alio*; it is being in an other. As an accident, it requires a subject in which to inhere, else it would have no existence. Since the bond arising from a valid marriage is a relation, it is an accident, requiring for its very existence a subject in which to inhere.<sup>98</sup>

This view is in accord with the teaching of *Gaudium et spes* that the bond arises out of the “covenant of irrevocable personal consent”<sup>99</sup> whereby the couple pledges to live as husband and wife. It is the relationship of husband and wife that gives life to the bond and as such the bond inheres in the human persons who make up the relationship. So when the Church speaks of the reality of the marriage bond it must mean the reality of a man and woman who have given an entire orientation to their lives by pledging that they will live together as husband and wife.

Once this is clear, that the bond of marriage is nothing more nor less than

<sup>96</sup> Kasper, *Theology of Marriage* 49.

<sup>97</sup> Orsy, *Marriage in Canon Law* 271.

<sup>98</sup> Lawler, “Blessed Are Spouses Who Love” 221.

<sup>99</sup> *Gaudium et spes* no. 48.

a human relationship, “a permanent orientation of the whole internal world of a person to another,”<sup>100</sup> then we can make sense of what happens when the relationship is terminated: the bond has ended. The bond is the bond of marital love and if the marriage relationship has ended the bond has ended; there is no sacrament for there no longer exists a human reality as the “element” of the sacrament.<sup>101</sup>

Matrimonial law in the Roman Catholic Church has enshrined a view of marriage as being about the bond not the human relationship, as if the two are separable: one ceases to exist and the other continues. If such is the claim, what is lacking in present teaching is a meaningful description of what the bond is once it is separated from the human matrix, the actual marital relationship. To claim that a juridical bond persists is to return to the contractual model of marriage for this did not require an intimate partnership of life. But in a covenantal model of marriage, it is difficult to see how a bond endures absent a true marital relationship.

What is the subject to which indissolubility applies in the contractual model? An abstraction called the bond, but a bond that has no reality in the actual life of a marriage. It is a bond, treated as if it were a “metaphysical hypostasis” to recall Kasper’s complaint. We agree with Orthodox archbishop Peter L’Huillier’s statement that “it is difficult to pretend that the marriage continues to subsist in the abstract.” We maintain that the bond is the marital relationship and relationships do not exist apart from the specific persons who enter into and sustain them.

### The Meaning of the Bond

Rather than interpret the relationship of marriage in a juridical manner we suggest it is best understood morally. The bond of marriage creates obligations, to be sure, as relationships normally do. In marriage we make a commitment to another, “yielding to another a *claim* over ourselves—a claim to be and do what we have promised.”<sup>102</sup> An effect of the words spoken, the consent exchanged, between a man and woman is that they both now sense an obligation to make the words come alive, to enact the pledge that they will be for one another a loving partner in life throughout the coming years. As Kasper writes of the marriage bond: “It points to the

<sup>100</sup> Orsy, *Marriage in Canon Law* 272.

<sup>101</sup> An analogy suggested by Tibor Horvath is to see the breakdown of the marital consortium having an effect upon the sacramental bond similar to the effect upon the sacramental presence when the eucharistic elements are destroyed. “Marriage,” in *The Sacraments*, ed. Francis Eigo (Villanova, Penn.: Villanova University, 1979) 143–81.

<sup>102</sup> Margaret Farley, “Divorce and Remarriage: A Moral Perspective,” in *Commitment to Partnership*, ed. William Roberts, 107–27, at 114.

constant claim that the partners can make on each other and their openness to each other.”<sup>103</sup> The bond of marriage creates “a *moral ought* inherent in the marriage union.”<sup>104</sup> That “ought” is the moral obligation to keep one’s promises, to follow through on one’s commitments. The ought is due to the person to whom the commitment is made and so is an interpersonal obligation, but the obligation is more complex because it is more than interpersonal.<sup>105</sup>

Because the marriage bond is not simply an interpersonal pledge, there are also legal obligations enforced by civil authorities and, in the case of sacramental marriage, religious obligations before God and the Church enforced by religious authorities. The Church makes no claim about the first bond of an interpersonal pledge, but teaches it alone can dissolve the bonds of marriage and sacrament. It permits dissolution of marriage for good reason when there is no sacrament and will grant a dissolution of a sacramental marriage when it is not consummated.<sup>106</sup>

It is important to note that the moral bond is broken, the commitment violated, not by remarriage but by divorce. This is too often overlooked by the focus of the Church’s ban on remarriage. In the West the emphasis on

<sup>103</sup> Kasper, *Theology of Marriage* 50.

<sup>104</sup> Richard McCormick, “Divorce, Remarriage and the Sacraments,” in *The Critical Calling* (Washington: Georgetown University, 1989) 233–53, at 248 (emphasis in original).

<sup>105</sup> The personal relationship of love creates a moral bond obliging the couple to be faithful to each other in their stated commitment to self-giving. They alone can break that bond. Their relationship is further bonded by a social ritual, marriage, whereby they are now obliged by civil law. This bond requires more than their personal decision to cease, the state must make a legal determination freeing the couple from their social bond. Finally, because both partners are baptized the relationship is religiously bound by God’s grace as a sacrament. No human authority is able to release the couple from this sacramental bond. In short, their love binds them morally, their wedding binds them civilly, and their sacramental participation binds them religiously. This is the “triple bond” of Christian marriage as the tradition has been understood. See Lawler, “Blessed Are Spouses Who Love” 227–28.

<sup>106</sup> Intrinsic indissolubility reflects an appropriate concern by the church to hold a couple accountable, that is, answerable to the community for the failure of a marriage. In cultures with highly individualistic biases this may appear a burden to some but it appears to us to be a proper expectation that it is the community of faith, led by the Spirit, that possesses the power to release members from their public and sacramental vows, their obligation to each other and to the community that was sacramentally sealed. The expression “Petrine Privilege” is unfortunate, however, for it implies that the power to dissolve is solely possessed by the Bishop of Rome. Historically, the exercise of this power reflects the imbalance of an Ultramontanist theology of the papacy. A more adequate and integrated ecclesiology will provide a better means of expressing the power of the church than a unilateral papal decision.

indissolubility has resulted in more concern about the evil of remarriage than separation or divorce, but it is not remarriage alone which is the violation of the marriage bond. Divorce itself is a failure to live up to the obligations assumed by marriage. The inability to maintain the intimate partnership of life is a moral failing and one for which repentance is necessary.

The Orthodox Church has long stressed that divorce without a valid reason is morally wrong, even as it has permitted remarriage. The prohibition that Jesus cites from Genesis in the Synoptic accounts speaks of the evil of a husband and wife separating. When a couple choose to separate on a permanent basis, a practice permitted by Catholic teaching even in the case of a sacramental marriage, the marriage bond is violated. Only if we revert to a contractual exchange of sexual rights as grounding the bond of marriage could it be thought otherwise. The intimate partnership in life, the covenantal bond of marriage, is destroyed when a permanent separation begins. To suggest otherwise is to ignore the human experience of those who endure such sadness. Humanly speaking, it is the permanent separation or divorce that is the tragedy in a person's life. If there is a second marriage it is often the experience of healing and redemptive love.

### **Marital Commitment**

A final issue under this heading of the marriage bond that deserves comment is the limits of commitments. As a practical matter we commonly recognize that pledges are given, promises made, vows taken, that are not always kept. The very commonality of such experience does not make the moral failure less. Sometimes there appears little justification for the failure to live by one's word and as a result the need for repentance and recompense can be profound. At other times we acknowledge factors that limit a person's ability to do what they promised or the presence of competing goods that made the decision to break a vow reasonable, perhaps justifiable. Still a sense of regret exists even in the latter case, for a promise broken for good cause remains a broken promise. The sense of "oughtness" hangs over the situation. Thus, the element of the tragic is part of the moral life. There are occasions when the best we can do nonetheless leaves an obligation unsatisfied, a pledge, implicit or explicit, unmet.

This is readily accepted in everyday matters. We make a date for dinner and our hosts depend on our presence, having gone to trouble and expense to prepare for the evening. Yet various reasons may arise as cause for not being present—a medical emergency, an auto accident on the way, remembering that a previous engagement for the evening already had been made, a last-minute desire to stay home for a quiet evening. Any of these may be the reason for failing to make the dinner engagement but they are not of

equal weight and some are unsatisfactory, though not all. Fair-minded people would judge some reasons as justifying the breaking of the promise. However, a sense of regret remains so that a phone call to cancel includes a sincere apology and some sort of reparation may be extended, perhaps flowers or a card asking for forgiveness and extending an offer to host the next dinner. It is this residual sense of regret that underscores broken promises are not neutral acts—they cause harm. People quite naturally wish to make amends for breaking a commitment, even if maintaining they were justified in doing so.

Vows of marriage are vastly more important than promises to make a dinner engagement. But the pattern of making a commitment through free consent and then breaking it is similar. According to present teaching the bond of marriage is forged through “the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable.”<sup>107</sup> The vow once made cannot be taken back. Considering the seriousness of the commitment of marriage the emphasis on permanence and the exhortation to fidelity to one’s commitment is understandable and correct. But is it really irrevocable? What is it about this promise that makes its binding force absolute?

The mystery of a person is not encompassed in one event, and the self-gift of a person is best seen as a process of decisions and acts. Married couples realize that in a successful marriage there is a long history of repeated acts of committed love. As noted earlier regarding consummation, the present teaching that one act of sexual intercourse can consummate or bring to completion a partnership in life is unpersuasive. It is similar with the consent that gives rise to the bond of marriage—one act at the time of the wedding is incapable of carrying the weight of an irrevocable commitment. The marriage vow certainly points toward lifelong commitment, the person making the vow aspires to a total and final self-gift that is the proper goal for marriage. But none of that is the same as declaring that an irrevocable promise absolutely occurs once and for all at the moment of ritualized consent.

In no other area of human promise-making does the Catholic tradition hold the irrevocability of human commitment.<sup>108</sup> And nowhere else is the claim made that the person not only *ought not* break their commitment but

<sup>107</sup> *Catechism of the Catholic Church* no. 1640.

<sup>108</sup> In this matter we cannot ignore the popular sentiment that the Church’s discipline in marriage is not matched by similar rigidity when treating the situation of vowed religious. The vows of professed religious are free decisions. Usually they are undertaken only after considerable time and formation occurs, far more preparation than most couples undergo before they take marital vows. Scandal is a risk when the vows are broken. The vows of the religious are public, the Church promises that the religious will be given the grace to undertake the life. Indeed, *Lumen*

cannot break the commitment; that it is not only wrong, but impossible to put aside the obligations arising from the vows which the individual entered. The reason why marriage is special according to the present teaching is the claim that the bond continues despite the demise of the relationship. But, as we have argued, that claim ignores the development of the theology of marriage approved by Vatican II. In conciliar theology the bond of marriage is the relationship between the wife and husband. Remove that relationship and the bond is an abstraction, with no rootedness in a human matrix. If the bond does not exist there is nothing left to which the trait or character of indissolubility may be said to adhere.

Perhaps, due to the difficulties of arguing for a bond that perdures despite the complete dissolution of any marital relationship, there has been a recent shift in emphasis in the presentation of the official Catholic teaching. Today, more than was the case previously, the Catholic position on indissolubility rests upon an understanding of marriage as symbolizing the unbreakable covenant between Christ and the Church.

### SACRAMENTAL SYMBOLISM

According to the ITC, “a unique bond exists between the indissolubility of marriage and its sacramentality” for marriage’s “sacramental nature constitutes the final grounds, although not the only grounds, for indissolubility.”<sup>109</sup> We have discussed the other grounds in the previous sections of this article. Now we turn to what the *Catechism of the Catholic Church* teaches is “the deepest reason” for indissolubility, that through the sacrament “spouses are enabled to represent this fidelity [that of Christ to his Church] and witness to it.”<sup>110</sup>

The particular history of this claim for marriage’s indissolubility begins with the Letter to the Ephesians.<sup>111</sup> In the final part of the letter the author

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*gentium* no. 44 speaks of the vows as assisting consecrated religious to symbolize “the unbreakable link between Christ and His Spouse, the Church.” This is precisely the symbolic reality that the magisterium claims makes marriage indissoluble. The vows of religious are made before God and, unlike marriage, one might even argue that in the case of religious profession the other partner in the commitment is divine. In whose name is the Church acting, therefore, when it releases a person from a commitment solemnly entered into before God? Why is the Church’s competence in this matter greater than in marriage? Recall that in the past there were Doctors of the Church who maintained that not even the pope could dispense from the solemn vows of religious. See Aquinas, *Summa theologiae* 2-2, q. 88, a. 11.

<sup>109</sup> ITC, “Propositions” 237 (see n. 27 above).

<sup>110</sup> *Catechism of the Catholic Church* no. 1647.

<sup>111</sup> Though much modern scholarship questions the ascription of authorship to the Apostle Paul we adopt the traditional designation of the author as Paul and refer to the Pauline theology of the letter.

uses the Pauline adoption of the classical household code (*Haustafeln*) as a format for describing the moral life of the Christian.<sup>112</sup> In chapter six the author discusses the relationship of children and parents as well as slaves and masters. But prior to this, in verses 21–32 of chapter five, he comments on husbands and wives.

Woven into his moral exhortation of mutual subordination in Christ and his acceptance of the hierarchical relation of males and females in ancient society is an exalted view of marriage. He quotes Genesis 2:24 and sees in it a hidden lesson, a secret long-hidden that only comes to light centuries later: the love of man and woman, willed by God at creation, was a “type”<sup>113</sup> that prefigured the love of Christ for the Church.<sup>114</sup>

This passage is primarily a moral teaching. Paul explains to his audience that Christians live their lives “in the Lord,” and this is true even when they participate in the customary social institutions such as marriage. This latter institution was hierarchically structured with the husband as head and the wife placed in a subordinate position.<sup>115</sup> Paul does not challenge this arrangement explicitly. As with his teaching on slavery, Paul did not upset the traditional social order. So, too, in the case of Ephesians with marriage. The love which is “in Christ” recognizes no distinction between Jew and Greek, slave and free, male and female. Nonetheless the social customs of marriage were left unchallenged as were the practices of slavery.<sup>116</sup>

At this point Paul is simply emphasizing the need for a Christian to

<sup>112</sup> A difficulty here is that central to the entire household code is the idea of subordination. As history witnesses, Paul was only partly successful in presenting his theology of marriage because of his use of an analogy that presumed and reinforced patriarchy. See the comments of Margaret McDonald, *Colossians and Ephesians*, Sacra Pagina vol. 17 (Collegeville: Liturgical, 2000) 325–41.

<sup>113</sup> Markus Barth, borrowing from R. P. C. Hanson, suggests the distinction between a type and an allegory is that with a type the original is true yet it fore-shadows an even deeper truth to be revealed in the future; with allegory only the spiritual truth is meant. *Ephesians 4–6*, The Anchor Bible vol. 34a (Garden City: Doubleday, 1974) 643, n. 143.

<sup>114</sup> Joseph Fitzmyer, “Pauline Theology,” 1382–1416, at 1415, and Paul Kobelski, “The Letter to the Ephesians,” 883–890, at 890 in Brown, Fitzmyer, Murphy, *New Jerome Biblical Commentary* (Englewood Cliffs, N.J.: Prentice-Hall, 1990).

<sup>115</sup> Although we take seriously the weight of the Ephesians text in the discussion of indissolubility we also make our own the question posed by Margaret Farley: “what insights are possible regarding divorce and remarriage from a tradition that makes the sacramentality of marriage a critical warrant for the indissolubility of marriage, and that makes the imaging of a covenant between unequals a critical warrant for sacramentality?” (“Divorce and Remarriage: A Moral Perspective” 110). Feminist theologians alert us to the problem with the continuation of imagery that compares marriage of a man and woman to the love of Christ for the Church. In such analogies the woman is always placed in secondary status.

<sup>116</sup> As Schillebeeckx observes: “We can only deplore the fact that the Christian message of love, which rightly demanded reciprocity, did not have the revolution-

demonstrate greater intimacy and respect for one's spouse in marriage, although this is to occur within a marital relationship entailing the subordination of women to men. The analogy of Christ and the Church is used to justify this subordination. As Christ is head of the Church so husbands are the heads of their wives and wives should be subordinate. Yet, this is not an opportunity for domination or abuse by husbands because husbands should love their wives on the model of Christ who is head of the Church and loves it generously.

Christ loves his body the Church. Husbands are called to love their wives as their own bodies. Paul quotes the Genesis text to drive home this point, that despite the relationship of subordination a husband can no more abuse his wife than Christ could abuse the Church. In verse 32 this is spoken of as "a great mystery," Christ is so united with the Church that the bond between them can be compared to that of a husband and wife, they are one in the flesh.

The text should be read without the glosses that have developed over the centuries. Paul's use of the analogy, husbands are to wives as Christ is to the Church, does not refer to the indissolubility of marriage. His point is not doctrinal. Instead, Paul is engaged in moral exhortation. He is encouraging husbands to relate to their wives not in a dominating fashion of superior to inferior but as Christ relates to the Church. Christ sees the Church as part of his body. Paul is not speaking of the indissolubility of marriage in this passage and the reader should not infer from his analogy that the marriage of two Christians is indissoluble. A legitimate inference is the lesson that husbands are to love their wives with the same sacrificial love shown by Christ who feeds and cares for the Church, his body.<sup>117</sup> The analogy is meant to teach the disciple about love even in the context of a hierarchical relationship.

How is it then that the tradition came to read the Ephesians text as a biblical warrant not only for indissolubility as a moral imperative but as a juridical bond impervious to the actions and decisions of the spouses or anyone else? The process starts not with Paul but with Augustine, although it is a selective use of Augustine by later authors. The Bishop of Hippo was not the first to rely upon Ephesians 5 for teaching about marriage but its earlier use was for moral teaching, as already noted. Augustine used Eph-

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ary power to break more directly through the injustices of marriage in a patriarchal social order" ("Christian Marriage and Marital Breakdown" 89).

<sup>117</sup> Ernest Best, *Ephesians*, The International Critical Commentary (Edinburgh: T. and T. Clark, 1998) 539–40; Arthur Patzia, *Ephesians, Colossians, Philemon*, New International Biblical Commentary (Peabody, Mass.: Hendrickson, 1990) 267; Schillebeeckx, *Marriage: Human Reality and Saving Mystery* 116.



esians for his sacramental theology and he relied upon the Latin use of *sacramentum* to translate *mysterion*. Mackin has traced the development of Augustine's thought on the *sacramentum* of marriage, citing at least four different uses of it: as image of the eschatological union of all people in Christ; as the hidden meaning that human marriage is taken up into the union of Christ and the Church; as the cause that brings about the effect of lifelong perseverance in marriage; as the bond that unites the spouses until death.<sup>118</sup>

It is not readily apparent what Augustine thought was marriage's *sacramentum*. Later commentators seeking greater precision seized upon one explanation, the marital relationship as an earthly image of the relationship between Christ and the Church. Medieval canonists further developed the idea by emphasizing that the marriage had to be consummated for the imaging process to be complete. Once the couple have become "one flesh" then their union can signify the union of Christ and the Church. As Orsy summarizes: "Once it is a sign, it takes on the nature of the signified. The signified union cannot be dissolved. Therefore, after its consummation, no marriage can be dissolved either."<sup>119</sup>

The present teaching of the magisterium goes well beyond anything that Paul wrote. We can ask: "how much of this development is an authentic unfolding of the Pauline doctrine, therefore an integral part of our Catholic faith, and how much of it is of human construction, therefore potentially subject to revision?"<sup>120</sup> Our conviction is that the teaching on marriage's symbolism falls into the latter category. The initial erroneous assumption was to think that verse 32, the great mystery, referred to marriage.<sup>121</sup> Then when the translation of *mysterion* as *sacramentum* became enshrined it was possible to choose one of Augustine's explanations of the *sacramentum*—the imaging of the union of Christ and the Church—and the transformation of the Ephesians text was set. No longer a moral exhortation to husbands to love their wives, Ephesians was read as a doctrinal claim that marriage was indissoluble.

It is, of course, possible that the development is sound and the teaching is to be held in esteem even if the biblical basis is not as secure as once maintained. It is also possible, however, that what we find here is an

<sup>118</sup> Theodore Mackin, "Ephesians 5:21–33 and Radical Indissolubility," in *Marriage Studies: Reflections in Canon Law and Theology*, vol. 3, ed. Thomas Doyle (Washington: Canon Law Society of America, 1985) 1–45, at 15.

<sup>119</sup> Orsy, *Marriage in Canon Law* 275.

<sup>120</sup> *Ibid.*

<sup>121</sup> Among exegetes who dispute that the "great mystery" in verse 32 refers to marriage is Rudolf Schnackenburg, *Ephesians: A Commentary*, trans. Helen Heron (Edinburgh: T. and T. Clark, 1991) 255–56.

example of a misconstrued biblical text that leaves us with a weak foundation for the certainty of a teaching.<sup>122</sup>

### **The Use of Analogy**

In addition to the biblical interpretation there are also questions about other aspects of the formulation of the doctrine. Analogies are essential to theological reasoning but there is a danger if we turn the analogy into a literal claim. In their usage the biblical writers, both in the Old and New Testaments, were not attempting to develop a doctrine of indissolubility. Instead they were using a familiar human experience to help believers understand something about God. To describe the faithful, loving, intimate relationship that Yahweh sought with Israel the sacred authors used the analogy of marriage. Marriage was used as a way to explain Yahweh's love. It is important to be clear about the prime analogue. Yahweh's love had some qualities similar to the human love found in marriage.

At different times the analogy was employed to bring out different lessons. If the Hebrews reflected upon the exclusivity of marriage they could understand something of Yahweh's desire to be the one God of Israel. If they considered the intimacy of marriage they might grasp the close concern of Yahweh for the nation. Attention to the mercy of a forgiving spouse pointed toward Yahweh's treatment of the repentant. The analogy of marriage was not used restrictively to teach but one lesson about Yahweh. It had to be read in context.

When the author of Ephesians employed the analogy he was interweaving two points, one a moral lesson for husbands and wives typical of household codes and the other a comment about Christ's love for the Church. It is a mistake to elide the two into one. As Christ is to the Church so a husband is to his wife, but as the head he ought to love her and not exercise his authority unfairly. That is the first lesson. The second is the intimacy of a husband and wife being one flesh, as written in Genesis, holds a deeper truth not revealed until Paul and his generation—all have been invited into union with Christ through membership in his body, the Church. There were two related but distinct comparisons being suggested by Paul. The husband was head of his wife like Christ was the Church; the union of Christ and the Church is as intimate as two becoming one flesh.

### **Causality: an Unresolved Question**

The later development of the teaching with its misreading of Ephesians raises a question that is not satisfactorily answered anywhere in the tradi-

<sup>122</sup> The misuse of Genesis 38 as a basis for denouncing masturbation as gravely sinful serves as another recognized exegetical error that supported a long-held teaching.

tion. Because the tradition has turned its mistaken analogy into a literal claim the issue of causality arises. Human marriage, sacramental and consummated, is deemed indissoluble due to its symbolizing the unbreakable bond between Christ and the Church. The teaching is not *just as* Christ loves the Church indissolubly so spouses love each other in the same way. Rather, it is *because* the bond between Christ and his Church is indissoluble the sacramental, consummated marriage of a man and woman is indissoluble.

The causality issue moves beyond the “oughtness” of indissolubility. That is, if one accepts the development of the tradition that earthly marriage symbolizes the union of Christ and the Church it is easy to say that therefore Christian marriage ought to be indissoluble. But, according to present teaching, the argument is stronger than that. The Church teaches that because marriage symbolizes the union of Christ and the Church it is not possible for a sacramentally consummated marriage to be dissolved. How does that happen? How has the moral imperative been transformed into a claim about the objective reality of marriage? It is not clear that the tradition supplies an answer to this question.

Augustine’s view is that the *sacramentum* is what made the marriage indissoluble but he was unclear as to just what the *sacramentum* is. Noonan suggests that the *sacramentum* entails a “symbolic stability” and that Augustine viewed marriage as a sacrament because it is permanent, not permanent because it is a sacrament. In his analysis Mackin concludes that Augustine did not see the *sacramentum* as the marriage itself, as the relationship of the spouses nor the marriage’s symbolization of the Christ-Church relationship. It appears that the *sacramentum* of marriage, the reason for its indissolubility, was the spouses’ commitment to God to maintain the marriage. *Sacramentum* was understood as an oath to the Lord.<sup>123</sup> By either reading, *sacramentum* as lived commitment or oath before God, Augustine’s reasoning was not adopted by later commentators in their defense of indissolubility.

At the Council of Florence the bishops, after avoiding the issue in order to pursue unity with the Greeks, treated indissolubility at the request of the Armenians. They followed the position of the Scholastic canonists who saw the *sacramentum* as the human marriage signifying the union of Christ and the Church. Trent, however, put it differently. There the bishops did not say it was a marriage’s imaging of the Christ-Church relationship that makes it indissoluble. Rather the bishops stated “that Christ’s grace is

<sup>123</sup> John Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge, Mass.: Belknap, 1965) 128–29; Mackin, “The International Theological Commission and Indissolubility,” in *Divorce and Remarriage*, ed. William Roberts, 27–69, at 67 n. 6

available to make marriages indissolubly indissoluble” and by implication that marriages made indissoluble are sacraments.<sup>124</sup>

In *Casti connubii* Pius XI made the argument in the manner most familiar to contemporary scholars. A consummated sacramental marriage, its two-in-oneness, is the perfect image of Christ’s love of the Church. Since the latter union or bond is indestructible so must the former be. The causal nexus is not because the marriage is indestructible it can image the Christ-Church union but the reverse. Because a marriage is a consummated sacrament it is the perfect image of the Christ-Church relationship, and is therefore indissoluble. The marriage is made indissoluble because it is meant to image the model. The pope relies upon Ephesians for his argument, presuming the customary reading to be an accurate account of Paul’s position.

The teaching of Vatican II is closer to the teaching of Trent than the position taken in the intervening years. In *Gaudium et spes* no. 48 the way in which the grace of the sacrament is understood leaves room for human volition in cooperating with the work of Christ. As Häring put it, the role of Christ in the couple’s marriage “understood dynamically, is to make their love increasingly resemble his own love for the Church, so that it will truly become mutual dedication in absolutely faithful love.”<sup>125</sup> The sacrament offers the presence of Christ whose love deepens and enriches marital love. In the council’s presentation indissolubility has the characteristic of a gift which is given to a couple by means of their cooperation with the grace of Christ available to them in the Church’s sacrament.<sup>126</sup>

Indissolubility in this perspective is the achievement of Christians whose love is strengthened by the grace of the sacrament. Grace, of course, does not deny human freedom. Therefore it is not helpful for the Church to speak of indissolubility as being the effect of the sacrament independent of the wills of the spouses. Instead the sacrament’s effect is to assist the couple in their efforts to build a consortium of intimate love so that the destruction of their love becomes virtually unthinkable. This is quite a distance from the claim that God has, through the sacrament, established a bond unrelated to the actual status of the human relationship and impervious to the human volition of the couple. This latter claim of the tradition appears to us less and less convincing as an explanation of the sacramental effect.

What if the couple does not cooperate with the grace of Christ? What if at some point one or both spouses reject the obligation to maintain the

<sup>124</sup> Mackin, “Ephesians and Radical Indissolubility” 6.

<sup>125</sup> Bernard Häring, “Part II, Chapter 1,” in *Commentary on the Documents of Vatican II*, vol. 5, ed. Herbert Vorgrimler (New York: Herder and Herder, 1969) 225–45, at 235.

<sup>126</sup> *Gaudium et spes* nos. 48–49.

bond of love between them? According to the present teaching the sacramentality of the marriage preserves its indissolubility. Therefore, a marriage in which there is no longer any interpersonal relationship continues to be a sacramental symbolization of the union of Christ and the Church. How is this to be understood? What is it in the couple's marriage that continues to signify the union of Christ with his Church? We have already argued that without a human matrix no sacrament can persist.

The matrix for marriage is the relationship of the couple. Absent that matrix there can be no moral bond of a loving relationship. And without such a relationship what is the operative sacramentality of marriage?

It is the committed, faithful love of a man and woman that embodies the sacrament; not that they receive the sacrament so much as they are the sacrament. Their love is the symbolic presentation of the love between Christ and his body. What is it that continues to symbolize the Christ-Church union once the tragedy of marital breakdown occurs? The present teaching has not yet provided a convincing answer to this question, nor is it clear that there is something retrievable in the tradition to formulate a response.

### A Balanced Eschatology

According to Gustave Martelet, whose influence upon the ITC propositions on marriage was significant, Jesus has restored "the primordial authenticity of the couple." That is, he has overcome the "hardness of heart" reflected in the Mosaic Law on divorce and now permits couples to live as intended by the Creator when marriage was instituted in Genesis. Now, once again, "man and woman can love each other from now on as God, from all time, desires that they should love, because in Jesus is manifested the source of that love which establishes the kingdom."<sup>127</sup>

Evident here is a curiously one-sided eschatology that ignores the incomplete nature of the establishment of the kingdom of God. Think, by contrast, of the Church's acceptance of violence as a regrettable but necessary instrument in a world where the gift of peace is not fully realized.<sup>128</sup>

The need to recall the eschatological tension in human life is also true of marriage and this is confirmed by the Ephesians text. In 5:27 the description of Christ's purification of the Church, rendering it without wrinkle or

<sup>127</sup> Gustave Martelet, "Christological Theses on the Sacrament of Marriage," *Origins* 8 (September 14, 1978) 200-4, at 202.

<sup>128</sup> Among many examples that could be cited there is the pastoral letter by the National Conference of Catholic Bishops "The Challenge of Peace" (Washington: United States Catholic Conference, 1983) nos. 27-65 in which there is an explicit endorsement of how an eschatological tension must be maintained in assessing the morality of war.

blemish, is an eschatological portrayal. The author is describing what is being accomplished not what has been fully realized. If marriage is a symbol of a relationship between Christ and the Church then marriage symbolizes a relationship that is being brought to perfection, one that is still on the path to its fulfillment. Just as the perfection of the model is incomplete so must be the perfection of the image. If indissolubility is part of the perfection of marriage, and we believe it is, it is an unrealized goal toward which any marriage points, an end to which married couples rightly aspire.

### **Rereading the Symbol**

The evolution of the tradition with its emphasis on one reading of the sacramental symbol has also hindered our understanding of alternative readings of marriage's symbolic power. Why is the interpretation of Ephesians limited to the relationship of Christ to the Church and not the Church to Christ? If this were taken seriously the symbolic import of marriage continues but in a way that is particularly relevant to recent papal actions. John Paul II has on several occasions sought pardon in the name of the Church for historical errors and failings, signifying "the Church herself has not always been faithful to her spouse, not always correctly interpreted the meaning of her mission in varying circumstances of her history." Perhaps by analogy, "spouses who suffer the failure of their endeavor do in fact resemble the church herself at certain moments in her history"<sup>129</sup> when it has failed in its own relationship with its spouse.

Such a reading is congruent with the eschatological tension that ought to be maintained and suggests a theological rationale for a different pastoral approach to the divorced. It is also possible that second marriages can be seen as having their own sacramental symbolization, not the steadfastness of Christ's love for the Church but the merciful forgiveness of a God who, like the father of the prodigal son, loves us beyond any merit that accrues to moral rightness.

### **CONCLUSION**

It is the rare couple who marry not wishing to see their marriage last until death. Humans crave fidelity and permanence in their experience of love. We believe the example of a lifelong marriage is a striking sacramental expression of Christ's love for the Church. Nothing in what we have written should be interpreted as a retreat from the radical demand upon a couple to continue to grow throughout their lifetimes in a faithful, committed, loving union. Our argument is that the formulation of that demand

<sup>129</sup> Pagé, "Sacrament of Love" 21.

as an exceptionless norm for all consummated, sacramental marriages is unrealistic, incoherent, and injurious. Unrealistic because stable marital relationships are never achieved simply in any one statement or event. Incoherent because the biblical and theological elements comprising the present teaching do not fit together. Injurious because the burden that is placed on those who divorce and remarry is beyond the requirements of moral integrity and the bounds of pastoral compassion.

We maintain that the present teaching is neither *de fide* nor definitive doctrine but authoritative doctrine that calls for *obsequium*, a religious submission of mind and will. Like all authoritative doctrine the teaching on the indissolubility of a *ratum et consummatum* marriage is to be granted a presumption of truth. However, a presumption is just that, it stands unless there is substantial evidence that brings the presumption into doubt. If we may be permitted an analogy, the presumption of innocence in the criminal justice system of the United States means that the prosecution must make a case beyond reasonable doubt that the suspect is guilty. With enough evidence that can be done and juries find suspects to be guilty. In a similar way the presumption of truth granted to authoritative teaching cannot mean that the teaching is certainly correct for that would erase any distinction between the different categories of teaching authority. Rather, if substantial evidence to the contrary can be presented then the presumption of truth may be overcome. We maintain that the evidence marshaled in this article constitutes a substantial case against the present teaching on indissolubility. At the very least the presumption of truth is weakened by the evidence presented.<sup>130</sup> The appropriate conclusion is that we, as a Church, must reconsider whether the teaching is sufficiently certain and consistent to determine all present pastoral care and sacramental practice.

<sup>130</sup> Indeed, it seems that those in high teaching offices harbor misgivings or uncertainties about the doctrine of indissolubility. Witness: (a) the CDF reversed its policies in the 1970s on the requirement of conversion in favor of the faith dissolutions; (b) neither the CDF procedural guidelines of 1973 nor those of 2001 were promulgated in the *AAS*, but only circulated privately; (c) the canon of the 1917 *Code* (1119) on the dissolution of nonconsummated marriages by solemn religious profession was omitted from the 1983 revised *Code* without explanation; and (d) the proposed canon of the 1983 *Code* (c. 1150) which recognized the authority of the Roman pontiff to dissolve the marriages of nonbaptized persons when neither of them intend to receive baptism was dropped from the *Code* before it was promulgated but after it had been approved by the 1981 plenary of the Pontifical Commission for the Revision of the *Code*.