

THE RELATIONSHIP BETWEEN A THEOLOGICAL UNDERSTANDING OF
MARITAL COMMITMENT AND A JURIDICAL ARTICULATION OF MARITAL
CONSENT IN SACRAMENTAL MARRIAGES IN THE UNITED STATES

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In partial fulfillment of the requirements for
the degree of Doctor of Philosophy

By

Angela M. Robb

May 2015

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By

Angela M. Robb

Approved December 1, 2014

George Worgul, Ph.D.
Professor of Theology; University
Coordinator of Academic Programs
With Africa
(Committee Chair)

Elochukwu Uzukwu, C.S.Sp., Th.D.
Associate Professor of Theology
(Committee Member)

Maureen O'Brien, Ph.D.
Associate Professor of Theology
(Committee Member)

James Swindal, Ph.D.
Dean, McNulty College and Graduate
School of Liberal Arts
Professor of Philosophy

Maureen O'Brien, Ph.D.
Chair, Department of Theology
Associate Professor of Theology

ABSTRACT

THE RELATIONSHIP BETWEEN A THEOLOGICAL UNDERSTANDING OF MARITAL COMMITMENT AND A JURIDICAL ARTICULATION OF MARITAL CONSENT IN SACRAMENTAL MARRIAGES IN THE UNITED STATES

By

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May 2015

Dissertation supervised by George Worgul, Ph.D.

Sacramental marriage is an essential social, public, ecclesial, and theological good, yet its influence in the United States is threatened by a divorce rate comparable to the U.S. population in general, an explosive increase in cohabitation, and a declining marriage rate. The underlying assumption of this dissertation is that commitment and consent, more thoroughly understood and consistently lived, are essential to lifelong, faithful, and life-giving marriage that symbolizes and makes present Christ's indissoluble love for the church. Through an adapted use of Don Browning's fundamental practical theological method, this study begins with practical concerns regarding concrete marital and family practices in the United States and ends with practical means and strategies related to the pastoral care of sacramental marriages and all those in the stages of marriage preparation, aftercare, and sadly, family fragmentation. Within this theological

method, canon law is considered an ecclesial science distinct from theology yet organically united to it in the church. Relying primarily on Ladislav Örsy's theory of the relationship between theology and canon law, I affirm that theology identifies, explains, and evaluates the values or goods of marriage through the movements of biblical, historical, systematic, and moral theology, whereas canon law produces norms, processes, and structures for the protection and promotion of those goods. In this view, theology judges canon law to determine the fittingness of canonical norms and structures for theological realities. Furthermore, canon law is a ministry that is both pastoral and juridical to ensure freedom and good order within the church. Canon law is part of the overall care of the faithful given that justice is the minimum demand of love. Consent creates marriage; therefore, an integral and in-depth understanding of consent in canon law in light of a theology of commitment is important in helping the church to appropriate the human and theological values of marriage.

DEDICATION

To my husband, Michael, and our children, Emily, Caleb, Ian, and Macrina, who make
present to me God's unlimited love and mercy each day

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I wish to thank my director, Dr. George Worgul, for his patience with my progress, motivation in moving me forward, and insightful questioning of the text. Years after taking his course on the sacraments, I am able to have a greater appreciation of his teaching, not simply because of what I have learned since then, but because of what I have lived. In addition, I would like to express my gratitude to Dr. Maureen O'Brien for the many ways she has allowed me to move forward and given me guidance through the years. I greatly appreciate Dr. Elochukwu Uzukwu's thoughtful reading of my dissertation and comments. I would like to acknowledge those teachers that have left their mark permanently on my theological thinking. Thanks to Fr. Michael Slusser, there is not a Trinity Sunday that goes by that I do not listen attentively to the homily and reflect on the practical relevance of the doctrine of the Trinity to our lives. Additionally, the christological and pneumatological insights of Dr. William Thompson-Uberuaga remain with me always. Finally, I would like to acknowledge Dr. James Hanigan for awakening my interest in canon law, but mostly for demonstrating what it means to be a teacher.

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CHAPTER ONE

THE CONTEXT FOR THE QUESTION

1.1 Describing Marriage and Family Practices in the United States

In the early 1980's, Americans experienced the highest divorce rate in the nation's history. In 2010, that rate was nearly twice that of 1960, despite a gradual decline.¹ In addition, many Americans are choosing not to marry in the first place. From 1970 through 2010, the marriage rate declined by more than 50 percent. This decline can be attributed to the increased median age of first marriages and the slight decrease in remarriage among divorced persons.² Another contributing factor is the increasing growth of the phenomenon of cohabitation. Cohabitation, or the state of unmarried sexual partners sharing a household, has increased more than seventeen-fold since 1960 in America.³ In more than 60 percent of all first marriages, living together outside of a marital commitment comes before marriage, a situation that frequently increases the likelihood of couples breaking up, unless cohabitation occurs after engagement.⁴

1. W. Bradford Wilcox and Elizabeth Marquardt, eds., *The State of Our Unions, Marriage in America 2010: When Marriage Disappears: The New Middle America* (Charlottesville, VA: National Marriage Project and the Institute for American Values, December 2010), 71, http://www.virginia.edu/marriageproject/pdfs/Union_11_12_10.pdf (accessed June 1, 2011).

2. National Marriage Project and Center for Marriage and Families, "Social Indicators of Marital Health & Well-Being: Trends of the Past Five Decades," in *The State of Our Unions* (Charlottesville, VA: National Marriage Project and Institute for American Values, 2012), 62, <http://www.stateofourunions.org/2012/SOOU2012.pdf> (accessed July 1, 2014).

3. *Ibid.*, 76.

4. *Ibid.*, 76-77. The significance of engagement will be addressed in later chapters. See Galena K. Rhoades, Scott M. Stanley, and Howard J. Markman, "The Pre-Engagement Cohabitation Effect: A Replication and Extension of Previous Findings," *Journal of Family Psychology* 23, no. 1 (2009): 110.

Increasingly, there is also a separation in ideology and practice between marriage and child-rearing. Over 40 percent of all cohabiting couples live with children who are under the age of 18, an almost 1,000 percent increase since 1960.⁵ Furthermore, more than four out of ten births nationally are to unmarried mothers.⁶ For those who do choose to marry, the lifetime probability that their first marriage will end in divorce is between 40 and 50 percent, although there are several factors that greatly reduce the risk of divorce or separation within the first ten years of marriage.⁷ Unfortunately, simply being a Catholic is not one of those factors. The number of Catholics, who are divorced, separated, or living with a partner is very similar to the U.S. population as a whole, according to a 2007 survey from the Center for Applied Research in the Apostolate.⁸

Identifying and clarifying the psychological, social, and economic aspects of divorce, cohabitation, and single parenting is an integral part of understanding marriage and family in America today. The data on the consequences of divorce and single

5. W. Bradford Wilcox and Elizabeth Marquardt, eds., *The State of Our Unions, Marriage in America 2009: Money & Marriage* (Charlottesville, VA: National Marriage Project and the Institute for American Values, December 2009), 103, http://www.virginia.edu/marriageproject/pdfs/Union_11_25_09.pdf (accessed June 1, 2010).

6. Wilcox and Marquardt, *The State of Our Unions, Marriage in America 2010: When Marriage Disappears: The New Middle America*, 95.

7. *Ibid.*, 72-74.

8. Mark M. Gray, Paul M. Perl, and Tricia C. Bruce. *Marriage in the Catholic Church: A Survey of U.S. Catholics* (Georgetown University: Center for Applied Research in the Apostolate, October 2007), 19, 24, 123, 124, http://www.usccb.org/laity/marriage/marriage_report.pdf (accessed February 4, 2008). The CARA Report states that those in the Vatican II Generation (born 1943-1960) are more likely to be currently divorced or to have ever been divorced (38% compared to 16% in the Post-Vatican II Generation and 25% in the Pre-Vatican II Generation). This could change as the younger generations age. However, Vatican II and Post-Vatican II Catholics are less likely to say their view of marriage is consistent with the statement that marriage is a lifelong commitment. In addition, the report finds that the more frequently Catholics attend Mass, the less likely they are to be divorced, currently or previously. Those who attend Mass more frequently are more likely to say their views are very consistent with marriage as a lifelong commitment, marriage as contributing to the common good of society, and marriage as a vocation. One should keep in mind that these findings are correlational and not causal so interpretation must be qualified.

parenting has been growing and gaining wider recognition in the past 20 to 30 years. Probable and possible effects of divorce and single parenting on children include: increased risk of poverty, juvenile delinquency, and child abuse; average lower educational achievement, career advancement, and psychological well-being; and difficulty in forming long-term commitments when grown, to name a few.⁹ In addition, a 2008 report from the Institute for American Values estimates that family fragmentation costs U.S. taxpayers at least \$112 billion every year.¹⁰ The faces of poverty in America are primarily women and children due in large part to the breakup of families through divorce and the failure of fathers to integrate into the mother/infant dyad. Such a phenomenon is known as the “feminization of kinship and poverty.”¹¹ According to recent data, the creation of stepfamilies does not seem to resolve these issues for children of divorce. The divorce rate of second marriages (67%) is higher than first-time marriages (40-50%), and children in stepfamilies suffer as many risks as children of single mothers, if not more.¹² Family breakup is even more likely for cohabiting couples. Children of cohabiting parents have more than five times the risk of parental separation

9. Glenn T. Stanton, *Why Marriage Matters: Reasons to Believe in Marriage in a Postmodern Society* (Colorado Springs, CO: Piñon Press, 1997), 133-40.

10. Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* (New York, NY: Institute for American Values, 2008), 5, <http://www.cpr-mn.org/Documents/Taxpayer%20Cost%20of%20Divorce.pdf> (accessed January 15, 2014).

11. Don. S. Browning, *Equality and the Family: A Fundamental, Practical Theology of Children, Mothers, and Fathers in Modern Societies*, Religion, Marriage, and Family Series, ed. Don. S. Browning and John Witte Jr. (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2007), 90.

12. Wilcox and Marquardt, *The State of Our Unions, Marriage in America 2009: Money & Marriage*, 102; Stanton, *Why Marriage Matters: Reasons to Believe in Marriage in a Postmodern Society*, 143-54. Mark Banschick, “The High Failure Rate of Second and Third Marriages,” last modified February 6, 2012, <http://www.psychologytoday.com/blog/the-intelligent-divorce/201202/the-high-failure-rate-second-and-third-marriages> (accessed July 14, 2014).

compared to children of married parents.¹³ Even a cursory look at the data demonstrates that marriage is beneficial for spouses and their children.¹⁴ According to W. Bradford Wilcox and a team of family scholars, marriage is an essential social and public good, extending benefits to all, even poor and minority communities in which marriage is tenuous. In this report, leading family scholars have concluded that marriage (not including remarriage) is associated with better relationships among family members, increased wealth, reduced poverty, better physical and psychological health, lowered risk of infant mortality, reduced rates of drug and alcohol abuse, and longer life expectancies.¹⁵ When marriages break down or fail to form in the first place, the support and care that family members provide one another then need to be given by other agencies, private and public, ecclesial and secular. The psychological, social, and economic effects of family breakup ripple across generations and communities. Failed marriages and parental separation are a problem for the world, a problem requiring a sustained, organized, and concentrated response from the Church.¹⁶

13. David Popenoe, *Cohabitation, Marriage and Child Wellbeing: A Cross-National Perspective* (New Brunswick, NJ: The National Marriage Project at Rutgers University, 2008), 4, <http://www.virginia.edu/marriageproject/pdfs/NMP2008CohabitationReport.pdf> (accessed June 26, 2010).

14. Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (New York: Broadway Books, 2000); Judith S. Wallerstein, Julia M. Lewis, and Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York: Hyperion, 2000); Barbara Dafoe Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family* (New York: NY: Vintage Books, 1998), 179.

15. W. Bradford Wilcox, et. al, *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences*, 2nd ed. (New York, NY: Institute for American Values, 2005).

16. The Church (capitalized) throughout this dissertation refers to the Roman Catholic Church in the United States of America, because that is the focus of this study. That being said, the primary reality of the Catholic Church is the diocesan church or “particular church.” The Roman Catholic Church in the U.S. (and worldwide) is a communion of diocesan churches. For a practical theology, this point is significant, for the ministry of the church happens in the concrete, in the local church, or parish, which is connected to the other Eucharistic communities in the particular church. The church (in lower case) refers to the parish, diocese, or universal church.

The preceding empirical picture of marriage and family in America situates us in the thickness of practice, the beginning and end of this study. The thrust of this dissertation began with my very real concern for the concrete lives and marriages of men and women today and especially for their children.¹⁷ It is this practical/pastoral concern that is the beginning and end of this study. In other words, this practical concern began my questioning and research, and it is always toward offering practical ideas and recommendations that my study leans. To be precise, the primary practical/pastoral problems to be addressed and in need of a response are the failed state of too many apparent Catholic sacramental marriages in the United States today, the explosion of cohabitation as a prelude to marriage or a replacement for marriage, and the changing cultural landscape of thought and practice regarding the ordering of our sexual lives in America.

1.2 Underlying Principles of Operation

In accord with the work of Don S. Browning, this dissertation is written under the operational principle that all theology is fundamentally practical. In the article that was the springboard for his meticulous work on theological method, *A Fundamental Practical Theology*, Browning defines fundamental practical theology as “critical reflection on the church’s dialogue with Christian sources and other communities with the aim of guiding its action toward social and individual transformation.”¹⁸ His methodology is heavily

17. For an in-depth study based upon the theory that the divorce cycle can be attributed primarily to the lessons learned in childhood about commitment, see Nicholas H. Wolfinger, *Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages* (New York, NY: Cambridge University Press, 2005).

18. Browning, *Equality and the Family: A Fundamental, Practical Theology of Children*,

informed by Hans-Georg Gadamer's hermeneutic theory and the "practice-theory-practice" model of human understanding.¹⁹ Browning interprets Gadamer's hermeneutic circle as a practical circle which is set in motion by practical questions. These questions are then posed to the historical classics that are already imbedded in our understanding.²⁰ Browning then follows the trajectory of Gadamer's thought and develops a theological method that is practical throughout.

In *Truth and Method*, Gadamer painstakingly dismantles the Enlightenment's prejudice against prejudice. Our prejudices, literally pre-judgments, open us up to that which we are trying to understand. It is our prejudices, understood as our preliminary, anticipatory, fore-meanings and fore-conceptions, which constitute our finitude and historicity. Such prejudices are the inevitable corollary of our historical situatedness in the world. Prejudice was not understood as a negative concept and attribute until the Enlightenment.²¹ The Enlightenment's demand to free oneself from all prejudices in order to know anything scientifically is demonstrated by Gadamer to be not only an error, but more accurately, a prejudice itself. Gadamer asserts, "The overcoming of all prejudices, this global demand of the Enlightenment, will prove to be a prejudice, and removing it opens the way to an appropriate understanding of the finitude which dominates not only our humanity but also our historical consciousness."²² The

Mothers, and Fathers in Modern Societies, 6.

19. Browning, *Equality and the Family: A Fundamental, Practical Theology of Children, Mothers, and Fathers in Modern Societies*, 8.

20. *Ibid.*, 3.

21. Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2nd ed. (New York, NY: Continuum, 2004), 273.

22. *Ibid.*, 277.

hermeneutical task is to “fore-ground” and appropriate one’s own biases, prejudices, fore-meanings.²³ In this view, reason and faith in authority are not mutually exclusive. Faith in the authority of another is itself an act of reason, the acknowledgment that the judgment of another is superior to one’s own, and consequently, should be trusted. The prejudices of another are taken as one’s own, because the authority has earned such a position.²⁴ The influences of authority and tradition, that is, the prejudices and explicit judgments of others in space and time, comprise our historical being. We are situated within traditions that help shape the very questions that are the path to knowledge. Gadamer’s articulation of “historically effected consciousness” is crucial in his explanation of the hermeneutical process:

In seeking to understand tradition, historical consciousness must not rely on the critical method with which it approaches its sources, as if this preserved it from mixing in its own judgments and prejudices. It must, in fact, think within its own historicity. To be situated within a tradition does not limit the freedom of knowledge but makes it possible.²⁵

Our prejudices constitute the horizon of the historical present.²⁶ In other words, they limit and influence the range of our current worldview. What has been handed down to us from the past, Gadamer’s dynamic conception of tradition, shapes the very questions that we bring to a text, event, or practice we are seeking to understand. Vital to understanding anything is to become conscious of effective history, which means being

23. Gadamer, *Truth and Method*, 271.

24. *Ibid.*, 281.

25. *Ibid.*, 354.

26. *Ibid.*, 304-5.

conscious of the hermeneutical situation.²⁷ The horizons of the past are not entirely foreign to us, because they form a singular horizon in which we all live and move, Gadamer's active notion of continuing tradition.²⁸ We experience distinct horizons as we project a historical horizon as that which is different and distant from our present situation. Understanding occurs when these apparently disparate horizons are fused.²⁹ The seemingly alien world of the text, event, or practice becomes one's own.³⁰ Gadamer's notable "fusion of horizons," when it happens systematically, is the outcome of historically effected consciousness.³¹ In *Truth and Method*, Gadamer's argument then leads to the significance of *application* in interpretation and understanding. The role of application in theological method is critical in this study.

For Gadamer, understanding is always intimately connected to interpretation and application. Understanding, interpretation, and application are aspects of one integrated process.³² Neither interpretation nor application is an afterthought in coming to understand a text, event, work of art, or current practice. Through an explication of Aristotle's concept of *phronesis*, "the virtue of thoughtful reflection," Gadamer demonstrates how the hermeneutical process is similar to practical moral wisdom, in that neither abstractly applies universal knowledge to particular situations.³³ Instead, both the

27. Gadamer, *Truth and Method*, 300-1.

28. Ibid., 303.

29. Ibid., 305.

30. Ibid., 390.

31. Ibid., 306.

32. Ibid., 306-7.

33. Ibid., 319.

hermeneutical process and the virtue of *phronesis* are codetermined from the beginning by the concrete situation of the interpreter and moral thinker. Gadamer states directly that application implicitly or explicitly governs understanding from the beginning. “We too determined that application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning. Here too application did not consist in relating some pre-given universal to the particular situation.”³⁴ The interpreter can only truly understand a text, event, or practice if he does not try to discount himself, but rather connect and correlate it to his present situation and present concerns. The interpreter, the scholar, the practitioner all seek to understand through their own prejudices and fore-meanings. Whether conscious of it or not, the concern for concrete application drives all knowing. In seeking to understand, the interpreter becomes a part of the meaning grasped.³⁵ Method, understood as that which frees the scientist from bias and prejudice, is utterly impossible. For Gadamer, method has limits; whereas, truth occurs ultimately through the structure of questioning and answering, the dialogue.³⁶ These fundamental precepts of Gadamer’s thought—the significance of prejudice, the decisive role of application in understanding, and the dialogical character of understanding—inform Browning’s methodology, and consequently, the method and structure of this dissertation.

According to Browning, all of our practices have been shaped by religious and cultural classics. They are “theory-laden.”³⁷ Fore-meanings and prejudices are contained

34. Gadamer, *Truth and Method*, 321.

35. *Ibid.*, 335.

36. *Ibid.*, 484.

37. Don S. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*

within those practices. When these practices come into crisis in a religious community, the community begins to question the present situation and the normative texts and events that form the community. The crisis precipitates the need and desire to look more closely into the meanings and theories contained within its current practices and to engage in conversation with the normative texts of the community. This crisis leads the community to see its normative texts and events in a new light, which may lead to change in current practices. Change in practices stimulates change in questions engendering a more differentiated conversation between the religious community's new questions and its new practices. This spiraling view of practical theology is stated more concisely by Browning: "Or more accurately, it goes from present theory-laden practice to a retrieval of normative theory-laden practice to the creation of more critically held theory-laden practices."³⁸ Hence, for Browning all theology is practical, because all theology (and all understanding) begins in and arises from questions about concrete, theory-laden practice. This dissertation adheres to the assumptions of Browning's analysis of the hermeneutical process and method in theology.

The "crisis" which gave rise to this dissertation was described in numbers and statistics previously. The proportions of adult Catholics who are married, divorced, remarried, or living with a partner are similar to the U.S. population as a whole. The numbers are cold and unfeeling, but the stories behind the numbers are filled with pain, confusion, disillusionment, loss, and broken hearts and lives. Decades of social and psychological research have delivered the conclusion that broken families and absent fathers leave all family members at risk economically, psychologically, and socially. The

(Minneapolis: MN: Fortress Press, 1991), 6.

38. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 7.

ways in which our families are formed and dismantled and formed again with different family members deserve our continued attention. Evidence that such an organized and sustained effort is happening in the Catholic Church in the United States is the formation of the National Pastoral Initiative for Marriage by the U.S. Bishops. The initiative began in 2005 with development, research, and consultation with married persons, priests, pastoral ministers, theologians, social scientists, and canonists, among others. The fulfillment of the initiative is the creation, dissemination, and implementation of a pastoral letter on marriage and family which responds to current pastoral concerns by providing teaching and guidance to engaged and married persons and their ministers. The pastoral letter, *Marriage: Love and Life in the Divine Plan*, was published and began implementation in 2009.³⁹ Through the initiative, the U.S. Bishops seek to witness to the benefits of marriage to spouses, their families, and their communities by working with social organizations to protect, promote, and strengthen marriages. This initiative is a source of hope for marriage in America, but further questions remain. Again, in accord with Gadamer and Browning, these questions arising from current practices propel our search for meaning and desire for more life-giving practices.

As the Catholic Church in the United States seeks to strengthen and promote marriage, some fundamental questions should be asked: Why do the proportions of married, divorced, or cohabiting Catholics look so similar to those proportions in the general population? What is marriage, and what is the theological meaning of sacramental marriage? What are the theological reasons for the prevalence of so many

39. United States Conference of Catholic Bishops, Committee on Laity, Marriage, Family Life, and Youth, *Marriage: Love and Life in the Divine Plan* (Washington, D.C.: United States Conference of Catholic Bishops, 2009), <http://www.usccb.org/laity/loveandlife/MarriageFINAL.pdf> (accessed June 26, 2010).

divorced sacramental marriages? What is the theological meaning of divorce and civil remarriage in light of the doctrine of indissolubility? What is the theological meaning of cohabitation, and how is it different from the theological meaning of marriage? What makes some marriages last a lifetime while others fall terribly short? Only with a more differentiated and critical understanding of these questions do we have a greater hope of answering the final question: How should the Catholic Church in the United States, as redemptive community, respond? These questions should be asked systematically by theologians, ordained and non-ordained, although they may surface from the experiences of the faithful intuitively as well. What is necessary is an intentional, systematic response from the Church at the national level to be implemented at the local level in the concrete lives of the faithful.

Before these questions can be answered, some preliminary but foundational thoughts on the church and human history should be noted. This brief, introductory ecclesiological sketch is a synthesis of the ecclesiology of Joseph Komonchak, who fleshes out the outlines of a theology of the church inspired by the work of Bernard Lonergan.⁴⁰ Prejudice, as described previously, is a neutral concept. It is constitutive of our finite, historical existence. In the lives of human persons, prejudice may have a positive or negative value.⁴¹ This neutral concept of prejudice is not to be confused with Lonergan's negative principle termed *bias*. Komonchak develops the foundations for an ecclesiology built upon Lonergan's theory of human history. According to Lonergan, human history is a story of progress, decline, and recovery.

40. Joseph A. Komonchak, "Foundations in Ecclesiology," ed. Fred Lawrence, supplementary issue, *Lonergan Workshop Journal* 11 (1995): vii-ix.

41. Gadamer, *Truth and Method*, 273.

Progress occurs in human history when persons and groups use their intelligence and freedom to ask questions, which leads to understanding and action based upon such new understanding. Acting in the world then changes the concrete situation, which may then lead to new questions and understanding.⁴² This process is reminiscent of the hermeneutical theory of Gadamer and the theological method of Browning. However, human history is not only the story of free and intelligent persons working together to create progress.

This is not a world in which all persons at all times live attentively, intelligently, reasonably, and responsibly, that is, according to Lonergan's transcendental precepts.⁴³ Decline is also a part of human history. Decline occurs due to the negative principle of *bias*, theologically understood as sin. Bias, or sin, obstructs, averts, and warps progress. Komonchak summarizes Lonergan's analysis of the three⁴⁴ forms of bias:

Individual bias is a person's subordination of the demands of intelligence, reason, and responsibility to selfish needs and interests. Consciousness is made to serve egoistic purposes, and its self-transcending thrust is blunted. *Group bias* is a sort of collective selfishness by which the needs and interests of a group within the larger society constitute the primary criterion for its actions. Intelligence, reason, and responsibility here are deflected from their service of the common good of the whole society to serve local and particular interests. Finally, there is a *general bias*, a culture-wide surrender of transcendent exigencies to the tyranny of 'common sense.'⁴⁵

42. Komonchak, "Foundations in Ecclesiology," 78-79.

43. Bernard Lonergan, *Method in Theology* (Toronto, Canada: University of Toronto Press, 2007), 55.

44. Dramatic bias, or unconscious, psychological disturbance, thwarts progress by excluding from consciousness painful, unwanted insights. It is due in part to the fear of insights. This bias of unconscious motivation will not be discussed here. See Bernard Lonergan, *Insight: A Study of Human Understanding*, ed. Frederick E. Crowe and Robert M. Doran, 5th ed., vol. 3 of *Collected Works of Bernard Lonergan*, (Toronto, Canada: University of Toronto Press, 1992), 214-27.

45. Komonchak, "Foundations in Ecclesiology," 79-80.

Here, bias refers to the twisting and misuse of human freedom and intelligence. Bias is a force human persons create in the world, and yet at the same time, it is that into which human persons are born and raised. The recognition of decline in the world and history presupposes the ideal of progress.⁴⁶ We experience decline in history as that which should not be. In theological terms, it is the difference between the ideal intention of creation and the reality of creation infested with sin in human history.

The battle between the forces of intelligence and freedom on one hand and bias on the other is not the center of the human story. Salvation history is the story of recovery. God's grace is the redemptive principle of human history.⁴⁷ The salvific work of God in human hearts and human history realizes the possibility of the restoration of progress:

In fact, then, the solution to the problem of individual, social, and cultural decline cannot come from theory or argument, for arguments can only be heard by selves living within horizons, and inauthentic horizons do not include the materials for their own reversal. Inauthenticity is an existential condition, a practical alienation of freedom and intelligence from their own self-transcending goal. If that alienation cannot be overcome, there is no solution. A new and higher *viewpoint* is not enough; there must be a new and higher *integration* of human living itself.⁴⁸

The force of sin is not something humans can overcome independently. This higher integration is made possible by the gift of redemptive recovery in the message, work, and person of Jesus Christ. Christ's message reveals the sinful condition of humanity and the way to triumph over it. Union with Christ through His death and resurrection is redemption, the only way to overcome the principle of bias and recover the possibility of progress.⁴⁹

46. Komonchak, "Foundations in Ecclesiology," 80.

47. Ibid.

48. Ibid., 135.

49. Ibid., 80-81.

From this sketch of the components of human history, Komonchak articulates the foundations for an ecclesiology that takes seriously theological and transcendent dimensions of the church as well as sociological and concrete ones. The human person is given the “redemptive possibility,” that is, the potential for conversion—religious, moral, and intellectual—through Christ and the power of the Spirit.⁵⁰ As bias is a force in human history, more powerfully, grace is *the* force in human history. This “redemptive possibility” is realized in the church:

A new community, defined by new experiences, new insights and judgments, new values and commitments, came to be in response to the life, teachings, death and resurrection of Jesus Christ. That community, which we call the Church, was and is the concrete social and historic difference he has made. It is the enduring sign of his life and work because it is their effect. A new community of meaning and value has been constituted in this natural world of ours: a new intersubjectivity in grace, with its own language and symbols, its own roles and institutions, its own interpretative and evaluative culture. Among the many worlds constituted by meaning and value there exists one which defines itself by reference to Jesus Christ and lives by the grace of His Spirit.⁵¹

The church in the world gives future generations the language, symbols, examples, roles, institutions, and norms that make possible conversion and authentic living. Christ’s life and work continue in history through the power of the Spirit in the church.⁵² The church is then the instrument of Christ, the life of Christ, the Body of Christ in the world to save the world.

The church, as redemptive community, must respond to the sin of the world. That is its purpose. One may even be so bold as to say that without sin, there would be no church. Perhaps, more fittingly, all human persons together would be church, one in

50. Komonchak, “Foundations in Ecclesiology,” 87; Lonergan, *Method in Theology*, 235-44.

51. Komonchak, “Foundations in Ecclesiology,” 87.

52. *Ibid.*, 87-88.

perfect communion with God and one another. However, the more suitable term for such a perfect communion is not *church*, but the *Kingdom of God*. Essentially, the church is the beginning of the Kingdom of God.⁵³ The world, affected by and infected with sin, needs the church, set apart from the world yet in it, to continue the redemptive work of Christ. According to Komonchak, the church is the practical solution to the practical problem of “our incapacity for sustained development caused by existential, social, and cultural bias.”⁵⁴ The church, as the practical solution to the problem of sin, can be described as “the realization of an alternate, redemptive experience of community.”⁵⁵

An ecclesiology that emphasizes the practical role of the church in history calls for an understanding of theology that is practical throughout:

This means, first, that a theology intended to serve the self-realization of redemptive community must be conceived as a theory about a practice. It is practice and not theory that comes first. It is the practical history of frustrated and distorted development in individuals, societies, and cultures that sets the problem. It is the practical history of Jesus Christ, the practical experiences of grace in individuals, the practical self-realization of redemptive community in the Church that describe the solution.⁵⁶

Here, Komonchak understands theology as “a *theoretical* mediation of a practice.”⁵⁷

Through seeking to understand practical problems confronting us in our concrete historical situation, theologians can make an irreplaceable contribution to effectively changing current problematic practices and to work with and in the church to participate

53. Ladislav Örsy, *Receiving the Council: Theological and Canonical Insights and Debates* (Collegeville, Minnesota: Liturgical Press, 2009), 63.

54. Komonchak, “Foundations in Ecclesiology,” 167.

55. *Ibid.*, 168.

56. *Ibid.*

57. *Ibid.*, 169.

in Christ's redemptive mission. In the theological task, the theologian cannot be removed from the work being done. The theologian's historical situation and personal worldview are a part of her interpretation of the problems at hand and understanding of the normative Christian texts and events. In explicating his division of the functional specialties in theology, Lonergan emphasizes the unrivaled importance of conversion for theology. "As conversion is basic to Christian living, so an objectification of conversion provides theology with its foundations."⁵⁸ The emphasis on conversion in theology heightens the point that the theologian cannot be eliminated from her theology. The *intellectually* converted theologian knows that true knowing is "experiencing, understanding, judging, and believing."⁵⁹ The real process of knowing is a process of self-transcendence, a process of living by the transcendental precepts.⁶⁰ The *morally* converted theologian knows that in choosing values over mere satisfactions, one is essentially deciding the kind of person to be.⁶¹ Living morally means striving to be aware of the sin and bias that is in the world and in oneself and to *do* the good one knows. The *religiously* converted theologian exists in a state of unconditional self-surrender to God, the ground and goal of all that is.⁶² All three forms of conversion are foundational to the theologian in order that one can "foreground" not only the prejudices that help understanding, but more importantly, those that hinder understanding, namely, the forces of bias or sin.

58. Lonergan, *Method in Theology*, 130.

59. *Ibid.*, 238.

60. *Ibid.*, 239.

61. *Ibid.*, 240.

62. *Ibid.*, 240-41.

1.3 Focusing the Question through an Adapted Use of Fundamental Practical Theological Method

As stated previously, some of the foremost practical problems or crises confronting the Church in the United States today are the following: the failed state of too many apparent Catholic sacramental marriages, the declining rate of marriage, the explosive increase in the rate of nonmarital cohabitation, and the separation in ideology and practice between marriage and childrearing. Many factors could be identified as contributory to marital and family breakup—factors that are economic, political, social-structural, or psychological. While these factors are important and deserve the attention of scholars in their respective fields, questions of *commitment* in the context of sin, virtue, character, culture, and community deserve increased attention in the discipline of theology. From the foundation of conversion, theologians understand these problems from distinctive worldviews. The expressions may be different, but they originate from the same faith.⁶³ Part of the task at hand is to develop a theology of marital commitment, in order that the Church can understand more critically its current theory-laden practices of marriage and family for the greater purpose of more effectively strengthening, supporting, and promoting lifelong, committed marriages.

According to the methodology of Browning,⁶⁴ all theology is fundamentally practical with the traditional disciplines of historical, systematic, moral, and practical

63. Lonergan, *Method in Theology*, 271.

64. This dissertation is an approximate use of Browning's methodology. A stricter use of his methods would require a narrower field of study than all Catholic sacramental marriages in the United States. Descriptive theology, as all of theology, develops as a conversation where the pre-understandings (prejudices) and commitments of both the researcher and the community under study are explicitly recognized and brought into dialogue with one another.

theology serving as movements or subspecialties within a trajectory that is practical throughout.⁶⁵ The preliminary task of fundamental practical theology is to “fore-ground” theological dimensions of current practices which are in conflict with cultural meanings. Such conflicts in theological and cultural meanings create the “crises” that spur theological reflection. There can be no question that there are vast differences in theological and cultural meanings of marriage and family today, yet marriages, divorces, and sexual relationships inside and outside of the Church look disturbingly similar. The theological task begins with what Browning has coined *descriptive theology*. Browning elucidates, “It is to describe the contemporary theory-laden practices that give rise to the practical questions that generate all theological reflection.”⁶⁶ The statistics previously mentioned regarding marriage, divorce, and cohabitation rates and their effects give a cursory level description of our current marriage and family practices in the U.S. This is part of the task of descriptive theology. Descriptive theology uses the human sciences but always within theological horizons. The particular theological lens through which one sees the data will be greatly dependent upon one’s historical situatedness and personal experience, including the experience of conversion. In Browning’s analysis, the most concrete level of human action refers to the rules, roles, and patterns of communication embodied within the thickness of practice.⁶⁷ In order to describe, and consequently, to understand the concrete practices of Catholic marriages (and the

65. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 7-8.

66. *Ibid.*, 47.

67. *Ibid.*, 111-12.

effective disintegrations of many), a descriptive theology must consider the role of canon law.

Canon law is an inevitable and overriding aspect of all Catholic marriages. It is a part of the thickness of the concrete practices of marrying in the Catholic Church. All persons intending to marry in the Catholic Church must establish canonical freedom to marry, and they must marry according to canonical form, unless the appropriate dispensations are given. Significant to this study is canon 1057 of the 1983 Code of Canon Law.⁶⁸ Canon 1057 embodies in canonical language the tradition of the church since the twelfth century that it is consent which makes marriage. The underlying assumption of this study is that commitment and consent, accurately understood and lived, are essential to lifelong, faithful, and life-giving marriage. It is the relationship between consent as understood in canon law and commitment as understood in theology that is the focus of this study. Before this relationship can be explored, the relationship between the two ecclesial sciences of theology and canon law needs to be clarified. The distinctions and connections between theology and canon law are the focus of Chapter Two. Within Browning's methodology, canon law can be envisaged as an ecclesial science that theologians can and should draw on by being in dialogue with canonists for the purpose of *describing* marriage and divorce more completely, critically, and accurately. In this way, canon law is a science used in conjunction with other human sciences to describe concrete practices theologically. The marriages of Catholics are governed by canon law and have been for centuries; therefore, canonical language and

68. John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000). All references to specific canons in the Code of Canon Law (1983) will be from this edition and English translation.

meanings are very much a part of the pre-understandings, pre-judgments, that is, prejudices that form the horizon of the historical present.

The movement of descriptive theology concerns what Catholics *are* doing presently in marriage and family practices. This leads to questions of what the Church *should be* doing in marriage and ministry. Inevitably, this leads back to the normative and authoritative texts and events which have shaped the current meaning and practice of sacramental marriage. The second movement or subspecialty in a theology that is practical from beginning to end is *historical theology*. In this movement, Browning places biblical studies and the history of Christian thought.⁶⁹ The normative texts of the Christian tradition are engaged and analyzed in order to better understand what marriage has been, what it currently is, and what it should be. Chapter Three begins as an exercise in historical theology. The biblical foundations for sacramental marriage are explored along with key texts and events that have been formative in the history of the development of sacramental marriage in the Church. This is certainly not a new task, nor is it intended to be comprehensive. With faith in the expertise of biblical and historical theologians, I rely on their analyses and conclusions.

The movement of historical theology flows into the movement of *systematic theology*, which Browning identifies as a critical correlation between the meaning and vision inherent in our current practices and the meaning and vision interpreted from our normative texts and events. “The systematic character of this movement comes from its effort to investigate general themes of the gospel that respond to the general questions

69. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 49-51.

that characterize the situations of the present.”⁷⁰ Chapter Three is also an exercise in systematic theology as terms, concepts, and themes central to a nuanced understanding of sacramental marriage are explored, such as: sacrament, *matrimonium in fieri*, *matrimonium in facto esse*, contract, covenant, faith, intention, *ratum et consummatum*, grace, *vinculum*, communion, family, domestic church, sexuality, vocation, intimacy, and love.

For Browning, *theological ethics*, or *moral theology*, is not a distinct movement in theology, but rather contained within the final movements in two particular forms. “First, I mean the theoretical and critical form it takes in systematic theology. And second, I mean the concrete and contextually nuanced form it takes in strategic practical theology.”⁷¹ In Chapter Four, the first form of moral theology can be found. It is a more abstract form that provides the distance necessary to clarify general assertions regarding character and norms of action. Browning calls the first form “only a passing moment between concrete practical interests and consequent concrete practical acts.”⁷² The final movement of strategic practical theology, and the placement of the second form of moral theology within it, will be discussed shortly. In Chapter Four, a theological understanding of commitment is placed within the context of a cultural lack of commitment in present-day American life. Here, I use Browning’s division of the five dimensions of practical moral thinking to give structure to what it means to sustain an interpersonal, in this case marital, commitment. Moving from the abstract to the more

70. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 51.

71. *Ibid.*, 96.

72. *Ibid.*, 141.

concrete, these dimensions or levels correspond to the five dimensions of social action and are named: visional, obligational, tendency-need, environmental-social, and rule-role.⁷³ The possibility of being released, morally, from a marital commitment is also discussed using these dimensions.

After expressing a more differentiated view of the role of canon law in theology, the meaning of sacramental marriage, and the significance of marital commitment in actual marriages, this study turns toward the meaning of marital consent in canon law. This is the focus of Chapter Five. In this chapter, I rely on the expertise of canonists found in commentaries on the canons, scholarly books and articles on canon law, papal allocutions to the Roman Rota, and jurisprudence contained within canon law journals.⁷⁴ In agreement with Ladislav Örsy, James Coriden, and many others in the field, I argue that theology has the capacity to judge canon law.⁷⁵ Therefore, theology provides the framework and parameters within which marital consent can be understood. As affirmed previously, an inclusive understanding of sacramental marriage cannot occur without the proficiency of canonists included in the critical conversation. The Code of Canon Law along with its interpretation by canonists and concrete jurisprudence are indispensable in the movements of descriptive, historical, and systematic theology. Chapter Five begins by uncovering the meaning of marriage, both natural and sacramental, contained in canonical language. Terms, concepts, and themes central to a nuanced understanding of

73. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 105-11.

74. Sources used in this study are primarily from the English-speaking world as this study focuses on the marriages of Catholics in the United States.

75. Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, Minnesota: The Liturgical Press, 1992), 172; James A. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church* (New York, NY: Paulist Press, 2000), 142.

marital consent in canon law are explored, such as: *consortium totius vitae*, ends, essential properties, essential elements, conjugal rights and obligations, indissolubility, and nullity. An inquiry into both theological and juridical meanings of marriage is needed to present a detailed picture of what marriage is and should be, as gleaned from the church's normative texts. In this vein, what is articulated regarding consent in juridical norms and language should be evaluated based upon a theological understanding of marital commitment.

Browning identifies the final movement of the practice-theory-practice structure of all theology as *strategic practical theology*. He understands this final movement to be the “culmination of an inquiry that has been practical throughout.”⁷⁶ With Gadamer, Browning sees an inner fusion among understanding, interpretation, and application.⁷⁷ The concrete application of our theological thinking is not a post facto addendum to the other movements in theology. The concern for concrete application is determinative of all theological thinking from the beginning and throughout the process. Chapter Six will utilize Browning's questions that direct strategic practical theology to frame the current crisis in marriage and family and proposed pastoral recommendations regarding marriage in the Catholic Church in the United States.⁷⁸ (1) “How do we understand this concrete situation in which we must act?” (2) “What should be our praxis in this concrete situation?” (3) “What means, strategies, and rhetorics should we use in this concrete

76. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 57.

77. Gadamer, *Truth and Method*, 306-21.

78. Browning's question regarding how we critically defend the norms of our praxis in this concrete situation will not be addressed in this study.

situation?”⁷⁹ The final question is not the totality of practical theology but the end and beginning of further theological thinking. “The practices that emerge from the judgments of fully strategic practical theology soon engender new questions that start the hermeneutic circle again.”⁸⁰ The second form of moral theology is found within this final movement. Moral theology as a part of systematic theology is a moment of stepping back to reveal general themes in moral thinking; whereas Christian ethics as a part of strategic practical theology is an immersion into the immediate questions about concrete practice facing a specific community.⁸¹ Many of the fields traditionally associated with practical theology are found in this movement, fields such as: liturgics, homiletics, education, care, and social justice ministries.⁸²

In this schema, what is the relation of strategic practical theology to canon law? Previously, emphasis on the importance of incorporating the insights of canonists into the movements of descriptive, historical, and systematic theology was stated. In strategic practical theology, it is even more essential that there be dialogue and mutual interchange between canonists and theologians. In concert with other fields of study in strategic practical theology, canon law is a ministry in the church.⁸³ James Coriden describes ministry as “public activity, performed by baptized members of the church, under the

79. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 55-56.

80. *Ibid.*, 58.

81. Rather than fall into the predictable designation of moral theology as a Catholic term and Christian ethics as the Protestant version, I propose that “moral theology” be designated the more abstract, distanced form within systematic theology and “Christian ethics” be the contextually nuanced form within strategic practical theology. Such a proposal, though arbitrary, facilitates greater clarity and the promotion of ecumenical perspectives.

82. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals*, 57.

83. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*.

impetus of the Spirit's gifts, recognized or affirmed by the community, in service to the kingdom of God."⁸⁴ Further, he adds that canon law is "the theology of the church put into practice" and "applied theology."⁸⁵ So as not to mistake this for a theory-to-practice model of theology and ministry, the nuances of the role of canon law in strategic practical theology are discussed in Chapter Two. Keeping canon law as a vital participant in the hermeneutical conversation maintains and underscores the practice-theory-practice structure of all theology.⁸⁶

Although Chapter Six cannot be called an exercise in strategic practical theology in a strict sense, this final chapter is a movement toward a practical response to the failed state of so many sacramental marriages in the United States and the reality of family breakup. Canon law as a ministry within the church is very often the place where concrete marriages come into contact with theological reflection. The practice of canon law is theory-laden; the prejudices, in the Gadamerian sense, and the explicit convictions of the legislator are embedded in the canons. In addition, the judgments of ecclesiastical tribunals contain the prejudices and convictions of their respective jurists. The concrete practice of canon law in marriage cases is part of the thick description of social action that spurs theological reflection. The movements of descriptive, historical, and systematic theology culminate in practical theological thinking about the ministries of the church. Canon law is one of these ministries, and therefore, an essential dialogue partner in strategic practical theology. In other words, canon law is intended to be one aspect of

84. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 135.

85. *Ibid.*, 142.

86. In this study, the movement of strategic practical theology cannot fully emerge, because the population of all American Catholics is much too general and diverse to be able to carry out a strategic practical theology. This claim reveals a possible difficulty with the codification of canon law in general, a difficulty to be addressed further.

the church's practical response to sin in the world and a participation in Christ's salvation of the world. In this way, Browning's questions that direct strategic practical theology can direct our thinking about the relationship between a theological understanding of marital commitment and a juridical articulation of marital consent. After describing the situation of the many divorced, remarried, or cohabiting Catholics, what should be the concrete response of the Church? Do our canonical norms on consent reflect a theological understanding of commitment and the human person? Does a more critically-held theological understanding of marital commitment together with a more differentiated understanding of marital consent illumine the practice of cohabitation from a theological horizon? What does cohabitation mean from within such a horizon, and how can greater clarity on the meaning of cohabitation contribute to the ministry of the Church in caring for marriages? What are some specific strategies and courses of action that would promote, support, and strengthen marital commitment, while at the same time offer the love of Christ to those whose commitments have broken?

The practical or pastoral aim throughout this study is to work toward greater clarity in our understanding and articulation of commitment and consent in order that sacramental marriages may more closely re-present Christ's love for the Church. Sacramental marriages are meant to be a symbol and witness to the world of God's undying love and unwavering covenant. In essence, sacramental marriages are to be transformative of human persons, families, neighborhoods, communities, that is, the world in which God acts. In order to better form children and adolescents in the truth of human sexuality, to better prepare couples for marriage, to better help couples elicit valid consent in the Church, to better support married couples in all their stages, and to better

deal with marriages that have painfully failed, we must be clear on the commitment and consent necessary for marriages to last a lifetime.

CHAPTER TWO

THE RELATIONSHIP BETWEEN THE ECCLESIAL DISCIPLINES OF THEOLOGY AND CANON LAW

2.1 Theology and Canon Law as Ecclesial Disciplines

Insights, principles, and directions in this chapter are heavily influenced by the work of Ladislav Örsy, canonist and theologian. His articulation of the distinction, yet organic connection, between these two disciplines is foundational in the overall current of this dissertation. With a basic synthesis of Örsy's thought presented at the outset, greater nuance can be elucidated afterward along with the placement of canon law within a fundamental practical theology. These initial particulars regarding theology and canon law will facilitate a clearer picture of marital commitment theologically understood and marital consent juridically articulated.

Örsy's theory regarding the relationship between theology and canon law is built upon an epistemological approach.¹ For his use of this approach, Örsy credits the methodological insights of his colleague at the Gregorian University in Rome, Bernard Lonergan.² Örsy's theory centers on the operating subject of both theology and canon law, namely, the church. He envisions the generation of both disciplines in a way that mimics the operation of the human spirit. Both disciplines are generated from within the church making the church the "acting subject" in both disciplines; therefore, they can be

1. Ladislav Örsy, "How to Relate Theology and Canon Law," *Origins* 22, no. 32 (January 21 1993): 552.

2. Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, Minnesota: The Liturgical Press, 1992), 8; Ladislav Örsy, *Receiving the Council: Theological and Canonical Insights and Debates* (Collegeville, Minnesota: Liturgical Press, 2009), ix-x.

called *ecclesial* disciplines.³ Theology and canon law may be related to other disciplines, even intimately, as theology is related to secular philosophy and canon law is related to secular jurisprudence. However, both sciences are generated, understood, and interpreted in the light of faith and the context of the church, making them truly ecclesial disciplines.

The assertion that theology is an ecclesial discipline requires little elucidation, whereas the classification of canon law has been the subject of debate.⁴ Is canon law a juridical science or a theological science or are both categories suitable/unsuitable? If an indication of the nature or classification of canon law is necessary (and some may argue it is not), the identification of canon law as an *ecclesial* science seems most appropriate and consonant with Örsy's thought. He argues, "The correct conception of canon law places it in the order of salvation; it sees our whole legal system as part of the redeeming mission of the church."⁵ Örsy states explicitly, "Canon law proper is essentially an ecclesial science."⁶ The creation, interpretation, and implementation of canon law take place within an "ecclesial context."⁷ This is no minor detail but rather a fundamental hermeneutical consideration. To further reinforce this point Örsy explains, "In brief, the proper locus of interpretation of our laws is the redeeming church, and inside of it, the

3. Myriam Wijlens, "The Church Knowing and Acting: The Relationship Between Theology and Canon Law," *Louvain Studies* 20 (1995): 24.

4. I am making a normative statement about what theology *should be* rather than a descriptive one about what theology is, for some. Not all theologians are believers, yet theology begins in faith; therefore, the discipline of those theologians without faith should be called more accurately religious studies or another related field.

5. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 111.

6. *Ibid.*, 133.

7. *Ibid.*, 134.

overriding truth of redemption must govern the meanings of the norms.”⁸ In addition to Örsy, Catherine Clifford designates both theology and canon law as “ecclesial sciences” as she offers her respectful and perceptive critique of Örsy’s theory.⁹ Her valuable critique will follow this synthesis of Örsy’s theory.

For Örsy ‘the church’ refers to “the whole community of believers, which is an organically structured communion.”¹⁰ Each member of the Body of Christ has a unique and irreplaceable role: mothers and fathers, bishops and priests, theologians and canonists, sisters and brothers, that is, all of the faithful. From the pope to the pauper, the church is the People of God and a communion of communions as Vatican Council II emphasized. In referring to the ecclesiology of Vatican Council II, Örsy clearly states the inimitable value of each member of the church. “Each person is an integral part of a body where all the organs work together for the good of the whole: one body, one soul.”¹¹ Thus, every person in the church has an ecclesial vocation. Örsy focuses specifically on the complementary ecclesial vocations of both theologians and canon lawyers. He explains, “*Vocation* is not an idle word here. In this order of creation and redemption God needs the help of his creatures to carry his word and distribute his strength. The church needs persons who can explain his saving deeds and also persons who can help the community to approach the mysteries.”¹² The significance of describing church as “organically structured communion” and the unique vocation of

8. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 135.

9. Catherine E. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," *Studia Canonica* 40 (2006): 125.

10. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 121.

11. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 23.

12. Örsy, "How to Relate Theology and Canon Law," 550.

each member will be explored in more detail at the end of this chapter when the role of the reception of canon law is discussed.

2.2 Theology: The Church Knowing

Because Örsy uses an epistemological approach in explaining how to relate theology and canon law, he emphasizes the church *as subject doing* theology. For Örsy the church doing theology is encapsulated in St. Anselm's classic definition: *fides quaerens intellectum*. The whole church is "contemplative" as the faithful seek greater understanding of the mysteries.¹³ Whenever and wherever persons of faith think intelligently about the mysteries, the church is doing theology. Of course, there are those who dedicate their lives to plumbing the depths of the mysteries, thus Örsy states, "Within this contemplation the ecclesial vocation of theologians is located."¹⁴

According to Örsy, the church is enlivened by the Holy Spirit, and it is this Spirit that leads the church in seeking knowledge.¹⁵ The church desires to know more deeply the mystery of God who has been revealed and intends to grow in understanding of all God has done in salvation history. This knowledge has two elements or dimensions.¹⁶ Principally, all theological knowledge begins in God. God's gift to the church is God revealed. In the act of faith, the church accepts God's revelation. This is what Örsy calls the divine element of theological knowledge. The human element is our struggle to

13. Örsy, "How to Relate Theology and Canon Law," 549.

14. Ibid.

15. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 163.

16. Ibid., 160.

articulate this mystery using human concepts and categories limited by time and culture. Both elements, the human and divine, unite when the church does theology.

Absolutely central to Örsy's theory of how theology and canon law relate is the concept of the instrumentality of "values." He situates values in this principal position due to the historicity of persons and communities. Human beings are imperfect, meaning that they need to progress in order to become complete. This is reminiscent of Lonergan's theory of human history as the story of progress, decline, and recovery discussed in Chapter One. Örsy explains how in order to progress, persons need to appropriate good things at every level: biological, psychological, intellectual, and spiritual. "In all these processes, the pattern is the same: intelligent and free persons appropriate good things, and when a symbiosis between persons and good things takes place, the persons are enriched; to a small degree, they may become perfect."¹⁷ In short, values are "'good things' which contribute to the development of persons."¹⁸

Always and only through the power of the Holy Spirit, the church is vital in this process of perfecting human persons. Theology, as an ecclesial science, has a significant role to play in helping members of the church reach their completeness and in moving the world toward wholeness in time. For Örsy, the church doing theology means the church naming the values the community needs in order to sustain its life and to grow in faith, hope, and love.¹⁹ The theological task is to know, to name, to identify, to understand, and to articulate the mysteries of faith. Through the identification of necessary values,

17. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 90.

18. *Ibid.*

19. Örsy, "How to Relate Theology and Canon Law," 551; Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 137.

theology provides a vision of the mysteries of God and our relationship to those mysteries in order that the community may recognize what is true and good for our development and perfection.²⁰

2.3 Canon Law: The Church Acting

Again using an epistemological approach, Örsy considers what the church *as subject is doing* in canon law. He asks, “What is the church doing in creating decisions (legislation) and prompting the community to action (implementing the laws)?”²¹

Modifying St. Anselm’s classic definition of theology, Örsy’s response is succinct: *ecclesia quaerit actionem*. The church is “active” as the faithful reach for the good by continuing the work of Christ through word and sacrament, actions that from the beginning have required norms issued by authorities.²² The ecclesial vocation of canonists is found here in the church active. Because the church is both contemplative and active, the ecclesial vocations of theologians and canonists are complementary, indicating their interdependence and “organic unity.”²³

Örsy clearly identifies what he means by ‘canon law’ or ecclesiastical law. Canon law does not refer singly to the canons in the Code of Canon Law. The canons of the Code have notably different literary forms, not all of them laws properly speaking. The principal literary forms of the Code are dogmatic statements, theological opinions, statements of morality, spiritual exhortations, philosophical theories, conclusions from

20. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 107.

21. Örsy, "How to Relate Theology and Canon Law," 551.

22. Örsy, "The Theological Task of Canon Law," 5; Örsy, "How to Relate Theology and Canon Law," 549.

23. Örsy, "How to Relate Theology and Canon Law," 549.

the empirical sciences, and laws creating right and duty situations.²⁴ Additionally, not all ecclesiastical laws are contained in the Code.²⁵ Örsy explains, “It is a system of structures and norms to secure freedom for the people so that they can receive, without impediment, the gifts of the Spirit. *And* it is a system of structures and norms to secure freedom for the Spirit to dispense, without impediment, God’s gifts.”²⁶ The shift in focus is significant, because it illustrates how canon law provides freedom for the people as well as a context in which the Spirit is free to work in the church. Canon law provides stability and structure to the church moving through history. Freedom and good order provide the church with an open and ordered space for the movement of God and God’s people. Freedom is protected and good order is maintained as a means to “prepare the way of the Lord so that his people are well disposed to receive him.”²⁷ This is the ideal purpose of canon law. Whether or not this purpose is achieved is another question altogether.

Just as theology is described as having divine and human elements, so also does canon law. These elements intermingle to reveal both present in the church’s norms and structures, because both are present in the church itself. Örsy describes canon law as “a necessary human instrument, in a divinely founded community, to bring good balances into the operations of the group.”²⁸ In an introductory article in the *New Commentary on the Code of Canon Law* commissioned by the Canon Law Society of America, Örsy

24. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 53-58.

25. *Ibid.*, 160.

26. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 78-79.

27. Örsy, "The Theological Task of Canon Law," 7.

28. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 78.

describes the role of law in the church. This passage summarizes the human element of canon law in its contingency, reformability, fragility, and limitedness. It also makes clear canon law's "affinity with the divine" in its transcendence and close connection to the Word of God and the sacraments:

It is part of the external visible sacramental structure of the Church; there it shares the composite nature of the community. In its provisions it can be human; it can display the limitations and weaknesses of our nature. It can also represent divine wisdom and thus testify that God is present among his people. It is contingent and in constant need of reform in order to be in harmony with the rhythm of life of the Church and of the surrounding world; it is constant as far as it gives effect to the word of God.²⁹

Örsy further maintains this tension in asserting that faith does not work alone in canon law. He states, "Faith, however, does not articulate the norms: our practical reason does, with the help of some divine wisdom revealed to us and some human ingenuity brought into play."³⁰ Keeping in mind this intricate balance between the divine and human elements in canon law is important in understanding and evaluating the relation of theology and canon law.

For Örsy, seeking knowledge of the values necessary for the church to grow in grace is an indispensable task of theology. In contemplating the mysteries, the church seeks awareness of the values that not only fulfill and perfect our human nature but also connect us with the divine nature in eternal life.³¹ Once these values are known, they need to be appropriated. Through canon law, the church translates these values into norms and structures that facilitate increased faith, hope, and love. When explaining the

29. John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000), 3.

30. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 7.

31. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 101.

role of values in the worlds of theology and canon law, Örsy succinctly and cogently presents his theory of their relation:

These two worlds meet where the values are. First, theology leads to their discovery, then canon law sets the norms for their appropriation. Theology provides the knowledge necessary for acknowledging them, canon law gives binding norms for acquiring them. The two worlds are linked together by the dynamic movement of the subjects from vision to action.³²

In his epistemological approach, canon law cannot be understood without reference to theology. The church can act because it has first known.

2.4 Theology and Canon Law as Distinct and Organically United

2.4.1 Theology and Canon Law in their Origins

To unearth the precise ways in which theology and canon law are distinct yet organically united, Örsy examines them both in their origins (dynamic process) and in their developed content (static existence). In referring to the genesis of each, Örsy considers language, authority, and intentionality.³³ He simplifies (perhaps oversimplifies) their difference in language by stating that theology is in the indicative mood while canon law is in the imperative mood.³⁴ Theology articulates what *is*, while canon law issues commands about what *ought to be*. John Coughlin's articulation of what canon law *is not* may help clarify this distinction Örsy is trying to convey, for certainly theology expresses what *ought to be* through magisterial documents, homilies, and moral discourse to name a few. Coughlin specifies that canon law is not Scripture. "Although canon law carries a certain normativity and authority in the Roman Catholic

32. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 107.

33. *Ibid.*, 161.

34. *Ibid.*, 162.

Church, it is not constitutive and foundational in the sense that sacred scripture is to the church.”³⁵ In other words, canon law does not carry the same weight as Scripture and Tradition, because it is not revelation. He proffers the suggestion that “canon law acts as a bridge between immutable theological truths and practical action.”³⁶ The use of “is” in theology versus “ought to be” in canon law points to the distinction in what the church is doing in each discipline; in theology, the church is knowing, whereas in canon law, the church is acting or obliging one to act. The church is acting in other areas as well, such as liturgics, homiletics, education, care, and social justice ministries. As discussed in Chapter One, these are the fields associated with the movement of strategic practical theology, which reinforces Örsy’s point that canon law is the church acting. What distinguishes canon law from the other types of action the church does relates to Örsy’s second and third points regarding authority and intentionality.

The distinct worlds of theology and canon law differ in the authority governing them. For theology, this authority is faith as it mediates God’s self-revelation and reason as it moves to understand in human concepts and categories the mysteries of faith.³⁷ For canon law, this authority is the ecclesiastical legislator who through divine authorization and human execution seeks to bring order to the community.³⁸ The origin of canon law can be an ecumenical council, the pope, the diocesan bishop or ordinary equivalent to

35. John J. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory* (New York, NY: Oxford University Press, 2011), 18.

36. *Ibid.*, 19.

37. It is curious that Örsy does not mention the role of the hierarchy as an authority in theological discourse regarding doctrinal matters. If there is an organic unity between theology and canon law, should there not also be an organic unity between authority that guides the articulation of doctrine and authority that governs the legislation of norms for action?

38. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 162-63.

him in law, or a provincial chapter of a religious institute.³⁹ Canon law is not equivalent to a body of moral norms, because it has been promulgated as law. The origin of law is related to authority in that it comes from a “person or persons who are vested with the sacred power of governance,” because they have care over the community.⁴⁰

Finally, as discussed previously, the worlds of theology and canon law differ in intentionality. In theology, the church intends knowledge of the truth, that is, the mysteries of faith and those values that will bring growth and life to the community. Conversely in canon law, the church intends actions that help the community appropriate the good, the coming to be of those values in the life of the community. According to Coughlin, canon law can be differentiated into doctrinal law and disciplinary law. “Doctrinal law contains some specific doctrinal point drawn directly from sacred scripture, natural law, or tradition.”⁴¹ He points out that parts and chapters in the Code of Canon Law often begin with introductory canons that quote directly from the documents of Vatican II.⁴² Theological doctrine then becomes promulgated as doctrinal law. “In contrast, disciplinary law sets forth some practical norm of action that explains and urges the spiritual good of the faithful.”⁴³ Canon law guides the Catholic Church by obligating the faithful through the rule of law, meaning that “those who exercise the power of

39. John J. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law* (New York, NY: Oxford University Press, 2012), 247; See also cc. 134, 135, 368, 381.

40. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 247.

41. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 20.

42. *Ibid.*

43. *Ibid.*

governance do so through laws.”⁴⁴ Canon law occupies an intermediary role in the church by ensuring that truth and justice are embodied in the concrete actions of the community. It rests on divine and natural authority, but it also “encompasses certain positivistic justifications,” because it is a command of ecclesiastical authority.⁴⁵ As a bridge between theological truth and practical action, canon law “functions in an auxiliary role in setting the conditions for the church’s salvific mission. Canon law cannot eradicate sin from the human condition. Rather, canon law is intended to assist in setting conditions in the church that favor justice.”⁴⁶ According to Örsy, theology and canon law are related in their genesis as two stages of the human spirit in the process of moving from knowledge to action. Örsy summarizes,

*The process has two stages because our spirit can intend two different objectives and operate in two distinct ways. It can intend to find the truth or to reach for the good; in the first case its operation will rest in a judgment, in the second it will terminate in a decision. These are two distinct movements of the human spirit driven by an unbounded desire to know and an innate impulse to act.*⁴⁷

Örsy’s analysis of the differences between theology and canon law in their genesis and dynamic existence—differences in language, authority, and intentionality—demonstrates the distinction in unity between these two disciplines. This distinction in unity can also be discovered by an analysis of the content of the two disciplines, a more static view.

44. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 10.

45. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 242-47.

46. *Ibid.*, 246.

47. Örsy, "The Theological Task of Canon Law," 5.

2.4.2 Theology and Canon Law in their Content

In presenting this static view, Örsy warns that such an analysis runs the risk of oversimplifying the reality of the relationship for the sake of understanding. He qualifies, “Besides, even if they can be so represented, theology and canon law are not like two material constructions which can be physically measured and meticulously compared. They have all the subtlety of a product of the mind.”⁴⁸ He attempts to avoid this risk through clarification and nuance. Whether or not he is successful in avoiding this risk will be addressed subsequently. In comparing their content, Örsy examines their forms, horizons, hermeneutics, and matrices.

Because theology uses the indicative mood, its form is a body of knowledge, whereas canon law, written in the imperative mood, is a system of commands. Örsy reinforces this point by recalling the centuries-old distinction between heresy (obstinate denial of defined doctrine) and schism (obstinate breaking with legitimate authority).⁴⁹ Further revealing this difference in form is the long separation between departments of theology and canon law. Örsy rightly asserts that the “divorce has gone too far,” although it is a clear reminder of the differing forms of the two disciplines.⁵⁰

Another difference between the two disciplines is found in their horizons and corresponding hermeneutics. The world of theology has no limiting horizon, because the end of theology is knowledge of all that is uncreated and created, all that has been revealed and received, all the relationships God has with creation traversing all time and

48. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 165.

49. *Ibid.*, 166.

50. *Ibid.*

space. This unlimited horizon of theology requires a “hermeneutics for expansion.”⁵¹ By this, Örsy means the interpreter endlessly seeks to learn more about the divine mysteries. A hermeneutics for expansion connotes an ever increasing breadth and depth in meaning for the theologian to explore. The end can never truly be reached. On the other hand, the world of canon law encompasses a defined field of study. All of the ordering norms of canon law are publicly promulgated making canon law as a field of study clearly circumscribed. Örsy names the corresponding hermeneutics for canon law a “hermeneutics for restriction.”⁵² He stresses the importance of utilizing this hermeneutic without negating the great difficulty of accomplishing such a task:

If this hermeneutical rule were respected, it would soon put an end to diffuse commentaries and would give us canon law books marked by concise lucidity. The process of discovery in commenting on a legal text should focus on the unique intended action, and not on every conceivable construction that the words can bear. To find that unique action and to express it with classical brevity and clarity is hardly ever easy: to reach the required certainty a great deal of historical and doctrinal background study is needed.⁵³

Örsy contrasts the unlimited hermeneutics for expansion required for theology with the limited hermeneutics for restriction necessary for canon law. This distinction necessarily follows from Örsy’s separation of knowledge and action in theology and canon law respectively.

Örsy describes a final distinction between theology and canon law in their content, namely, their matrices. The church has received God’s revelation and seeks to understand those mysteries more fully and to act on that knowledge more freely. For

51. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 166-67.

52. *Ibid.*, 167.

53. *Ibid.*, 167n.

centuries, the church doing theology has tried to comprehend the mysteries using philosophical systems, categories, and concepts. The particular philosophies used have varied through time as the church doing theology “mediates between revelation and contemporary culture.”⁵⁴ For theology, secular philosophy has been the primary cultural matrix in which theology grows and forms. The cultural matrix reveals the human dimension of theology, but as mentioned previously, the human dimension cannot be separated from the divine. A theology is as it is due to its own underlying and shaping philosophy, whether implicit or explicit. The same prominent philosophies that have influenced and formed secular culture have also affected and molded theology. From Platonic and Aristotelian philosophies to Existentialism and Phenomenology, theology utilizes philosophy to aid in understanding. Similarly, canon law develops and takes shape within a cultural matrix. However, for canon law this matrix is secular jurisprudence. When Christianity was not only accepted, but more accurately privileged, by the Roman Emperor Constantine in the fourth century, the influence of Roman culture on the church was vast. It was practically inevitable that “the church of the empire” would be heavily shaped by Roman law in terms of legal structures, procedures, and language.⁵⁵ During the classical period of canon law from the twelfth through the fourteenth centuries, renewed interest in the study and use of Roman law again solidified the entrenched connection between canon law and secular jurisprudence, specifically Roman law.⁵⁶

54. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 168.

55. James A. Coriden, *An Introduction to Canon Law*, rev. ed. (New York, NY: Paulist Press, 2004), 13.

56. *Ibid.*, 18.

2.4.3 Theology and Canon Law United in the Church

All of these aforementioned differences do not negate their more profound unity. The basis for this unity is found in Örsy's epistemological approach. The disciplines of theology and canon law are two products of one dynamic process of the church moving from vision to action.⁵⁷ For that reason, both disciplines share terms and concepts, although such 'identical' concepts take on particular nuance within each field.⁵⁸ Örsy asserts that theological concepts such as church, *communio*, and intention can also have a "canonical meaning" when such concepts "appear in a specific horizon in which everything is ordered to action."⁵⁹ Örsy expounds upon the canonical meaning of theological realities and the importance of understanding and respecting the difference between the two meanings, that is, theological and canonical. This distinction is of primary importance to this dissertation concerning the theological meaning of marital commitment and the canonical meaning of marital consent. Therefore, Örsy's explication is quoted at length:

The problem with the "canonical meaning" of theological realities is that law cannot create realities but can only adjust to them. When this adjustment is not correct, the law creates a fiction and operates on the basis of such fiction. Such deviation, when it occurs, carries its own built in penalty: the subjects soon perceive the shadows of formalism or legalism, and a contempt for law follows. Reality (including theological reality) has its own way of taking revenge.

This does not mean that research into the "canonical meaning" of (say) *communio* is not legitimate; on the contrary, it is of supreme importance to discover how far canon law has adjusted to the theological reality of *communio*. The researcher, however, should be aware that the study is not completed until it is shown how far the canonical concept corresponds to, or deviates from, the only existing reality, which is theological.⁶⁰

57. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 170.

58. *Ibid.*, 168.

59. *Ibid.*

60. *Ibid.*, 169n.

Because Örsy envisions the theological meaning of ‘identical’ canonical concepts as the only existing reality, he states explicitly that theology has the capacity to judge canon law. Theology points to the values the church ought to appropriate, and canon law provides the norms and structures for doing so. The judgment is unidirectional. Örsy affirms, “Canon law has no capacity at all to judge theology because legal *ordinationes* are not meant to be judgments.”⁶¹ For Örsy, the capacity of theology to judge canon law does not imply that canon law is useless to theology. On the contrary, canon law “supports the moral life of the community.”⁶² Those structures and norms derived from theological values give the church the ability to live out the values it knows it must. They become the means to live what the church knows. Another way canon law is important to theology is through granting theologians the necessary space to accomplish their task. Whether this “free space” is given in reality is a worthy question, but one that is beyond the scope of this dissertation.⁶³

The organic connection between theology and canon law, affirmed and upheld, produces “an integrated community.”⁶⁴ When a person lacks connection between what one knows and what one does, that person lacks integrity. A community can lack integrity, also. Örsy states, “Hence, the church itself cannot have internal harmony and operational integrity unless its perception of values through theology is followed by practical effort to appropriate them. The precept to uphold this unity can be called rightly

61. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 172.

62. *Ibid.*, 132.

63. *Ibid.*

64. *Ibid.*, 94.

‘the principle of integration.’”⁶⁵ Two types of distortions occur when this organic unity is deficient. Perfect integration is only an ideal, but when the distinction between the two disciplines becomes a veritable break, the church as a whole suffers. The first type of distortion occurs when the structures and norms of canon law become divorced from theological values. When law becomes autonomous, it can develop into a type of unyielding dictator. This independence of law can arise during the making of law or during the interpretation of law. At either point in the life of the law, the resulting “sickness” in the church is “*legalism*.”⁶⁶ The law then is perceived to be taxing and vacant, and the consequences for the community will likely be failure to observe the law with the possibility of outright challenges to the suitability of the law. Coughlin maintains that legalism “places the law above the person and community” and “often reflects a notion of reason that is disconnected from faith and theological reflection.”⁶⁷ For example, the gratuitous granting of declarations of nullity on psychological grounds in the period following Vatican II demonstrates a legalistic approach divorced from theological reflection.⁶⁸ Many of these decisions were based upon expert testimony whose anthropological assumptions were antithetical to Christian anthropology. In his 1987 and 1988 Addresses to the Roman Rota, John Paul II focuses upon this problem.⁶⁹

65. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 103.

66. *Ibid.*, 94-95.

67. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 59.

68. *Ibid.*

69. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. February 5, 1987, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/john_paul_ii/speeches/1987/documents/hf_jp-ii_spe_19870205_roman-rota_en.html (accessed July 14, 2008); John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. January 25, 1988, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/john_paul_ii/speeches/1988/documents/hf_jp-ii_spe_19880125_roman-

The proliferation of these affirmative sentences gave the impression that tribunals were just a legalistic machine pumping out “Catholic divorces.” During this period, canon law failed to uphold the theological value of the *bonum sacramenti*, indissolubility.

The second type of distortion occurs when theological values are not adequately enfolded in fit canonical structures and norms, or if they are, then they are disregarded. For this type of distortion, the resulting disease is “*lawlessness*.”⁷⁰ Coughlin calls this distortion “antinomianism,” which “diminishes or rejects the validity of law.”⁷¹ “It often results from a theological or pastoral response that severs the connection between canon law and the order of reason.”⁷² Coughlin cites as an example of antinomianism the response of the church to what would later be known as the clergy sexual abuse crisis in the period following Vatican II.⁷³ Instead of using penal processes as outlined in canon law, church officials opted for more “pastoral” or “therapeutic” avenues. Failure to enforce the canonical norms and structures that would have protected children and prevented future abuse brought about immeasurable pain and distrust. The denial of canon law its proper role in the life of the church led to great devastation culminating in a period of panic and perhaps even anarchy. Quickly the pendulum swung in the opposite direction toward legalism.⁷⁴ Coughlin claims that the legalistic approach of the U.S. Bishops in 2002 to the crisis led to “an environment of suspicion and doubt about

rota_en.html (accessed July 14, 2008).

70. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 95.

71. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 3.

72. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 59.

73. *Ibid.*

74. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 176.

fundamental justice in the public order of the church.”⁷⁵ Coughlin explains why a predominantly antinomian approach will yield an overly legalistic approach and vice-versa:

The rule of reciprocity between legalism and antinomianism in the church corresponds to the conflicting anthropological desires for order and freedom. The anthropological reality helps to explain why legalism and antinomianism may coexist in the same situation. Legalism and antinomianism may each represent a doomed attempt to restore balance between the need for a common life and the rightful autonomy of the human person in the ecclesial community.⁷⁶

Both of these extremes can be avoided through sustained and intentional collaboration between theologians and canonists and between the hierarchy and the faithful.

Maintaining and supporting the organic harmony between theology and canon law is absolutely necessary for the health of the whole church. Örsy sees both disciplines as “signs of life and growth in the church,”⁷⁷ because both are necessary for the church to continually move toward its *telos*, which is the kingdom of God.

2.5 Distinction or Dichotomy between Theology and Canon Law?

2.5.1 Historical Development of the Discipline of Canon Law

In order to properly evaluate Örsy’s theory of the relation of theology to canon law, a brief sketch of the development of the discipline of canon law is offered. In this historical sketch, the demarcation of periods follows the work of Myriam Wijlens.

75. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 176.

76. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 60.

77. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 169.

Although history is fluid and muddled, she delineates four periods based upon certain horizon or paradigm shifts.⁷⁸

The first period spans the time from the post-apostolic church until Gratian in the twelfth century. Although canon law can hardly be called a discipline in this period for it lacked systemization and critical analysis, this early period is particularly significant for practical theology. Canon law, or church order, consisted mainly of collections of practical wisdom and recorded customs. Processes for councils and synods were developed, and the first ecumenical council took place in Nicaea in 325. In these first centuries, church order and discipline were created primarily through councils and customs.⁷⁹ When the church moved from the minority, in terms of power relations, to the majority in the fourth century, canon law assumed new elements and challenges. Canon law became heavily influenced by Roman law as mentioned previously. In addition, the bishop of Rome, now referred to as pope, took on a position of centrality and authority. Popes began to issue decretal letters, which began to be added to collections of canon law in conjunction with customary and conciliar legislation.⁸⁰ Perhaps one of the greatest challenges, one that still lingers today, is the effect of the church becoming the established religion of the empire. The explosion in membership meant “a decrease in the levels of preparation and commitment.”⁸¹ Additional challenges and changes to canon law occurred during the feudal period from the mid-ninth century until the early

78. Myriam Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco* (Lanham, MD: University Press of America, 1992), 5.

79. Coriden, *An Introduction to Canon Law*, 13.

80. *Ibid.*, 14.

81. *Ibid.*, 13-14.

part of the thirteenth century. Germanic law, which tended to be more customary, had an extensive influence on the development of canon law.⁸² This influence is particularly apparent in subsequent chapters when exploring the historical context as the church discerned specifically *what* makes marriage. The prevailing and unifying mark of canon law in this first period is its practical approach to solving the concrete problems of local churches. Wijlens summarizes, “Canon law was not an independent discipline, but still part of the whole of theology and was considered ‘practical theology.’”⁸³ Örsy characterizes the approach to canon law in this period as a “non-critical and non-scientific approach: the horizon of Christian wisdom.”⁸⁴ During this period, specifically in 1054, both theology and canon law suffered from the separation of Eastern and Western Christianity. The tension between collegiality and centrality is concretized by this persistent division in Christianity. In Eastern Christianity, synodality and collegiality have been emphasized in ecclesiology and canonical structures, whereas in the West, centralizing tendencies have been dominant.⁸⁵ This dissertation focuses primarily on the theological and canonical traditions of the West, while acknowledging the immense loss to both branches due to their division.

The second period in the history of canon law extends from Gratian to the Council of Trent. The beginning of this period, from the mid-twelfth century to the mid-fourteenth century, is known as the period of “classical canon law.”⁸⁶ Graziano de

82. Coriden, *An Introduction to Canon Law*, 15.

83. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 5.

84. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 24.

85. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 5n5.

86. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 7.

Clusio, known as Gratian, was most likely a Camaldolese monk who taught at the University of Bologna.⁸⁷ Although never formally promulgated, his *Concordia discordantium canonum* completed around 1140 transformed canon law into a science and discipline. Gratian's *Decretum*, as it came to be called, utilized the scholastic *sic et non* method for the purpose of finding an internal harmony among divergent canons, hence the name, *A Harmony of Discordant Canons*.⁸⁸ Whereas previous collections were simply that, aggregate collections, Gratian's *Decretum* added critical analysis, abstraction, systemization, comparison, and evaluation. The application of scholastic scientific inquiry to canon law marks the horizon shift into a new period in canonical history. During this period of classical canon law, Gratian's *Decretum* became the primary reference point for study, reflection, commentary, and teaching of canon law in European universities, particularly in Bologna and Paris.⁸⁹ The science of canon law was further advanced by the compilation of decretals from councils and popes by Gregory IX in 1234, marking the first time any collection of juridical decisions was promulgated as authoritative for the entire church.⁹⁰ At this same time, there occurred a rediscovery of and renewed interest in classical Roman law. Canon law continued to develop in a theological context while at the same time interacting with legal science. The pragmatic approach of the first period changed into a critical process of abstraction in the second

87. Theodore Mackin, *Divorce and Remarriage, Marriage in the Catholic Church* (New York: Paulist Press, 1984), 280.

88. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 6.

89. *Ibid.*, 8n12.

90. Coriden, *An Introduction to Canon Law*, 19.

period.⁹¹ Örsy identifies the approach to canon law in this period as a “critical and scientifically organized approach: the horizon of scientific abstraction.”⁹²

The latter part of this second period, from the mid-fourteenth century to the mid-sixteenth century, may be called the “post-classical period.”⁹³ In theology and canon law, this was a time of decline, instability, stagnancy, and finally reform. Significant and contributory events of this time include: the Black Death (1348-1349), the Avignon Papacy (1309-1377), the Great Western Schism (1378-1417), and the Protestant Reformation (1517-1560).⁹⁴ Papal power was in a state of corruption through the abuse of appointments to ecclesiastical offices and in a state of confusion through the simultaneous election of two, then three, popes. Stagnancy ensued as no noteworthy canonical legislation was developed and the scholastic language of the period of classical canon law became enshrined in the church’s system of governance. Canonists were instrumental in settling the Great Western Schism at the Council of Constance (1414-1418) by unifying papal power.⁹⁵ This council instituted a structure for ongoing reform by commanding general councils to be held every ten years. Eventually this practice lapsed due to fear that conciliar acts might detract from papal power.⁹⁶ The failure of the church to articulate canonical legislation that supports and promotes the theological value of trinitarian unity in diversity has played a significant part in deleterious divisions,

91. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 8.

92. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 24.

93. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 8.

94. Coriden, *An Introduction to Canon Law*, 20-21.

95. *Ibid.*, 21.

96. *Ibid.*, 22.

namely the split of Eastern and Western Christianity in the eleventh century and the Protestant Reformation in the sixteenth century.

The third period in the history of canon law spans the time from the Council of Trent to the Second Vatican Council. The process of abstraction and scholastic scientific inquiry that marked the early part of the second period fell into decline in the post classical period, which led to a horizon shift demarcating the third period. The Catholic Counter Reformation begat a more defensive church imaged as a “perfect society.”⁹⁷ Canonical legislation was based less on rational argument and critical inquiry and more on the will and authority of the legislator. Canon law grew to be thick and tedious while becoming detached from its historical context. The perennial struggle to adequately balance unity and diversity in terms of power and authority took form once again, but this time as the debate between the Ultramontanists and the Gallicans and Febronians. The dispute was settled at the First Vatican Council in 1870, which strongly upheld and enforced centralized papal power. During this period, the Western world was greatly influenced by humanism and Enlightenment rationalism, while the Roman Catholic Church gradually lost political power and remained in a defensive position against the modern world.⁹⁸ In the midst of an intricate web of canonical legislation, Pius X ordered the reorganization and reform of canon law under the direction of Pietro Gasparri. The new codification of canon law began in 1904 and was not completed until 1914. The Code of Canon Law was promulgated by Pope Benedict XV in 1917, and this act of

97. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 9-10.

98. Coriden, *An Introduction to Canon Law*, 25-27.

codification, which had become more popular in Europe, ushered in a new way of doing canon law. Coriden explains,

All previous compilations of canons had been in the form of collections of documents; the original words, pastoral situation, date, and issuing authority were retained. The canonical rule remained in its historical context. “Codification” is an exercise in conceptual juridical abstraction. It strives to reduce the rules to terse and abstract formulations and arrange them in a carefully constructed system. It is strong on clarity, brevity, consistency, and order, but the rules are entirely set apart from the social and historical context that gave rise to them.⁹⁹

The abstract nature of a universal code reinforced the centralization of power, which added some clarity to the state of canon law at the time but at the expense of creativity in canon law. In this period, canon law was considerably disconnected from theology and served chiefly to obey and serve authority rather than promote and preserve theological values.¹⁰⁰ Örsy characterizes this period as “the loss of critical spirit: the horizon of literal exegesis.”¹⁰¹

At the end of the third period, significant development began in ecclesiology. With inspired thinkers such as Yves Congar, Henri de Lubac, and Karl Rahner, to name a few, the images of the church as central, historical, visible, perfect, and hierarchical are gradually subsumed into the larger image of church as *communio*. In Pius XII’s 1943 encyclical *Mystici Corporis Christi*, he refers to the church as “the Church Militant” but also as the Mystical Body:

There can, then, be no real opposition or conflict between the invisible mission of the Holy Spirit and the juridical commission of Ruler and Teacher received from Christ, since they mutually complement and perfect each other—as do the body and soul in man—and proceed from our one Redeemer who not only said as He

99. Coriden, *An Introduction to Canon Law*, 28.

100. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 22.

101. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 24-25.

breathed on the Apostles “Receive ye the Holy Spirit,” but also clearly commanded: “As the Father hath sent me, I also send you;” and again: “He that heareth you, heareth me.”¹⁰²

In his collection of essays titled *The Mystery of the Church*, Yves Congar centers his ecclesiology on the role of the Holy Spirit in the unity and life of the church.¹⁰³ For Congar, the church is the Mystical Body of Christ. “Everything is already fulfilled in Christ; the church is simply the manifestation of what is in him, the visible reality animated by his Spirit.”¹⁰⁴ Congar does not deny the structural nature of the church; on the contrary, this Mystical Body animated by the Spirit is sacramental, apostolic, hierarchical, and social.¹⁰⁵ He describes Pentecost as the time when the church received the Holy Spirit, which is both law and soul:

What is law? It is the order authoritatively decreed by the head of a community, giving it its form of life, its rule of collective living; and so it harmonizes and adjusts the conduct of individuals to make of them a social unity. It is at once clear that when, as is the case with the Church, we are dealing with a community whose aim is salvation, whose life is of the spirit, the law is much more than something imposed by external force. As regards Christians, this law is chiefly the Holy Spirit in their hearts.¹⁰⁶

The Holy Spirit works within the individual and among all in the Body of Christ. The Holy Spirit is the principle of life for all the different members of the church and “the law of their communion in unity.”¹⁰⁷ For de Lubac, the church is primarily a mystery,

102. Pius XII, *Encyclical Letter of Pope Pius XII Mystici Corporis Christi*. June 29, 1943, Libreria Editrice Vaticana, no. 65, http://www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_29061943_mystici-corporis-christi_en.html (accessed October 13, 2005).

103. Yves Congar, *The Mystery of the Church*, rev. ed., trans. A.V. Littledale (Baltimore, MD: Helicon Press, 1965).

104. *Ibid.*, 27.

105. *Ibid.*, 35-52.

106. *Ibid.*, 167-68.

107. *Ibid.*, 170.

because as a complex and paradoxical reality the church holds in tension all the seemingly contradictory elements of the church (human and divine, visible and invisible, of earth and of heaven).¹⁰⁸ Coughlin points out that Congar and de Lubac emphasize the tension in the church between charism and institution and the visible and invisible aspects of the church.¹⁰⁹ Coughlin adds, “Canon law attempts to regulate the visible institutional elements in accordance with the invisible charismatic qualities of the Catholic Church.”¹¹⁰ Rahner describes the church as “the historical continuation of Christ in and through the community of those who believe in him, and who recognize him explicitly as the mediator of salvation in a profession of faith.”¹¹¹ Using many images for the church, Rahner asserts the need for law even in an ecclesial community:

Without a holy law, without a division of labor, functions and hence also of rights among different individuals, without this kind of differentiation of functions in the community the church would cease being the people of God, the house of God, the body of Christ and the community of the faithful. It would become a disjointed conglomerate of religious individualists. There has to be in the church a holy order, a holy law, and hence also a power which may and must be exercised juridically by one person in relation to others.¹¹²

Although written after the Second Vatican Council, this passage reflects the communion ecclesiology of that time in the diversity of images and the recognition of the need for law to create good order in the church. Rahner contends that “the real imposition of laws

108. Henri De Lubac, *The Church: Paradox and Mystery*, trans. James R. Dunne (New York, NY: Alba House, 1969).

109. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 52-53.

110. *Ibid.*, 55.

111. Karl Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity*, trans. William V. Dych (New York, NY: Crossroad, 1993), 322.

112. *Ibid.*, 391.

in the church is a real self-actualization of the church as a society and as a pneumatic community only if the law is maintained with a humility and a spirit of service which knows that law in God's church can provide space for this life and his grace, and even provide their presence."¹¹³ In the work of these theologians so influential over the Second Vatican Council, there is room for law but law is in the service of the Spirit. The Second Vatican Council brought these ecclesiological developments to the forefront, and a "new attitude of mind, *novus habitus mentis*,"¹¹⁴ was introduced inaugurating tremendous change in the church. Örsy uses this expression from Paul VI to describe the horizon shift that occurred around the council. The significance of *communio* ecclesiology and the church receiving the council will be discussed later in this chapter.

Because theology and canon law are both interrelated ecclesial sciences, these changes in ecclesiology led to questions about the nature and methodology of canon law. From explorations of these questions came various responses, which can be grouped into several theories (or schools of thought) regarding the relationship of theology to canon law. The schools of thought are not formal and defined but represent differing perspectives on the foundations of canon law and its relationship to theology.¹¹⁵ In very broad strokes, these theories are dissatisfying due either to their undue separation of canon law from theology and the excessive autonomy of each or due to their near

113. Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity*, 398.

114. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 9.

115. For an overview of these schools of thought, see Örsy's article "Theology and Canon Law" in the beginning of the commentary on the Code used in this study, Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1-9; Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 14-22. In addition to this brief overview, Wijlens' work is an in-depth comparison of the relationship between theology and canon law in the founder of the Munich School (Mörsdorf) and one of his disciples (Corecco); James A. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church* (New York, NY: Paulist Press, 2000), 13-19; Ladislav Örsy, "Theology and Canon Law: An Inquiry Into Their Relationship," *The Jurist* 50 (1990): 418-29.

identification of canon law with theology. Similar to the early church's struggle to articulate the divine and human in Christ during the christological heresies, the various theories may either describe too great a separation or too great an identification between the two disciplines in the church. Wijlens notes that whereas the other trends or schools of thought (mostly demarcated by language) discuss the relationship between theology and canon law "on the level of conceptual content," Örsy discusses that relationship "on a cognitional and epistemological level" as has already been described.¹¹⁶

One school of thought adds some insight into the relationship between theology and canon law that is worth exploring. This school of thought has been named the *Concilium* Project, because its main proponents were the editors of the periodical *Concilium*, who in its first issue recommended "a 'dejuridicizing' of theology and a 'detheologizing' of canon law."¹¹⁷ Theodore Jiménez-Urresti, one of the original editors of the canon law issues of *Concilium*, explains how there is "distinction and gradation" in the two ecclesial sciences of theology and canon law.¹¹⁸ The theology of the church espoused in his view (and the *Concilium* Project as a whole) is inspired and directed by the documents and spirit of Vatican II. Jiménez-Urresti upholds that the church is both event and institution composed of human and divine elements. As such, the church is a

116. Wijlens, *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*, 20n.

117. *Ibid.*, 17.

118. Teodoro Jiménez-Urresti, "Canon Law and Theology: Two Different Sciences," trans. Paul Burns, in *Canon Law Postconciliar Thoughts: Renewal and Reform of Canon Law*, vol. 28 of *Concilium: Theology in the Age of Renewal*, ed. Neophytos Edelby, Teodoro Jiménez-Urresti and Peter Huizing (New York, NY: Paulist Press, 1967), 17. Andrea Ponzzone states that Jiménez-Urresti "spent his entire academic life studying the epistemological approach to canon law and researching the epistemological statute of the science of canon law." Andrea Ponzzone, "Theology and Canon Law: The Epistemological Approach of T. Jimenez Urresti," *The Jurist* 72, no. 2 (2012): 578.

sacrament in that it expresses and making visible its “substance” or “basic structure.”¹¹⁹

The function of canon law is to apply and implement theological data into social-structural and historical form, namely ecclesiastical law. The “particularizing” role of canon law is described by Jiménez-Urresti:

Canon Law, on the other hand, receives these theological data in generic form as they concern the basic social structure of the Church, and particularizes them in its laws. Its end is the good of the body politic of the Church; it moves on the level of the instrumental and positive, adapting its social instruments (laws) to its end and prescribing a social conduct with practical judgments, so that *canonical truth* consists in the fitting of its means to the end intended by the legislator—in their efficacy.¹²⁰

It is the “instrumentality” and “particularization” of canon law that distinguishes it from theology.¹²¹ He states, “Thus, the task of Canon Law is to effect the actualization of generic divine law while being faithful to its theological basis, to make it function while being faithful to its inner sacramentary nature, and to order the ecclesial structure in fidelity to its transcendent aim of *salus animarum*.”¹²² Jiménez-Urresti explains that a “juridicist theology” occurs when theologians fail to recognize the distinction between the two ecclesial sciences. A “juridicist theology” is one in which theological principles are identified with one possible particular and historical application. When specific historicized canons are treated as theology without “stripping them first of their skin of canonical particularization,” theology suffers by being restricted and canon law suffers by being absolutized.¹²³ The call for a “de-theologizing” of canon law means to preserve its

119. Jiménez-Urresti, "Canon Law and Theology: Two Different Sciences," 18-19.

120. Ibid., 19-20.

121. Ibid., 21.

122. Ibid., 22.

123. Ibid.

“theological kernel” without its particular historical applications. In this view, canon law is law only in an analogous sense, and canon law as an ecclesial science must always be intimately related to theology without being confused with it.¹²⁴ Jiménez-Urresti argues that trying to contain both disciplines within their own proper field is extremely difficult, because the church “exercises a doctrinal magisterium and so moves in the sphere of theology, and at the same time, being visible society, possesses and effects a social order, and so moves in the sphere of implementation.”¹²⁵ The church doing both at the same time is the reason why there is overlap in seemingly ‘identical’ concepts creating confusion and the danger of treating both disciplines identically. Despite this danger, Jiménez-Urresti holds that canon law “finds its roots, nature and end in theology, not civil law, a fact which has sometimes in practice been overlooked.”¹²⁶ Jiménez-Urresti clearly states the relation of canon law to practical theology:

The function of canon law will be to formulate such “divine positive law” in a way to make it historical and achievable. Practical reason, along with its proper logic, devotes itself to this task. Thus one can consider canonical science as canonical practical theology. Still, this is insufficient; canon law, in order to fulfill its purpose, must appeal to the methods and sciences of normative implementation and to formal technical and organizational sciences. Such recourse is necessary not precisely because of the limits of human intelligence (though this is a valid reason, at least partially and at the beginning) but because objectively God has left this an area of free autonomous human decision. Thus, canonical science has its own proper and autonomous area, and so we should speak of the science of canon law as a science of implementation.¹²⁷

124. Jiménez-Urresti, "Canon Law and Theology: Two Different Sciences," 24.

125. *Ibid.*, 23.

126. *Ibid.*, 24.

127. Theodore Ignatz Jiménez-Urresti, "The Theologian in Interface with Canonical Reality," *Journal of Ecumenical Studies* 19, no. 2 (Spring 1982): 149-50.

Jiménez-Urresti's approach has a great deal of affinity with Örsy's epistemological approach, and will be evident in Catherine Clifford's contribution to be discussed subsequently.

The view of the relationship between theology and canon law that emerges from the *Concilium* Project is based upon an ecclesiology that clearly flows out of Vatican II. In his theology of canon law, Lamberto de Echevarría quotes from *Lumen gentium* 8 that the church is a "complex reality" of seemingly disparate and paradoxical elements such as hierarchical and mystical, visible and spiritual, and earthly and heavenly.¹²⁸ Because the church is institutional, as well as being mystical, it "embraces the idea of an order, a structure, an authority, as opposed to the mere existence of these things, which could merely be the causal result of some quality or interest in the Church."¹²⁹ De Echevarría is affirming that canon law represents the rule of law although not exactly in the same way as civil law, because it does not allow for democratic participation in legislation. Order in the church ensures "the best means for the faithful to obtain the *salus animarum* which is the ultimate end of ecclesial activity."¹³⁰ It is that space and structure that allows the Spirit to work in the church. De Echevarría affirms that "the Council showed a clear preference for the pastoral side of Church activity," a significant change from the image of "the Church militant" of the preceding period.¹³¹ He maintains that the church is "one

128. Lamberto de Echevarria, "The Theology of Canon Law," trans. Paul Burns, in *Canon Law Postconciliar Thoughts: Renewal and Reform of Canon Law*, vol. 28 of *Concilium: Theology in the Age of Renewal*, ed. Neophytos Edelby, Teodoro Jimenez-Urresti and Peter Huizing (New York, NY: Paulist Press, 1967), 10.

129. *Ibid.*, 11.

130. *Ibid.*, 13.

131. *Ibid.*, 14.

reality of governing and instructing” and that “the rule of the church is juridical and pastoral at the same time.”¹³² The theme of balancing and connecting the juridical and the pastoral in the church will resurface throughout this study.

2.5.2 Limitations of Ladislav Örsy’s Theory and Catherine Clifford’s

Contribution

Örsy’s innovative epistemological approach simplifies the relationship between theology and canon law in a way that takes seriously the principle of integration and the movement of the church from vision to action, at least ideally. However, Örsy’s theory can be enhanced and nuanced by Catherine Clifford’s critique and contribution. Clifford articulates a possible danger in Örsy’s approach to discriminating between theology and canon law, where theology concerns knowledge and canon law concerns action. Clifford states, “By introducing a distinction between worlds of knowing and doing, contemplation and action, one risks falling into the dichotomy which until recently dominated Catholic philosophy in the faculty psychology which distinguished, and ultimately separated, the faculties of intellect and will.”¹³³ Although Örsy does not intend to dichotomize the worlds of knowing and doing, his characterization of theology as *fides quaerens intellectum* and canon law as *fides quaerens actionem* could lead to the mistaken conclusion that Lonergan’s fourth level of conscious intentional operations has no place in the world of theology.¹³⁴ Clifford mentions the work of practical theologians as evidence of the centrality of action, decision, and living in theology. She continues,

132. De Echevarria, "The Theology of Canon Law," 14.

133. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 126.

134. Ibid., 125.

Örsy seems to relate separate operations of intellect and will as two distinct stages in a single cognitive or decisional process. An unintended consequence of such an approach is that, dividing up the operations of conscious intentionality among two ecclesial sciences, it appears to fragment, if not break down the unified cognitive process of conscious intentionality.¹³⁵

Rather than entirely rejecting Örsy's theory, Clifford seems to build upon his work while adding greater nuance and clarification. She maintains that Lonergan's eight functional specialties can be found in both ecclesial disciplines and that theologians and canonists operate on all four levels of conscious intentionality.¹³⁶ Specifically, Clifford underscores the theological task of canon law (as does Örsy¹³⁷) and situates canon law within the functional specialty of communications, where all the other functional specialties are interior and anterior to communications.¹³⁸

According to Lonergan, "Functional specialization distinguishes and separates successive stages in the process from data to results."¹³⁹ The functional specialties are "intrinsically related to one another" and "successive parts of one and the same process."¹⁴⁰ The theologian operates on all four levels of conscious intentionality (empirical, intellectual, rational, and responsible) in all of the functional specialties. However, all the operations are used "to achieve the end proper to some particular

135. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 127.

136. *Ibid.*, 129.

137. Örsy, "The Theological Task of Canon Law."

138. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 131.

139. Bernard Lonergan, *Method in Theology* (Toronto, Canada: University of Toronto Press, 2007), 126.

140. *Ibid.*

level.”¹⁴¹ Lonergan identifies eight functional specialties: research, interpretation, history, dialectics, foundations, doctrines, systematics, and communications. Because he envisions two phases in theology, the ends proper to the first four specialties correspond to the four operations of conscious intentionality, and the ends proper to the final four specialties correspond to the operations of conscious intentionality *in inverse order*. It is a parabolic movement from data through understanding and judgment to decision, then progressing from the foundation of a new horizon through judgment and understanding to data again—data to be applied, appropriated, and communicated. Lonergan explains the reason for the inversion:

In the first phase one begins from the data and moves through meanings and facts towards personal encounter. In the second phase one begins from reflection on authentic conversion, employs it as the horizon within which doctrines are to be apprehended and an understanding of their content sought, and finally moves to a creative exploration of communications differentiated according to media, according to classes of men, and according to common cultural interests.¹⁴²

He describes this movement in theology through the functional specialties as beginning in multiplicity culminating in a unified grounding horizon and moving down again into the diversity and plurality of human experience. Lonergan notes, “This descent is, not properly a deduction, but rather a succession of transpositions to ever more determinate contexts.”¹⁴³ In the final functional specialty, communications, “theological reflection bears fruit.”¹⁴⁴ Through the communication of Christ and Christ’s message, the church is effected and self-constituted. For the church to be a community, it necessitates common

141. Lonergan, *Method in Theology*, 134.

142. *Ibid.*, 135-36.

143. *Ibid.*, 142.

144. *Ibid.*, 355.

experiences, common ways of understanding, common judgments, and common values and goals.¹⁴⁵ “Common” here means shared, not necessarily identical. These shared experiences, understandings, judgments, and decisions come to pass through communication.

Although Clifford sees all eight functional specialties operative in both theology and canon law, she suggests that in the theological specialty of communications canon law is most properly placed.¹⁴⁶ She upholds, “In this way, the role of canon law might be thought of more precisely as mediating theology to concrete practice within the self-constituting community that is the church.”¹⁴⁷ Clifford’s more nuanced approach to the relation of theology to canon law encompasses the complexity of this relationship and accurately reflects the concerns of practical theology.¹⁴⁸ As Clifford warns, we need to avoid the danger of associating *understanding* with theology alone and *action* with canon law alone. Locating canon law principally within the functional specialty of communications highlights the pastoral character of canon law and its function as a ministry within the church.¹⁴⁹ Clifford describes the theological task of canon law and its role within the church:

Canon law mediates judgments concerning the constitutive elements of the Christian community and the demands of faith for Christian living. By defining

145. Lonergan, *Method in Theology*, 356-57.

146. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 131-33.

147. *Ibid.*, 132.

148. For further study, a correlation could be constructed between Lonergan’s functional specialties and Browning’s movements of fundamental practical theology. However, such an endeavor is beyond the scope of this dissertation.

149. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 131.

rights, obligations, roles, and terms of relations within the church, it effectively establishes patterns of relations in the concrete social order. Thus canon law might be understood as mediating theological meaning and values to the concrete practical life of the Christian community. The very consciousness of the whole church, permeated with a sense of intelligence and responsibility, must be contained in its norms.¹⁵⁰

The “distinction and gradation” in the ecclesial sciences with their own methodologies is necessary, because “the theologian does not ‘do’ Canon Law, nor the canonist theology.”¹⁵¹ Theologians and canonists must rely on each other for their respective parts in the process of the church moving from vision to action. Clifford describes the interdependence of theologians and canonists in the Peter and Paul Seminar:¹⁵²

Theologians in the Peter and Paul Seminar can and indeed do make practical suggestions for the renewal not only of theology, but also of institutional structures and praxis. Yet we must rely on our canonist colleagues to re-imagine how such revision might be mediated in the specificity of canonical form through the reformulation of various canons, norms and instances of canon law. The insights of theology, while a fundamental source for canon law, are no substitute for the insight of a good jurist.¹⁵³

The particular skill sets of good jurists are irreplaceable in the discipline of implementation. Jiménez-Urresti maintains that canon law, as a “science of implementation,” has its own proper logic and method. He continues, “With this systematic conception of theology as *unitas scientiae*, one can understand the implementation made by the Church’s authority in regard to sacramental and

150. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 132-33.

151. Jiménez-Urresti, "Canon Law and Theology: Two Different Sciences," 17.

152. This sustained and organized collaboration between theologians and canonists will be described in further detail at the end of this chapter.

153. Clifford, "The Collaboration of Theology and Canon Law in Light of Lonergan's Theory," 135.

ecclesiological matters, as theological conclusions of practical reason and practical theology.”¹⁵⁴

2.5.3 The Role of Conversion in Integrating the Ecclesial Disciplines

In line with Örsy’s theory, Clifford’s approach emphasizes the theological task of canon law and the significance of the role of conversion. Following Lonergan, Clifford contends that “the responsible and integrated (or converted) theologian” is concerned with concrete practices, actions, and social structures.¹⁵⁵ This is consistent with the concerns of practical theology previously discussed. Örsy, too, emphasizes the role of conversion. For Örsy, the canonist’s ability to see canon law within a theological horizon, versus a purely juridical one, can be described as a conversion.¹⁵⁶ The possibility of this transformation in the church is made possible by the Second Vatican Council, which Örsy describes as “an event of conversion.”¹⁵⁷ An anecdote he recites in several publications demonstrates the magnitude of the role of conversion for Örsy (and, coincidentally, how concrete historical experience spurs theological reflection). Örsy recounts a conversation he had with Msgr. Alexandre Renard, then bishop of Versailles, later Cardinal Archbishop of Lyon, at the Second Vatican Council:

I mentioned that the reception of the council would depend largely on the new canon law. “Will the council do anything about it?”—I asked. His response was swift and to the point: “I do not care about canon law;” it is even more to the point in the original French “*Je m’en fiche de droit canonique.*” Question: have

154. Jiménez-Urresti, “The Theologian in Interface with Canonical Reality,” 150.

155. Clifford, “The Collaboration of Theology and Canon Law in Light of Lonergan’s Theory,” 125.

156. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 110.

157. *Ibid.*, 83.

some bishops (the council?) failed to realize the existential role of law to create the freedom necessary for the reception of the council?¹⁵⁸

Conversion is necessary for the proper integration of theology and canon law to happen in the church. The values articulated by theologians need to find concrete manifestation in the particularity of canon law. Örsy reiterates, “Hence, only canon lawyers convinced of the importance of theology in the interpretation of canon law can bring new life to our old institutions. Everything will turn on their personal conversion.”¹⁵⁹ One may add that the possibility of theological values being received, appropriated, and lived depends a great deal on the conversion of theologians as they recognize the requisite place of canon law within a theological horizon. As asserted in Chapter One, the theologian’s consciousness of one’s historical situation and personal worldview are integral not only in accurately attending to and understanding the problem, but also in judging the proper courses of action and responding in agreement with one’s conscience.

2.6 Canon Law within a Fundamental Practical Theology

2.6.1 Practice-Theory-Practice Structure of Theological Thinking

This study returns now to Don Browning’s proposal that all theology is fundamentally practical and the question of how canon law relates to such a theory. After an exploration of the history of canon law and the work of Örsy, Lonergan, and Clifford, it is now possible to articulate how canon law relates to practical theology in a way that is consistent with the Second Vatican Council which ushered in and solidified the *novus*

158. Ladislav Örsy, "Law for Life *Sacrae Disciplinae Leges*: Forty Years After the Council," *The Jurist* 67 (2007): 32n27.

159. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 110.

habitus mentis. Through the event of the council, the church moved “from *imperium* to *communio*,” “from defensive isolation to expansive presence,” and “from a static world view to a dynamic one.”¹⁶⁰ Such a new attitude of mind enabled the church to move to a higher viewpoint, to learn from the human sciences, and to embrace ecumenical perspectives. A theory of canon law within theology must also reflect this new attitude of mind. Canon law envisioned within a fundamental practical theology does just that.

Within Browning’s theory of fundamental practical theology, canon law can be found as an ecclesial science of its own right and a principal dialogue partner with theology. Again, canon law is not to be confused with theology, nor to be completely separated from it. Canon law interacts with theology in all of the movements Browning specifies: descriptive, historical, systematic, and strategic. While keeping in mind Clifford’s caution that we do not reduce theology to knowledge and canon law to action, theologians and canonists can agree on their respective roles in the process of canon law appropriating theological values through the identification of roles and rights, the implementation of norms and structures, and the resolution of conflicting interests and claims.

In agreement with Örsy’s work, a fundamental premise of this dissertation is that theology has the capacity to judge canon law. In his 1992 book, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, Örsy claims that theology (specifically moral theology) has priority over canon law.¹⁶¹ This priority consists in theology’s capacity to discover values and to set limits for the creation and interpretation

160. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 12-13.

161. *Ibid.*, 128.

of laws.¹⁶² However, in his 2009 work, *Receiving the Council: Theological and Canonical Insights and Debates*, Örsy asserts that the question of priority between theology and canon law is “a misconceived query.”¹⁶³ He reiterates the unified process of the church moving from vision to action. The question of priority does seem misplaced as each discipline influences the other, albeit in different ways. That being said, canon law is found *within* a horizon that is practical and theological. Örsy maintains that other sciences have the capacity to judge canon law partially or under determinate conditions. Specifically, he alludes to the role of the human sciences, medicine, and philosophy in judging marital legislation and jurisprudence.¹⁶⁴ In contrast, theology’s capacity to judge canon law is neither partial nor conditioned, because canon law must always adjust to the theological reality.

Örsy’s characterization of theology’s relation to canon law as a unified movement from vision to action is missing a key element. Previous explanations of fundamental practical theology demonstrated the practice-theory-practice structure to all theological thinking. The theological vision that must be appropriated into canonical norms does not come out of emptiness, but out of chaos and conflict. Interestingly, Örsy provides the image of the chaotic turbulence that preceded creation to describe the internal life of the church as it struggles to embrace the communion ecclesiology of Vatican II.¹⁶⁵ However, he misses this crucial element when outlining his theory of the relation of theology to canon law. Theological thinking springs from reflection on crises in current theory-laden

162. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 128-29.

163. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 79.

164. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 172n9.

165. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 2.

practices. The collision of conflicting practices in church and culture or the clash between current ecclesial practices and their intended theological meanings causes the church as a community to bring questions to its normative texts and its theory-laden practices. This begins the movement of descriptive theology.

Theological thinking begins in the movement of descriptive theology, because we cannot escape the influence of the theory-laden practices in which we find ourselves. In addition, frequently, rules, roles, norms, and patterns of behavior emerge prior to their explicit theological justification and articulation. Örsy, aware of this point, explains how a practice may precede its theory chronologically, but theory always precedes practice ontologically:

In this context Newman's explanation of dogmatic development can be recalled: the church is in possession of an "idea" that somehow contains all that is in the tradition but not in the form of propositions. As history progresses, the church, guided by the Spirit, lets the "idea" unfold and its content be revealed in articulated formulations. Before this unfolding happens, however, the "idea" may already inspire practical norms, but this is really nothing else than an intuitive vision leading to a decision. Knowledge, even though implicit, remains the mother of action.¹⁶⁶

Of course, because of the presence of bias as Lonergan expressed it, such development occurs as a result of the grace of the Spirit and the possibility of conversion. What is implicit in Örsy here becomes an explicit movement in Browning. Descriptive theology utilizes the insights of other sciences, namely, psychology, sociology, anthropology, economics, ecology, civil law, and canon law to describe what we are doing, why we are doing it, and what legitimates such a practice. Regarding marriage practices in the church, canon law is an indispensable dialogue partner in describing the thickness of practice.

166. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 188.

As explicated in Chapter One, the description of what current practices are is not sufficient in theology. The theologian asks questions about what current practices should be. The movements of historical and systematic theology provide much needed distance between current theory-laden practices and the normative texts, events, and themes that define the church as community. Canonical and theological terms overlap here, yet the canonical meaning of terms must always adjust to the theological reality. Within these movements, canonical norms and practices are evaluated based upon the theological values they are intended to uphold, support, promote, and protect. In order to understand the role of canon law within these movements, a designation of precisely what laws are and what laws are for within the church is necessary.¹⁶⁷

2.6.2 What is Law and What is Law For in the Church?

Örsy distinguishes between law in the abstract order and law in the existential order. Aquinas' delineation of the essential elements of law is accurate and logical in the abstract world. In theory, law is “*ordinatio* of reason,” that is, “action to create order,” “by the one who is in charge of the community for the sake of the common good promulgated.”¹⁶⁸ While this description works in the abstract, it is missing an important element in historical reality. That element is reception by the community of the faithful. A law must be good for it to be law, meaning that it must be moral, fair, possible, and useful for the community.¹⁶⁹ Nevertheless, it must also be legitimately received by the

167. Within the movement of historical theology, the question of the meaning and purpose of law within the church could be answered and analyzed in various periods of time. Such a worthwhile work is beyond the scope of this dissertation; consequently, key insights from Örsy belonging more to systematic theology will be discussed.

168. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 38.

169. Timothy E. O'Connell, *Principles for a Catholic Morality*, revised edition (New York, NY: HarperCollins Publishers, 1990), 229.

community for it to be a “vital force in the community.”¹⁷⁰ Reception is not the same as ratification in the democratic process, primarily because for members of the ecclesial community animated by the Spirit of God, reception is a deep, personal response to God.¹⁷¹ However, for members of a secular community, reception is recognition and acceptance of prudent judgments of the human spirit.¹⁷² Ecclesial reception involves the whole of the person and one’s relationship with God. As explained earlier in this chapter, all persons and communities (including the church) are unfinished, in need of completion and perfection. Persons and communities need to reach out for those good things that contribute to progress and growth in life, both human and divine. In this context, Örsy affirms the role of law. “The purpose of laws is to prompt the community to appropriate those values; the reception of the laws is the process by which the community comes into the possession of the same values. (The laws speak of *intended* values; reception means the *acquisition* of values.)”¹⁷³ When received, law in theory becomes law in action.

According to Örsy, reception of canon law is a dynamic and integrated process consisting of five movements.¹⁷⁴ In the first movement, the ecclesial community, which is the whole people of God, attends to and becomes aware of the law that has been promulgated.¹⁷⁵ The lawgiver refers to the pope in matters regarding the universal church

170. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 45.

171. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 67.

172. *Ibid.*, 59.

173. *Ibid.*, 60.

174. Although not explicitly stated, these movements correspond to Lonergan’s four levels of conscious intentionality where the fifth movement flows into the action itself.

175. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 65-67.

and the bishops and their synods for matter regarding a particular church. The task of the lawgiver is to serve the needs of the people of God, to be servant and caregiver, shepherd and steward. The second movement involves the search for the value behind the law, the pursuit of understanding. For such understanding to occur, the ecclesial community must be capable, motivated, well informed, and free. The third movement in canonical reception is the presentation of law to conscience and the harmonious acceptance of the judgment of conscience that this law is to be followed. The implementation of canon law must pass through conscience. This is simply a reaffirmation of the primacy or ultimacy of conscience whether in canon law or moral theology. The fourth movement is the willingness of the receiver to act in accord with the law and to appropriate the value the law upholds. The receiver judges that the law is in accord with God's will and decides to act accordingly. The fifth movement is the act of implementing the law in concrete historical existence. In this movement, "life and law meet."¹⁷⁶ This meeting of the demands of law and the requirements of life may be harmonious or it may be conflictual. Such conflicts may occur because the community is not willing or not able to recognize and appropriate the value. Another possibility is that the law is not well formulated or that it is actually destructive of values.¹⁷⁷ The divine assistance guaranteed to ecclesiastical authority in matters of doctrine is not guaranteed in concrete practical matters including legislating.¹⁷⁸ A final possibility is that the law may not serve the intended value in a particular case. In such a case, the principle of *oikonomia* or the

176. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 68.

177. *Ibid.*

178. *Ibid.*, 62.

virtue of *epieikeia* may be applicable, but this discussion is best included in the movement of strategic practical theology in a later chapter.

The necessity of canonical reception for the very existence of a true ecclesiastical law emphasizes the communion ecclesiology of Vatican II and the movement of the People of God through history. The duty of the hierarchy in legislating is to serve the whole People of God by recognizing the needs of the community and issuing norms that aid the community in appropriating the values necessary for its life. Just as the *sensus fidelium* plays a vital role in doctrinal development, so also does the *sensus fidelium* contribute to the development of canonical legislation.¹⁷⁹ Örsy uses the parable of the sower to punctuate the vital participation of the church in receiving the practical norms of its own community:

The seed must be received in the soil, otherwise it cannot grow. The lawgiver should find the right seed for the soil, should go out and sow it with care; the soil must take it, shelter it, feed the latent life in it, and give growth to it. If this parable can describe the spreading of the Word of God, why could it not enlighten us about the creation and implementation of practical norms in the church?¹⁸⁰

To further bring to light how an ecclesiology of *communio* needs to be enfolded in the canonical system of the church, Örsy laments the lack of structure in place for the whole people of God to contribute to the canonical system. He states, “It follows that a legal system which leaves no room for the contribution of the people as described in the conciliar documents but is built nearly entirely on statutory laws is theologically unsatisfactory.”¹⁸¹ Örsy continues, “The very nature of the church postulates that there

179. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 61n.

180. *Ibid.*, 60n8-61n.

181. *Ibid.*, 116.

should be a real and concrete possibility for the people to contribute.”¹⁸² Each person within the communion has a unique vocation, a specific way of hearing the Word of God and responding to it. The church must be structured in a way not only to allow for each to contribute but also to empower each to flourish. The ancient legal wisdom of the church that “custom is the best interpreter of laws” is contained in canon 27, yet with the codification of canon law, the authority of custom is usurped when “doubts are decided by decrees.”¹⁸³

Although all of canon law is not contained within the Code, the Code is “the principal legislative document of the Church, founded on the juridical-legislative heritage of Revelation and Tradition.”¹⁸⁴ Within the Apostolic Constitution *Sacrae Disciplinae Leges* for the promulgation of the 1983 Code, John Paul II affirms the meaning of law within the church, the connection of the Code to the council, and the presence of the Code within a communion ecclesiology. He states that the New Testament writings reveal Christ as the fulfillment of the Law and the Law’s connection to Christ’s message of salvation. He continues,

This being so, it appears sufficiently clear that the Code is in no way intended as a substitute for faith, grace and the charisms in the life of the Church and of the faithful. On the contrary, its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to faith, grace and the charisms, it at the same time renders easier their organic development in the life both of the ecclesial society and of the individual persons who belong to it.¹⁸⁵

182. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 116.

183. *Ibid.*, 116n.

184. John Paul II, *Apostolic Constitution Sacrae Disciplinae Leges of the Supreme Pontiff Pope John Paul II for the Promulgation of the New Code of Canon Law*. January 25, 1983, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_25011983_sacrae-disciplinae-leges_en.html (accessed November 12, 2008).

185. *Ibid.*, 3.

John Paul II clearly states that the purpose of the Code is to ensure proper order develops in the church along with faith, grace, and the charisms in the lives of individual persons. The Code of Canon Law contains the norms, regulations, structures, procedures, and disciplines necessary for church order. In a critical passage in this apostolic constitution, John Paul II verbalizes the relation of the Code to the council and the ecclesiology it dwells within:

The instrument, which the Code is, fully corresponds to the nature of the Church, especially as it is proposed by the teaching of the Second Vatican Council in general, and in a particular way by its ecclesiological teaching. Indeed, in a certain sense, this new Code could be understood as a great effort to translate this same doctrine, that is, the conciliar ecclesiology, into canonical language. If, however, it is impossible to translate perfectly into canonical language the conciliar image of the Church, nevertheless, in this image there should always be found as far as possible its essential point of reference.¹⁸⁶

What the law is and is for within the church is always to be found within the communion ecclesiology of Vatican II. Undeniably, it is a tremendous task to translate the theological work of the council into the canonical work of the Code. When the event of the council had completed, nearly twenty years passed before the ecclesiological vision of the council took form in the Code. One may even argue that the task of translation continues as conflicts in practice occur, theological thinking arises, and canonical decisions are made and interpreted.

2.6.3 Values in Moral Theology and Canon Law

Although treated only briefly above, questions about the meaning and purpose of ecclesiastical law are part of the movements of historical and systematic theology.

Within these movements, the ecclesial discipline of canon law is an important dialogue

186. John Paul II, *Apostolic Constitution Sacrae Disciplinae Leges of the Supreme Pontiff Pope John Paul II for the Promulgation of the New Code of Canon Law*, 3.

partner. The organic connection between theology and canon law is even more apparent in moral theology, which is found within the movement of systematic theology. While this relation has been described previously, some questions within the realms of moral theology and canon law remain.

First, is there a difference between ‘goods’ and ‘values’? If so, is it significant for moral theology and canon law? Moral theologian, Joseph Selling, deems values to be a relational concept associated with the process of valuing and not suitable for canon law. Selling maintains, “That is, to refer to something as *a* value is to have made a judgment that an object of perception appears to exhibit certain qualities that are appropriate for responding to the needs or desires of specific persons in their cultural and historical context.”¹⁸⁷ For Selling, valuing is a relational process that assesses the needs of a particular person or community, the qualities of the object perceived to be good, the capability of the person or community to appropriate the good, and the motivation of the person or community to reach out for the good. Due to the complexity and specificity of this process, Selling believes that it is impossible for law to determine values for a community, much less for a person. Selling states, “Law, in the strict sense, then, should be understood as promoting the *good*, rather than promulgating *values*.”¹⁸⁸ Laws may promote things as “valuable,”¹⁸⁹ meaning that something “*might* be considered *good* for

187. Joseph A. Selling, "Laws and Values: Clarifying the Relationship Between Canon Law and Moral Theology," *The Jurist* 56 (1996): 108.

188. *Ibid.*, 109.

189. *Ibid.*, 108.

some (perhaps even the vast majority of) persons.”¹⁹⁰ He holds that law cannot decide what is a value for all. Selling concludes,

Therefore, I believe that it is more fitting to restrict the role of law to designating that which is good and to allow free agents to decide if and whether they can and will reach out for those goods. Simply “holding out” the good does not instantaneously create an obligation to realize that good. In the end, law is never in a position to override the conscience of responsible moral agents.¹⁹¹

Such a position upholds the primacy of conscience in canon law and moral discernment as Örsy has articulated already. It is true, as Selling maintains, that “the mere designation of something as good will not necessarily move persons to initiate any activity specifically aimed at appropriating that good.”¹⁹² However, Örsy does not say that law overrides conscience or that holding out a value creates an obligation. The source of obligation is always God, because God is the source of all that is good; reaching out for the good is essentially reaching out for God. In that sense, appropriating the good is integral to our relationship with God. The most basic moral obligation is to do good and avoid evil. This is the principal dictate of conscience, where one is alone with God. Canonical norms “point to values and ‘order’ (direct) the community to take action to obtain them.”¹⁹³ Canon law is an *instrument* to help the community intelligently reach out for the goods it should in order to grow in communion with God and God’s people. If the church community is not capable of living a law or motivated to act upon a law, then the law is not received. Again, reception is crucial in the life of a law. It seems that

190. Selling, "Laws and Values: Clarifying the Relationship Between Canon Law and Moral Theology," 109.

191. *Ibid.*, 110.

192. *Ibid.*, 105.

193. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 93.

one can use the terms, ‘values’ and ‘goods,’ interchangeably in canon law as long as one is referring to law that has been truly received by the community. A law that has been received is a mutual acknowledgment by the lawgiver and the community that the law is an authentic and necessary instrument in helping the community become what it should, that it supports a true value for the ecclesial community. Örsy does argue that the promulgation of a new law requires that “*the values the law intends to uphold, should be explained.*”¹⁹⁴ Understanding is necessary for intelligent and free persons to be motivated to appropriate the good. Helping the community to understand the good a law intends to promote is the joint work of theologians and canonists. In this way, the community will recognize the good as a value and legitimately receive the law.

Secondly, what kinds of values (or goods) are relevant to canon law? Selling states that not all values are germane to canon law. He infers from Örsy that the values relevant to moral theology concern the individual, while the values relevant to canon law concern the community.¹⁹⁵ Whereas it seems inaccurate to claim that Örsy considers moral theology to be directed toward the growth and perfection of the individual alone, Örsy does state that the values supported by canon law have “social significance.”¹⁹⁶ Furthermore, Örsy asserts, “The initial search is for values, but with a restriction: the legislator is interested in those values only which are necessary or useful for the welfare of the Christian community as community.”¹⁹⁷ From this, it seems that all the values

194. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 86.

195. Selling, "Laws and Values: Clarifying the Relationship Between Canon Law and Moral Theology," 97.

196. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 91.

197. *Ibid.*, 125.

canon law supports and protects have theological value for the community as a whole. However, ecumenist and theologian, J.M.R. Tillard, contends, “It would be absurd to say that each one of the canons or *leges* has theological relevance.”¹⁹⁸ As an example of a true *ordinatio*, Tillard lists c. 211, “All the Christian faithful have the duty and right to work so that the divine message of salvation more and more reaches all people in every age and in every land.” Obviously, this canon concerns duties and rights within the Christian community along with the mission of the church. Tillard holds that although individual canons may not have theological relevance per se, *lex ecclesiae* is theologically significant as it “manifests the specific nature of the *koinônia*—the Church of God.”¹⁹⁹ Certainly, it can be stated that some canons may not be properly named *leges*, because they have different literary forms; that being said, to declare the theological irrelevance of the majority of canons seems extreme. If some canons are theologically irrelevant, why are they included in the Code? Furthermore, what impact does that have on their reformability? By what criteria does the church determine which are theologically relevant and which are not?

2.6.4 Canon Law as Ministry

The final movement of fundamental practical theology is strategic practical theology where theological thinking culminates in questions and proposals for individual and social transformation in the concrete particularity of historical existence. In this movement, canon law is most aptly described as a ministry. Just as religious education, liturgics, and pastoral counseling are ministries of the church to build up the Kingdom of

198. Tillard, J.M.R., "Ecclesiology of Communion and Canon Law: The Theological Task of Canon Law: A Theologian's Perspective," *CLSA Proceedings* 58 (1996): 29.

199. *Ibid.*

God, so also is canon law. Canon law is an ecclesial science that can be studied, but more importantly it is a work of the church, something one does. This is not to say that it is the same thing as practicing civil law. Coriden asserts that the Latin *ius canonicum* is best translated “‘the canonical system,’ the norms proper to the church,” because an ecclesial society is a significantly different reality than a civil society; therefore, law functions differently within each.²⁰⁰ The ultimate end of canon law corresponds to the ultimate end of the church itself—the salvation of souls. Thomas Paprocki commenting on the final canon in the Code, c. 1752, intimates that the maxim, *salus animarum suprema lex*, can function as a hermeneutical key to the entire Code. “Just as the Latin language often places the most significant word at the end of a sentence for emphasis, the Latin Code of Canon Law puts its most important norm in the very last canon: the salvation of souls is the highest law of the Church.”²⁰¹ He goes on to assert that this supreme law of the church has its origins in Roman law as do so many other aspects of canon law. ‘Salvation’ in Roman law may have referred to the safety or welfare of the people in Roman culture.²⁰² Alternatively, ‘salvation’ in canon law has an explicit theological connotation further reinforcing the position that canonists are ministers in the church and the argument that theology and canon law are organically connected. It is not necessary to state as firmly as Coriden does that “canons are not the same as laws.”²⁰³ Not all canons are laws due to their literary form, but some do function as laws with

200. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 27-28.

201. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1847.

202. *Ibid.*

203. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 27.

salvation as their ultimate end. This line of reasoning leads to the question of the specific meaning of ‘salvation,’ an indisputably theological question.

Tillard provides an unambiguous response to the above question in his exploration of the theological task of canon law. He prefaces his position by arguing that *jus* (right) ontologically precedes *lex* (law). In other words, *lex ecclesiae* exists to promote and protect *jus ecclesiae*. He affirms that *jus ecclesiae* is “*jus salutis*, or *jus redemptionis*, or *jus divinae gratiae*,” which is in agreement with c. 1752.²⁰⁴ Moreover, he specifies the nature of this *jus* by explicitly identifying the goal and fruit of salvation, redemption, and divine grace. “This goal and fruit is the *koinônia*, rightly understood. For *koinônia* means *inseparably* the sharing in the fellowship within the divine trinitarian life, through participation in the reality of Christ, and subsequently the fellowship of all the baptized believers with one another.”²⁰⁵ This affirmation leads Tillard to conclude that “the *jus ecclesiae* has to be understood as a *jus communionis*.”²⁰⁶ In the application of canon law where law and life meet, the two fundamental values of the good of the individual and the common good need to be balanced. Wijens declares that the polarization of the individual from the community creates a “false dilemma.”²⁰⁷ The need to properly balance the individual good with the common good in canon law is based upon a theological anthropology that situates authentic human fulfillment within

204. Tillard, "Ecclesiology of Communion and Canon Law: The Theological Task of Canon Law: A Theologian's Perspective," 25.

205. *Ibid.*

206. *Ibid.*, 26.

207. Wijens, "The Church Knowing and Acting: The Relationship Between Theology and Canon Law," 37.

communal life. John J. Coughlin expresses the role of canon law in advancing and guarding that harmonious balance between individual and communal goods:

Canon law is intended to safeguard those social structures that set the optimal conditions in which the individual may discover fulfillment through participation and solidarity. Canon law recognizes the natural human need for participation and solidarity as well as the spiritual desire for communion. It attempts both to protect individual rights and articulate values that remain central to communal life.²⁰⁸

The most fundamental mediating structure where this balance can be learned is the family.²⁰⁹ Canon law regarding marriage and family exists to ensure that each individual is born or adopted into a family where individual human dignity is affirmed within communal participation and solidarity. Family is the place where that delicate balance is either helped or harmed. Family is the most elemental social association where persons can discover that solidarity is possible and necessary to genuine human fulfillment. Based upon the writings of John Paul II, Coriden states that solidarity is “a measure of the people’s commitment to participate in the life of the community and to promote the common good.”²¹⁰ Solidarity is a virtue acquired in the commitment to pursue the common good through recognition of the personal dignity of each and the responsibility of each to all.²¹¹

In order to balance individual and communal goods in the church, the ministry of canon law serves to protect and promote the primary values of freedom and order.

208. John J. Coughlin, "Canon Law and the Human Person," *Journal of Law & Religion* 19, no. 1 (2003/2004): 53.

209. *Ibid.*, 39.

210. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 76.

211. John Paul II, *Encyclical Letter of Pope John Paul II Sollicitudo Rei Socialis*. December 30, 1987, Libreria Editrice Vaticana, no. 38-39, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html (accessed June 12, 2014).

Freedom, which is vital to human dignity, is supported and shielded by this ministry. Coriden delineates the content and limits of freedom.²¹² Freedom means living in the freedom of Christ, a freedom that is personal, yet also corporate. Living free in Christ is being free from sin and free to love. Canon law helps to create a social environment in which this freedom can thrive. This ministry protects religious freedom in order that persons follow Christ out of personal choice and not state coercion. As previously mentioned, canon law protects the primacy of conscience. For conscience to operate, it must be “formed,” “followed,” and “free.”²¹³ The ministry of canon law serves the church by guiding the followers of Christ while respecting their powers of discretion and their gifts in discerning the Spirit’s movement in their lives. In addition, canon law identifies the rights of individuals and local churches so that their freedom can be preserved. Finally, freedom is promoted and protected through the canonical ministry when inculturation or contextualization is recognized and esteemed as a real need so as to allow the church to be a communion of communions. Respecting the historical and cultural situatedness of the local church demonstrates a theological commitment to the freedom of the Incarnate Christ offered to every person in every land. Protecting and promoting Christian freedom is essential to the very mission of the church. After exploring the theological task of canon law, Örsy concludes, “Our ‘theological task’ is to create an environment of freedom where the people have access to the saving mysteries

212. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 80-105.

213. *Ibid.*, 88.

and—more significantly—the unbounded mercy of God can reach the people.”²¹⁴ This freedom is a necessary prerequisite for life to grow.²¹⁵

Secondly, canonical ministry enables good order to exist in the ecclesial social body. According to Örsy, canon law is a “necessary human instrument” to recover, establish, and maintain balance and order in the community.²¹⁶ He presumes it self-evident that no community can survive without good order. It is the very nature of a living body, whether individual or social, to require order for proper functioning. Astutely, Örsy recognizes the perennial concept of *taxis* even within the divine community. He states, “There is order even in the holy Trinity: the Son proceeds from the Father, and the Spirit from the Father and the Son.”²¹⁷ The church, Body of the Incarnate Christ, needs visible structures and stabilizing norms to continue throughout history. It is spiritual and institutional, and as such, the church is an affirmation of the reality and goodness of the Incarnation.²¹⁸

For freedom and good order to be present in the church, authority is necessary; that is to say, only a particular kind of authority is appropriate. Authority in the church means not dominance, but service. From even a cursory look at how Christ exercised His authority and power in the New Testament, Coriden confirms that “authority as service goes to the very essence of what power is within the church.”²¹⁹ He notes that the term

214. Örsy, "The Theological Task of Canon Law," 23.

215. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 79.

216. *Ibid.*, 78.

217. *Ibid.*, 78n8.

218. *Ibid.*, 78n9.

219. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 111.

“hierarchy,” which conjures up images of separation, rank, and supremacy, literally means “priestly rule” or “sacred authority.”²²⁰ Coriden laments the use of this non-biblical term, a form of which is used only sparingly in the Code, to describe authority in the church. Authority in the church is not reigning over but guiding with. From the council, authority is understood as “collaborative and cooperative, making use of counsel, persuasion, and example, as well as sacred power.”²²¹ For authority in the church to follow the trajectory of Jesus and His apostolic church, it must be participative. Coriden claims the most genuine biblical forms of authority are “conciliar” or “synodal.”²²² This form of government, leadership, and power reflects a *communio* ecclesiology. The church, in all its particularity and distinctiveness, lives at the local level, and authority as participative allows the universal church to be a communion of communions. In addition, authority as serving and participative underscores the irreplaceable vocation of each member of the church. In general terms, the aforementioned participative character of authority is not easily challenged; however, the specific mode of this authority is a question of continued debate. The central question of this debate concerns the necessity of ordination in exercising the sacred power of governance and the capacity of the laity to hold office.²²³

220. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, 120.

221. *Ibid.*, 119.

222. *Ibid.*, 123.

223. For a persuasive argument challenging the truncated role of the non-ordained in the power of governance, refer to Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 35-45. Key norms of contention in this debate are c. 129 and c. 274 §1.

Ecclesial authority understood as service and ministry to the whole community of faith provides a clear connection between the juridical structure of the church and the moral life of the church. Örsy argues, “In fact, in many ways canon law supports the moral life of the community.”²²⁴ Canon law is an instrument of those in charge of pastoral care of the church to ensure that all are able to live in communion, that the church is a just community. Thus, canon law serves as a ‘guarantor’ that justice is preserved and promoted in the church. A just community is a morally good community, one in which each member is free and able to flourish and to grow. In a just community, each member shares proportionately in the burdens and benefits of the common good, and structures are in place to encourage continuing personal conversion and social transformation. Canonical norms received by the church and freely implemented could be described as the “minimum of charity.”²²⁵ Örsy expounds,

If laws are for the well-being of the community, as they should be, then all laws, secular and religious, are more than justice. They are manifestations of the love that the scholastics called *amor benevolentiae*, “love that wants to give” or “love that wants to enrich the other.” Virtues do not exclude each other; they blend and integrate into increasingly higher units. Thus justice becomes love. Justice could be defined as the minimum of charity.²²⁶

Canon law provides the minimum standards and structures the church requires in order to become a just and loving community, because law is the minimum demand of love.

Conversely, canon law should be evaluated based upon the extent to which it does (or does not) build the church into a more just and loving community.

224. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 132.

225. *Ibid.*, 136.

226. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 144n1.

Canon law can be described as an instrument supporting the moral life of the church, but the question of whether or not a juridical context is best for moral, spiritual, and sacramental concerns is a legitimate one. In fact, Örsy makes “a practical proposal” for the future.²²⁷ As mentioned previously, the Code contains different literary forms, only some of which are strictly legal norms (right and duty situations). In addition to other forms, the Code contains spiritual and moral exhortations that Örsy deems more suitable for moral theology rather than canon law. Therefore, he proposes,

There could be a “code” for strictly right and duty situations, such as legal relationships concerning contracts, properties, offices, etc.; and there could be a “Book of Christian Way of Life” exhorting the faithful to show their unity with the community by the devotional reception of the sacraments and by the observance of holy days and seasons.²²⁸

The judgment as to whether or not this proposal is indeed practical or advantageous is beyond the scope of this study; however, it is worth noting that such a task would require the dedication and expertise of canonists, theologians, philosophers, anthropologists, psychologists, and historians, that is, experts in their fields from both the hierarchy and the laity. With or without the actualization of Örsy’s proposal, the ongoing critical evaluation and reform of the human instrument of canon law is a premise beyond refutation.

Canon law within the movement of strategic practical theology necessitates collaborative creativity. This is a fundamental premise in accord with the council’s communion ecclesiology. The very concrete and differentiated nature of strategic practical theology requires that it be done in critical conversation with many experts.

227. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 136.

228. *Ibid.*, 137.

Wijlens concludes her study on the relationship between theology and canon law by stating, “At the end of this study we should be able to see how theologians and canon lawyers must work together: they have no other option.”²²⁹ Such collaborative creativity among experts presupposes the conversion and commitment outlined by Örsy previously. In order to interpret and evaluate canonical norms justly, canonists should have knowledge of other fields. Wijlens asserts, “The broader the field of vision of a canon lawyer (theology, philosophy, psychology, etc.), the more he or she sees.”²³⁰ Such a broadening of the canonist’s horizon can occur when there is organized and continual collaboration among many experts. Canonist Thomas Green concurs,

If the revised Code is to be an effective salvific instrument, it must be implemented responsibly and creatively. This task involves not merely canonists but also theologians, other scholars, and pastoral leaders at every level of the Church. Only serious and sustained interaction between them will enable the revised Code to serve the Church’s legal-pastoral life authentically.²³¹

Such sustained interaction should include both the hierarchy and the laity. Örsy argues that although ordination gives the power to rule, *potestas regiminis*, it does not automatically confer learning or prudence.²³² Purposeful interaction among the ordained, the non-ordained, theologians, canonists, scholars, pastoral ministers, and the faithful is needed at every level of government within the church. Örsy notes, “In the church of Christ no member can stand and function alone; there is an interdependence among the

229. Wijlens, "The Church Knowing and Acting: The Relationship Between Theology and Canon Law," 39.

230. *Ibid.*, 35.

231. Thomas J. Green, "The Revised Code of Canon Law: Some Theological Issues," *Theological Studies* 47 (1986): 618.

232. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 144n3.

organs as there is in one human body. Should this needed interchange be neglected, the whole body is bound to suffer."²³³

An archetype of this sustained interaction is the Peter and Paul Seminar, founded by Ladislav Örsy in 1998 to further ecumenical concerns through dialogue between canonists and theologians.²³⁴ Örsy's plan for the Peter and Paul Seminar was based on the work of the Groupe des Dombes, which is a group of pastors and theologians from French speaking Europe of the Reformed, Lutheran, and Catholic traditions committed to conversion and Christian unity. The Peter and Paul Seminar continues the ecumenical commitment of the Groupe by scrutinizing the canonical structures of the church to see how they may or may not serve the church's theological vision of Christian unity.

Wijlens describes the method of the seminar, which serves here as an exemplary model of how canon law within the movement of strategic practical theology should operate:

Methodologically, it becomes clear that a cooperation of experts in the history of theology and institutions, of systematic theologians and of canon lawyers (the membership of 'Peter and Paul Seminar' comprises exactly that!) is required. Systematic theologians will identify, through critical theological reflection, those institutions which stand in need of reform. With respect to the identified institutions, historians will assist in determining what kinds of modalities have been developed in the history of the Christian tradition to implement specific theological concepts and ideas. They (historians) along with theologians and canonists will seek to distinguish what belongs to the core of a certain institution from the modalities that are shaped and determined by historical and cultural circumstances. Canon lawyers will propose how current institutions might thus be reformed in such a way that they better serve the appropriation of the theological vision.²³⁵

233. Örsy, *Receiving the Council: Theological and Canonical Insights and Debates*, 145n.

234. Myriam Wijlens, "'Peter and Paul Seminar': A Follow up by Theologians and Canon Lawyers to the Group Des Dombes' Publication *For the Conversion of the Churches*," *The Jurist* 64 (2004): 16.

235. *Ibid.*, 10.

Further strengthening two critical elements of practical theology mentioned previously, Wijlens emphasizes how the work of the seminar requires personal conversion and interdisciplinary cooperation among experts.²³⁶ The Peter and Paul Seminar demonstrates concretely how the church can move from vision to action while exemplifying the *communio* ecclesiology which is central to the vision itself. Practical concerns determine its work from beginning to end as each uses one's personal gifts and proficiencies to contribute to the common good.

Within the movement of strategic practical theology, canon law operates as its own ecclesial science yet naturally entwined with all the previous movements of theology. Canon law is a science and ministry in which theological data finds specific social-structural and historical form. This "particularizing" role of canon law demands a finesse born from personal conversion from its ministers. The difficulty and delicacy of formulating, interpreting, and implementing theological data into concrete, unambiguous norms require conversion, prudence, creativity, and humility. In many ways canonical ministry resembles the Incarnation in which the ethereal, pure, eternal, and ambient becomes tangible, contingent, determinate, and contained. The analogy is imperfect, but pointed. Although both theology and canon law contain divine and human elements, canon law is acutely human as its theological kernel is positioned within the particularity of space and time conditioned life. Moreover, canon law's hermeneutics for restriction, as explained by Örsy, demand piercing clarity and directed order for action. Certainly such a task presupposes a humility characteristic of the Incarnation, an openness to the good being received. Canon law authentically received and implemented by the church

236. Wijlens, "'Peter and Paul Seminar': A Follow up by Theologians and Canon Lawyers to the Group Des Dombes' Publication *For the Conversion of the Churches*," 20.

as *communio* allows freedom for the people to receive God's gifts and for God to give unimpeded. The question of reception within a communion ecclesiology is essential to the relation of theology to canon law.

Writing shortly after the promulgation of the Code, Green urges canonists and other scholars to take into consideration the theological significance of reception in the life of a law.²³⁷ He warns that theological development can be precipitately stunted when a legislative response is given before a theological question has time to be explored.

Green notes,

A concern of some critics of the original *sacramental law schema* especially was its tendency to legislate answers to widely controverted and still unresolved theological, pastoral, and canonical questions. This seemed premature and not conducive to judicious legal norms genuinely serviceable to the community. One may sympathize with the Commission's continuing reluctance to deal with such complex issues as the relevance of faith to a genuinely sacramental union, the meaning of the dissolution/dispensation of the marriage bond, and the legitimacy of significant liturgical adaptation to different cultures, traditions, and spiritual needs. However, it is unfortunate that the Commission has generally chosen simply to reaffirm the existing discipline in these and other problem areas.²³⁸

If the Code is to be the final document of the council, it needs to be interpreted and evaluated within a communion ecclesiology, an understanding of the church in which all people have access to the mysteries and the ability to participate in the development not only of doctrine but also of canon law. As the theological understanding of the truths of faith and morals develops and refines, canon law should develop and change as well. Should the church's understanding of the "theological kernel" of the mysteries of faith advance, then its particularization in the structures and norms of the church must be reformed to be true to the one operation of the church moving from vision to action.

237. Green, "The Revised Code of Canon Law: Some Theological Issues," 625.

238. *Ibid.*

Örsy concludes his chapter on implementation through reception by stating, “It follows that by this sense of faith, God’s people can penetrate the laws by accurate insights and apply them correctly to life. When this happens, the law is received in the community.”²³⁹ The state of flux and conflict in marriage and family practices suggests that the time is ripe for greater theological reflection on the theological vision of sacramental marriage. After exploring this vision and the theological questions surrounding it, it is possible to probe whether this vision is adequately supported by canonical norms and structures or whether the fullness of the vision is stifled by these same structures and norms. Ultimately the Code should be an instrument to help implement the ecclesiological vision of the Second Vatican Council, the *novus habitus mentis*, which is dynamic not static, open not defensive, and conciliar not dictatorial. Theological questions regarding the marital sacrament and interpersonal commitment along with canonical norms concerning marital consent should be considered and correlated within the higher viewpoint of church as *communio*.

239. Örsy, "How to Relate Theology and Canon Law," 88.

CHAPTER THREE

MARRIAGE AS SACRAMENT

3.1 Symbolic Action

So as not to digress from the present purpose, the conclusions of historical and systematic theologians regarding the meaning of *sacrament* can be given at the outset. The seven sacraments delineated today are symbolic actions that reveal and make present the risen Christ in the lives of his faithful community, the church. Throughout salvation history, seven sacraments have been identified and acknowledged as guaranteed or promised manifestations of the work of Christ. The sacraments do not negate the fact that Christ can reveal Himself anywhere; they simply affirm and make present different aspects of the paschal mystery throughout the life cycle. Through these symbolic actions, Christ is given to the church and received in faith. Ultimately, the work of Christ has always been to create communion between humans and God, who is perfect Communion as Father, Son, and Holy Spirit.

Due to our capacity to reach beyond ourselves in knowledge and love, humans can be liberated from isolation and egocentricity through symbols. Humans are “symbol-making and symbol-using beings.”¹ Etymologically, the Greek origins of the word “symbol” connote two realities being “thrown together” or united.² The symbol unites the known with the unknown and the visible with the invisible. Because we are visible

1. Bernard Cooke, *Sacraments and Sacramentality*, rev. ed. (Mystic, CT: Twenty-Third Publications, 1994), 47.

2. George S. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments* (New York, NY: Paulist Press, 1980), 41.

and invisible, body and spirit, we exist symbolically and make ourselves present to others through the use of symbols. Our human bodies are themselves symbolic. George Worgul explains, “Your body, as a symbol, is an agent for the unity of you as a person. In and through your body, the disparate elements of your unique reality converge to form a whole.”³ As symbolic beings, we use symbolic gestures, actions, and behaviors to express who we are and to reach out to others. Our existing symbolically means we have the capacity for love and community.

We have a need to behave sacramentally, symbolically, and ritualistically precisely because we are human. In other words, sacramental behavior, which is symbolic and ritualistic, conforms to our being human. From a strictly anthropological position, ritual, which is “fundamentally a bundle of symbols,” is the primary vehicle for the social diffusion of a culture’s root metaphor.⁴ The root metaphor of a culture gives meaning to the many ambiguous experiences of its members. When the root metaphor is at work, life is meaningful and coherent. Adherence to this root metaphor can provide positive meaning to life’s negative experiences, which in turn helps to maintain the survival of the culture. For the Christian community, the root metaphor is the death and resurrection of Jesus Christ. Through the use of this metaphor, death which is the ultimate ambiguous experience is resolved and overcome by the resurrection of Jesus and the hope of His coming again. Through ritualized action, the paschal mystery is expressed, made present, and transmitted to all members of the church. Ritual is interpersonal, repetitive, and purposeful behavior that expresses the very identity of the

3. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 42.

4. *Ibid.*, 45, 185.

culture and connects it with its origins.⁵ The sacraments as rituals socially transmit and intimately express the fundamental identity of the Christian community. As Lisa Sowle Cahill explains, sacraments “ritualize basic experiences which give definition to the life cycle (birth, growth, marriage, social vocation, death) and to daily existence (food, forgiveness).”⁶ In and with one’s church community, life is meaningful, directional, and hopeful for Christians, because Christ died and rose again.

The sacraments are ritual celebrations of the church community. They celebrate and make present something real. In and through the celebration, the “reality-event” is expressed and deepened.⁷ Sacramental behavior must occur within a real faith context which presupposes the existence of the reality-event. The sacraments are communal celebrations of the real presence of Christ. This presence presupposes a real relationship with Christ. Sacramental celebrations are symbolic activities of the church that continue the work of Christ which is to bring about union with God. Through the sacraments, which begin in ritualized action, God uses sensate human actions to provide a setting and situation where divine friendship and reconciliation are offered.⁸ Worgul states, “In its sacramental activity the Church becomes what it was meant to be i.e., the historical presence of Christ in the world offering the Father’s love to humankind.”⁹ Sacramental behavior celebrated in faith effects grace, which is ultimately the possibility of and

5. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 81-94.

6. Lisa Sowle Cahill, "Marriage: Institution, Relationship, Sacrament," in *One Hundred Years of Catholic Social Thought: Celebration and Challenge*, ed. John A. Coleman (Maryknoll, NY: Orbis Books, 1991), 105.

7. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 213.

8. Theodore Mackin, *The Marital Sacrament, Marriage in the Catholic Church* (New York: Paulist Press, 1989), 7.

9. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 218.

capacity for union with the triune God. Utilizing the classic Latin Thomistic phrases, Worgul articulates how the sacraments are truly communal celebrations in faith that effect grace:

As ecclesial celebrations of faith, communal dimensions permeate the sacraments. Their performance (*sacramentum tantum*) establishes or intensifies an individual's relationship to or status within (*res et sacramentum*) the people called Church. Sacraments affect membership and specify an individual's community role. Sacraments are a medium or vehicle through which God offers his love and life (*res tantum*) to humankind.¹⁰

Through participation in these visible symbolic actions, one's membership in the church community is realized or changed so that deeper communion with God occurs.

3.2 Biblical Foundations of Marriage as Sacrament

3.2.1 Old Testament and Covenant

The origins of all the sacraments can be found in the earthly ministry of Jesus revealed in Scripture. Before considering specific sacramental behavior related to marriage and how marriage is a medium of grace, the biblical foundations of marriage as sacrament need to be outlined. As this task has been worked by biblical exegetes and theologians throughout the centuries, this will be only a cursory look at key texts which have been and will continue to be decisive in interpreting what it means that marriage is a sacrament.

The earliest and most basic biblical theme essential to understanding marriage as sacrament is covenant. The Hebrew Scriptures cohere in the covenant God established with the Israelites. It was the Israelites' experience of their covenant with God in its formation, violation, and restoration that shaped their very identity. Genesis, the first

10. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 227-28.

book of the salvation story, begins in the creation of everything in the context of covenant. Genesis 2-3, the earlier of the creation stories, explains in literary myth the vast difference between the good intentions of God that all live in right relationship, including men and women, and the sad reality begun by humans of discord and fractured relationships. Creation began in relationships of trust, care, and fidelity – covenant. The first man was placed in the garden to care for it, and a suitable partner was given him.¹¹ In “the nuptial presentation of the bride,” the first man is ecstatic as he recognizes one who is other yet equal.¹² His loneliness is resolved in her. As Edward Schillebeeckx comments, the woman as man’s helper and partner becomes a “means of refuge and support.”¹³ The woman is called “helper” not as a reflection of the servile status of women in that time and culture, but rather as a reflection of the way in which God is our helper, one on whom we can lean and find safety.¹⁴ God intended that all of creation live in interdependent care with man and woman united as servant leaders; this is an environment in which God can freely walk about as the breeze blows.¹⁵ Theodore Mackin explicitly points out the coalescence of these relationships. “In the beginning and according to God’s plan the man and woman were to be most intimate physical and emotional partners. They were meant to live in a covenant of trust. Living together in

11. Gn 2:15-25 (NAB).

12. Peter J. Elliott, *What God Has Joined: The Sacramentality of Marriage* (New York: Alba House, 1990), 7.

13. Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, trans. N.D. Smith (New York, NY: Sheed & Ward, 1965), 19.

14. Gn 2:18; Tb 8:6; Sir 36:24; Ps 28:7, 37:40, 54:6, 109:26; Is 50:7.

15. Gn 3:18.

this way they were to live also in the intimate friendship of God.”¹⁶ Their ability to live in solidarity and peace is dependent upon their obedience to God, to refrain from tasting, knowing, and experiencing that which is forbidden. Mackin interprets God’s command regarding the forbidden fruit to mean that the first humans “accept the human limitations of their experience, of their wisdom and their freedom.”¹⁷ Schillebeeckx adds that by listening to the serpent, which represented the fertility rites of the ancient world, Adam and Eve “dissociated marriage from the *hûqqôth*, the divinely appointed limits of creation.”¹⁸ With their loss of trust in God and reliance upon their own ways independent of God, the man and woman “entered on a history of sin.”¹⁹ With sin came blame and shame, and here the subservient situation of woman is interpreted to be a consequence and punishment for her role in the sin of the world.²⁰

In the creation stories, the laws, the prophetic books, and wisdom literature, God’s covenantal relationship with his people is foremost. Their experiences are interpreted through the lens of covenantal love. The religious creation poem of Genesis 1 affirms the goodness of human beings as male and female, so much so that they are called *imago Dei*.²¹ The designation of them as *imago Dei* is to differentiate human beings from the other animals of creation. Although many theories abound regarding how humans are made in the image and likeness of God, R.N. Whybray asserts their distinction is

16. Mackin, *The Marital Sacrament*, 30.

17. *Ibid.*

18. Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 26.

19. *Ibid.*

20. Gn 3:16.

21. Gn 1:27.

probably in the human's "unique capacity to communicate meaningfully with God" or to serve as God's representatives in caring for the rest of creation.²² Both male and female are fully and equally made in the image of God. Gareth Moore argues, "The great dignity which God bestows on people is not limited to the male. In this, the greatest gift which we possess, there is no distinction between male and female."²³ To say that male and female are complementary does not mean that one completes the other but rather "that they go well together, enhancing each other and forming a satisfying whole" "like strawberries and cream."²⁴ Immediately following the declaration of their being made in God's image is the duty of the couple to populate the earth and care for all of it. From the beginning, generativity and care are integral to covenantal life. This is evident in God's covenant with Abraham and the instances in which God brings forth new life in what seems to be impossible situations, namely the stories of Sarah, Rebecca, Rachel, stretching forth to Elizabeth and Mary.²⁵ The Mosaic Law is itself the human response to divine promise beginning with Abraham. The various sets of laws in the Hebrew Scriptures were needed to direct the people so that they might live in right relationship with God and one another. Many of the laws contain proscriptions and commands regarding marriage and sexuality. Natalie Kertes Weaver states, "Marriage and sexual integrity, then, were seen as extensions of the covenant between God and people as well

22. John Barton and John Muddiman, eds., *The Oxford Bible Commentary* (Oxford: Oxford University Press, 2001), 43, ProQuest Ebrary (accessed September 15, 2014).

23. Gareth Moore, *The Body in Context: Sex and Catholicism* (London: Continuum, 1992), 134.

24. *Ibid.*, 118.

25. This is not to say that unbelievers do not sustain faithful, generative love; it is simply to highlight the deep connection among covenant, love, and generativity in the stories of salvation history.

as a place where that covenant should be lived out.”²⁶ The prophets used the example of human marriage to reveal both hope and fidelity in the people’s covenant with God and betrayal and forgiveness. Real human marriages offered a comparison with God’s covenantal love, the former disclosing both how the God-human relationship ought to be and how it really is. Schillebeeckx describes human marriage as “the prism through which the prophets saw the saving covenant of God with his people.”²⁷ Such faithful human love could only be sustained within the divine covenant allowing those who witness their love to see God’s presence and activity within their relationship.²⁸ The wisdom literature offers practical instructions for living as God’s people. Many of those instructions contain advice for the married, since marriage was central to Jewish life and the primary way to enter the covenant. Instructions are directed toward men, and women are viewed as “objects of passion, of admiration, of care, of gratitude, of caution, of suspicion, of contempt.”²⁹ Such passages glaringly reveal the historical situatedness of the Scriptures and the need for careful exegesis. In contrast, the Song of Songs celebrates the beauty and joy of sexual longing and love. Throughout much of history, this poem was interpreted as an allegory disclosing God’s love for Israel and Christ’s love for the

26. Natalie Kertes Weaver, *Marriage and Family: A Christian Theological Foundation* (Winona, MN: Anselm Academic, 2009), 13.

27. Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 32.

28. It is interesting to note that the first use by the prophets of the human reality of marriage as a means of expressing God’s covenant with the people is found in Hosea. Hosea’s story is not the story of a perfect marriage, but rather one of infidelity and forgiveness. The implications of this for a practical theology of marriage will be explored in the next chapter.

29. Mackin, *The Marital Sacrament*, 50.

church, but in origin the poem evokes images of consuming erotic passion that yearns to be permanent.³⁰

The theme of covenant in the Old Testament lays the foundation for marriage understood as sacrament in Christian history. Acknowledging how the reality of human marriage falls short of the ideal of covenantal love, Weaver gleans three aspects of marriage as covenant from the Old Testament. First, marriage is both a created and a sacred reality. It is not a participation in the divine in the way the fertility cults regarded sexuality, but rather a gift from God and a medium through which to experience God's love. Second, covenantal love is active and faithful. It is something one does. Its presence can be seen in concrete behaviors that demonstrate forgiveness, patience, and constancy. Third, covenantal love is unconditional and indissoluble. Weaver expounds,

Covenants involve the whole person, and the measure of the person's character in a covenanted relationship is the sincerity and commitment one brings to upholding the relationship. As covenant relationships largely define human beings, they cannot be rejected without causing permanent damage to the persons rejecting them. In this sense covenants are indissoluble, for they involve the entire character and identity of the persons involved.³¹

The origins of marriage as sacrament begin in the biblical stories of God's covenantal love for Israel, continue in Jesus' instructions regarding marriage in the gospels, and develop in the Pauline tradition.

3.2.2 New Testament and Family

As previously discussed, the example of human marriage presents similarity in difference with the divine-human relationship throughout the Scriptures. The covenant God initiated with the Israelites reaches its culmination in Jesus Christ. God's desire to

30. Mackin, *The Marital Sacrament*, 43-45.

31. Weaver, *Marriage and Family: A Christian Theological Foundation*, 17.

be one with humanity is literally incarnated in his Son. The human marital relationship serves as a sign of how God loves his people. Walter Kasper describes it in this way. “Marriage, then, is the grammar that God uses to express his love and faithfulness. This covenant between God and humanity is realized in a definitive and unsurpassable way in Jesus Christ, who is in person God’s covenant with human beings.”³² Human marriage points to God’s covenant with his people serving as a symbol of faithful, fruitful, permanent love.

The divorce and remarriage texts of the synoptic gospels express Jesus’ posture toward marriage as interpreted by the first Christian communities. Although these texts have many differences, one can safely conclude that Jesus refused to tolerate divorce. Luke 16:18 is the shortest of the anti-divorce texts, while the Marcan text and one in Matthew place the sayings within a controversy with the Pharisees.³³ The controversy surrounds the proper interpretation of Deuteronomy 24:1. The Pharisees are testing Jesus to see if he teaches according to the Law of Moses regarding divorce or if he contradicts it. In response, Jesus places the argument on an entirely new plane and refers back to God’s intention from the beginning of creation. The law is a concession to their hardness of heart, whereas the creation stories express God’s saving intention of covenantal love. Dale Allison states, “Jesus does not undo Deuteronomy 24:1 but rather distinguishes the perfect will of God from the commandments which reflect human sinfulness.”³⁴ Jesus, aware of their hardness of heart, transcends the law knowing that the only way this is

32. Walter Kasper, *Theology of Christian Marriage* (New York, NY: Crossroad, 1983), 27.

33. Mk 10:1-12; Mt 19:3-12.

34. Barton and Muddiman, eds., *The Oxford Bible Commentary*, 868.

possible is through his own saving love. Kasper understands Jesus' anti-divorce saying to be a "prophetic and messianic statement, an affirmation of salvation and grace."³⁵

According to Jesus' teachings, marriage belongs to God's creation and salvation.

Jesus' pro-marriage ethic is contextualized within his many teachings regarding the equality of all in the Body of Christ. The anti-family strain in Jesus' teachings points to the "penultimate value" of human sexuality and marriage.³⁶ From the accounting in Luke of Jesus' separation from his parents in the temple to the story in Mark of his relatives attempting to remove him from the crowds, Jesus clearly teaches the priority of spiritual bonds of faith over basic family loyalties.³⁷ Further in Luke, with parallels in Matthew, Jesus promotes what Julie Hanlon Rubio terms "an extreme family-denying ethic."³⁸ Jesus proclaims, "Let the dead bury their dead," and "If anyone comes to me without first hating his father and mother, wife and children, brothers and sisters, and even his own life, he cannot be my disciple."³⁹ While the harsh tone of such biblical texts may make the contemporary reader cringe, Lisa Sowle Cahill places them within the context of the dominant first-century Palestinian family where fidelity to patriarchal structures reinforced and advanced social and material inequality among people. She explains, "Loyalty to one's own group and dedication to the status of that group over all others and at the expense of whoever stands in its way are incompatible with a life of

35. Kasper, *Theology of Christian Marriage*, 28.

36. *Ibid.*, 27.

37. Lk 2:41-52; Mk 3:20-35.

38. Julie Hanlon Rubio, *A Christian Theology of Marriage and Family* (New York: Paulist Press, 2003), 49.

39. Lk 9:60; 14:26.

mercy, service, and compassion for the neighbor in need or for the social outcasts and the poor existing on the margins of society.”⁴⁰ Rather than embodying patriarchal biological structures, families are to be restructured based upon the belief that all are equal in Christ and discipleship comes first if conflict between faith and family should occur. One’s biological family must not reign as an idol.⁴¹ The new kind of family that Jesus espouses is one in which all are united who seek to do the will of God.⁴² Santiago Guijarro argues that there is not a consensus among scholars regarding Jesus’ attitude toward the family, and the view that Jesus directly attacked the family to destabilize patriarchy is only one view, one that he does not hold.⁴³

Guijarro places the contrast between the biblical texts that have a more positive evaluation of the family and the anti-familial strain within the context of leadership in the Jesus movement. He contends that Jesus was the leader of a peasant mass movement, in which most of the members of the movement came from the peasantry but the leader came from another social class, particularly with greater mobility (e.g. an artisan). According to Guijarro, it would have been self-defeating for Jesus to directly attack the family, because the family was the main source of identity. However, Jesus did ask his closest disciples to break ties with family. Guijarro explains that the breaking of family ties was “a prophetic action coherent with the image of a God who is beside the poor and

40. Lisa Sowle Cahill, *Family: A Christian Social Perspective* (Minneapolis: Fortress Press, 2000), 29.

41. Rubio, *A Christian Theology of Marriage and Family*, 53-54.

42. Mk 3:34-35.

43. Santiago Guijarro, "The Family in the Jesus Movement," *Biblical Theology Bulletin* 34 (August 2004): 115.

needy and accompanies those who are victims of injustice.”⁴⁴ In this way, the breaking of family ties was a condition for leadership in the movement. Jesus’ close group of disciples then formed a “surrogate family, in which they could find support, protection and identity.”⁴⁵ Jesus then sent his disciples into households “to announce the good news of the kingdom through healing and open table-fellowship.”⁴⁶ He continues, “The purpose of this commissioning was to reconstruct society from its roots, recreating in its basic cells, the household, the traditional values of solidarity and hospitality and establishing in them new relationships of brotherhood and sisterhood.”⁴⁷ In this way, the anti-family strain originates from Jesus urging his closest disciples to join in leadership, and the pro-family strain comes from this Jesus’ new surrogate family (and the households that accepted Jesus’ message). Guijarro concludes that “there exists a fundamental continuity in this respect between the pre-Easter and the post-Easter periods of the early Christian movement.”⁴⁸ Carolyn Osiek states something similar, “The boundaries of kinship are not removed but reset. Those who will fulfill the role of true family members are those bound together not so much by blood or social structures as by Baptism and Eucharist.”⁴⁹ The two strains regarding the family can coalesce in the New Testament, because “family is not abolished but extended.”⁵⁰

44. Guijarro, "The Family in the Jesus Movement," 117.

45. Ibid., 118.

46. Ibid., 119.

47. Ibid.

48. Ibid., 120.

49. Carolyn Osiek, "The Family in Early Christianity: 'Family Values' Revisited," *The Catholic Biblical Quarterly* 58 (1996): 23.

50. Ibid.

“Pro-family” and “anti-family” biblical texts are found in the Pauline corpus as well. In 1 Corinthians 7, Paul defends the goodness and necessity of marriage while at the same time clearly acknowledging his preference for celibacy, not only for himself but also for everyone.⁵¹ This preference could be attributed to the eschatological belief that the end is imminent. However, one does not need to believe that the end of the world is looming to embrace the moral virtue of singleness of heart.⁵² Not even biological and marital family loyalties should distract one from pursuing the Kingdom of God. Yet in what seems to be an utter contradiction, Paul teaches that an unbeliever can be made holy through marriage to a believer.⁵³ In other words, rather than being an *obstacle* to holiness, marriage can be a *means* to holiness. In reference to this text, Mackin laments, “It is regrettable in light of our search for the earliest elements of sacramentality in marriage that Paul says no more exactly what he means here by the Christian spouses’ sanctifying the pagan.”⁵⁴ This text forms the basis for the Pauline Privilege, which allows the Christian spouse to remarry if the unbelieving spouse departs.⁵⁵ Schillebeeckx believes this text is “the strongest biblical basis for the sacramental aspect of marriage.”⁵⁶ He contends that through the faith and baptism of the Christian spouse the marriage is implicitly related to Christ. Only an explicit refusal of the faith, signified by the

51. 1 Cor 7:7-8.

52. Rubio, *A Christian Theology of Marriage and Family*, 61.

53. 1 Cor 7:12-15.

54. Mackin, *The Marital Sacrament*, 69.

55. The question of whether c. 1143 is a legitimate juridic translation of the Pauline text is beyond the scope of this dissertation.

56. Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 159.

departure of the unbeliever, can dissolve the marriage. During apostolic times, children born from the marriage of two Christian parents were not baptized, because through birth alone they were “baptized in the baptism of their parents, who formed the Christian environment into which the children were accepted and incorporated.”⁵⁷ Any theology of the sacrament of marriage must contain the biblical foundations of family seeking the will of God, which is that all be one in Christ. What appear to be pro-family and anti-family strains in the New Testament are simply examples of the penultimate value of marriage, which is to serve the primary value of becoming one in Christ. Stephen Post argues, “Salvation within Christianity is not dependent on the continuation of a biological lineage. One need not be married and a parent to enter the kingdom of God.”⁵⁸ Christianity embraces the theological concept of salvation through adoption.⁵⁹ All are welcome into God’s family where incorporation occurs through faith and baptism and hospitality is central.

The biblical text which has served as the unparalleled source for the theology of the sacrament of marriage is Ephesians 5:21-33. The first three chapters of Ephesians explain God’s plan for salvation through Christ’s death and resurrection so that all will be one in Christ. The language is primarily doxology and prayer. These chapters provide the “theological warrant” for the final three chapters of instruction and exhortation.⁶⁰

57. Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 164.

58. Stephen G. Post, *More Lasting Unions: Christianity, the Family, and Society*, Religion, Marriage, and Family, ed. Don S. Browning and John Wall (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 2000), 44.

59. Rom 8:14-17; Gal 4:1-7; Eph 1:3-6.

60. Ian A. McFarland, "A Canonical Reading of Ephesians 5:21-33," *Theology Today* 57 (2000): 344-56.

Ephesians 5:21-33 “is constructed on the framework of a table of rules for good management of the household.”⁶¹ Since the family was of primary political and economic importance in the ancient world, household management was a concern. Such an ethical code of household management was not remarkable in the ancient world; however, in this text “the conventional is transformed by the Christian sense that all relationships have to be lived ‘in the Lord’ and with unselfish, sacrificial love of Christ as the pattern and inspiration.”⁶² The patriarchal tone of the text reflects the rule of the *paterfamilias* of the time, but for households that are ‘in the Lord’ this rule cannot be total and unqualified. J.D.G. Dunn asserts that the Christian marital relationship occurs “within the primary context of mutual discipleship (cf. Mk 10: 42-5).”⁶³ Carolyn Osiek points out that whereas other household codes of the era were addressed to the *paterfamilias* because he was to rule all members of the house—wife, children, and slaves—this passage addresses the wife first, thus asserting her personal worth.⁶⁴ The similarity the author of Ephesians sees between human marriage and the Christ-church relationship is found in the loving service and mutual giving way of family members. Christ is the model of love. Although much debate and controversy has been triggered by the “submission” of women in marriage from this text, Osiek contends, “The Ephesians passage is not primarily about marriage, however, but about the church, as is the whole

61. Barton and Muddiman, eds., *The Oxford Bible Commentary*, 1176.

62. Ibid.

63. Ibid.

64. Carolyn Osiek, “Did Early Christians Teach, or Merely Assume, Male Headship?” in *Does Christianity Teach Male Headship? The Equal-Regard Marriage and Its Critics*, ed. David Blankenhorn, Don Browning, and Mary Stewart Van Leeuwen (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2004), 25.

epistle, whose major theme is the reconciliation of Jewish and Gentile Christians in their common faith in Christ.”⁶⁵ Referring to the parallel between the husband-wife

relationship and the Christ-Church relationship, Dunn maintains,

It is true that the placing of the relationship of husband and wife parallel to that of Christ and church (5:23-4) seems to set the wife in an intrinsically inferior status (cf. 1 Cor 11:3). But that again reflects the ethos of the time (the marital law which treated wives as the property of their husbands was only changed in Britain in the 19th cent.). And the main thrust of what follows is clearly intended to transfuse and transform that given relationship with the love of Christ. The paradigm for the husband is Christ as lover and savior, not as lord and master.⁶⁶

Christ’s headship essentially means service and unity. The head-body analogy is used to highlight the kind of sacrificial love that imbues Christ’s relationship with the church and the absurdity of the idea of one being without the other. This kind of unity, sacrifice, and mutuality ought to characterize human marriage in Christ. Mackin contends, “The intent is to bring the Christian spouses to understand how they ought to love and treat one another because they are impelled by the Spirit—love and treat one another in a way that may realize the *mystérion* that is God’s bringing reconciliation through Christ.”⁶⁷

Michael Lawler identifies the key elements of a conjugal spirituality and a theology of Christian ministry from the use of marriage as a prophetic symbol in Ephesians 5:21-33. This covenant is characterized by mutual giving way, mutual service, and steadfast and faithful love.⁶⁸ He states, “Christian marriage is indissoluble because Christian love is

65. Osiek, “Did Early Christians Teach, or Merely Assume, Male Headship?” 25.

66. Barton and Muddiman, eds., *The Oxford Bible Commentary*, 1177.

67. Mackin, *The Marital Sacrament*, 74.

68. Michael G. Lawler, “Christian Marriage and Christian Ministry,” *Spirituality Today* 40, no. 2 (Summer 1988): 135-44.

steadfast and faithful. Indissolubility is a quality of Christian marriage because it is, first, a quality of Christian love.”⁶⁹

The question may be raised whether the idea of headship is necessary for a biblical understanding of marriage. Maggie Gallagher explains that the idea of male headship was assumed indispensable for thousands of years in patriarchal societies, because the family was the primary unit of production under the rule of a head in much the same way today corporations are the primary means of production under a CEO.⁷⁰ Presumably, male headship in the family served to ensure conformity and organization for the common good. Gallagher queries, “One challenge to standard feminist discourse about the family, then, becomes this: why is it that submission to husbands is now almost universally regarded as degrading to women while submission to corporate presidents is not?”⁷¹ That being said, if the family needed a head, why must it be limited to men? In addition, when the economic function of family has so dramatically changed, is headship even necessary? Could it be detrimental to the institution of marriage considering the history of misogynistic practices? The idea of male headship carries with it untold and innumerable stories of the unjust treatment of women and the exploitation of their labors. Carolyn Osiek contends,

An overly literal interpretation of any biblical text out of context can lead to an impoverishment of symbols. An over-identification of the analogy of the husband as head of wife and Christ as head of church is no exception. When a symbol or

69. Michael G. Lawler, "Christian Marriage and Christian Ministry," 140-41.

70. Maggie Gallagher, "Reflections on Headship," in *Does Christianity Teach Male Headship? The Equal-Regard Marriage and Its Critics*, ed. David Blankenhorn, Don Browning, and Mary Stewart Van Leeuwen (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2004), 114.

71. *Ibid.*, 115.

metaphor becomes fixed and no longer points beyond itself, it loses its power to reveal the mystery of God.⁷²

In changed cultural and economic circumstances, the similarity between human marriage and the Christ-church relationship is found less in the idea of headship and more in the understanding of mutual love and service which bring about unity in the Spirit. In addition, the parallel between Christ as head of the church and husband as head of the family should be a charge to husbands that more self-sacrifice is demanded of them. If the head-body analogy holds, then the husband must be willing to die for the spouse.

3.3 Historical Development of Marriage as Sacrament

3.3.1 Patristic Era

In the first centuries following the death and resurrection of Christ, most Christians married according to local customs and did so before conversion. Marriage was a familial celebration and sacred duty with the purpose of producing children and procuring economic security. The father or male guardian, as head of the household possessing all legal rights and property, was the natural authority over marriage. Marriages were created by the two fathers, in agreement with their wives, consenting to the union of their children. A bride price and dowry were exchanged and the bride was ritually and legally transferred from the authority and house of her father to that of her husband. Although in Roman society a girl of the marriageable age of twelve could choose to be legally free and marry whom she wanted, the usual wedding custom included the handing over of the bride, which still continues to date. By the second or third centuries these secular wedding rituals survived primarily for patrician families.

72. Osiek, "Did Early Christians Teach, or Merely Assume, Male Headship?" 27.

For the *matrimonium liberum*, the free marriage, three elements created a marriage without paperwork, formal legalities, or even a traditional ceremony. These elements included: *connubium* (a citizen's right to marry), *maritalis affectio* (the desire and will to be married to one another), and the external manifestation of this *affectio* through reciprocal consent.⁷³ It was not until the fourth or fifth centuries that a priest or bishop gave his blessing, or approval, to the newly married. Schillebeeckx maintains, "The first evidence that we have of a nuptial mass with a priestly solemnization of marriage contracted civilly and in the family dates from the fourth and fifth centuries, in the Roman church."⁷⁴ In fact, it was not until the eighth century that liturgical weddings in churches became common, although not universal. In the eastern empire, the priest's blessing was critical for sacramental marriage, a practice which continues in the Orthodox Church today.

In the patristic era, ambiguity characterized the relationship between marriage and Christianity. Early on, Christians had to reconcile marriage, which suggested permanency and rootedness, with their belief in an imminent eschatology. Another source of such ambiguity was the complexity of Gnostic teaching and other philosophies hostile toward marriage. Although it is more accurate to refer to heterodox Gnostic *teachings* rather than one unified system, Gnostic philosophies in general embraced an ontological dualism in which all that is earthly, material, and corporeal was considered

73. Mackin, *The Marital Sacrament*, 87.

74. Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 255. This does not imply that this was uniform and universal practice at this time. In fact, Schillebeeckx argues that there was "no obligatory liturgy of marriage in the church before the eleventh century, except that for the lower orders of the clergy." In addition, in the British Isles, there is no evidence in the liturgical books of any marriage liturgy until the tenth and eleventh centuries. See Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 262, 265.

evil. Jaroslav Pelikan summarizes, “Each in its own way, the Gnostic systems all included a diagnosis of the cosmological descent of the human spirit into matter and sin.”⁷⁵ Consequently, marriage and procreation, being bodily, were evil for the ascetic Gnostics and worthless for the antinomian Gnostics.⁷⁶ The orthodox Christian reply to these teachings was to emphasize the natural purpose and legitimation of marriage, which was procreation. The earliest hints of the future recognition of the sacramentality of marriage can be found in the pastoral care given toward the married, the emergence of elements of the wedding liturgy, the belief that God offers graces to Christian spouses, and the unfolding exegesis of Ephesians 5.⁷⁷ Despite these early suggestions that marriage can be a means to holiness, the belief pervaded that “marriage is the default vocation of the weak” and celibacy is the ideal, because how could a sexual relationship image the invisible, holy relationship of Christ and His church?⁷⁸ Such a devaluing of sex and marriage was made evident by the disapproval of remarriage by widows. The reason for this devaluing was the belief that sex was infected with concupiscence—irrational, rebellious, sinful desire. Such bodily, self-centered desire, it was held, inevitably distracted one from pure contemplative union with God.⁷⁹ This view of sex, one where sex needed to be bridled and excused, made it difficult to imagine how sex in

75. Jaroslav Pelikan, *The Emergence of the Catholic Tradition (100-600)*, vol. 1 of *The Christian Tradition: A History of the Development of Doctrine* (Chicago: The University of Chicago Press, 1971), 87.

76. Shaji George Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition* (Rome, Italy: Gregorian Univeristy Press, 2007), 132, Google Play Book.

77. Mackin, *The Marital Sacrament*, 120-21; Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 245-56.

78. Mackin, *The Marital Sacrament*, 132-33.

79. *Ibid.*, 185.

marriage could be part of the imaging of the Christ-church relationship. However, this devaluing of sex was not a Christian innovation; it was very much a part of the culture due to the influence of Stoic principles and rigorous ethics of sexual renunciation of the upper classes.⁸⁰ Shaji George Kachuthara offers a different reason for the emphasis on procreation by the early Christians than only a reaction to the Gnostic movement:

Although norms regarding sexuality were rigorous, a kind of double standard was followed. Women were strictly punished for adultery, whereas men incurred no legal punishment for infidelity. The master had authority over the bodies of the slaves, both male and female, and it was a personal option of the master whether to have or not a sexual relationship with female slaves. One of the main intentions of the strict discipline in sexual life advocated by Christian authors was protecting the rights of the weaker section of the society, slaves, women, children etc., who were exploited by the masters and the powerful. The procreative dimension was emphasized and was presented as the valid norm for sexual intercourse, because it was thought that it would deter the people from sexual promiscuity.⁸¹

Kochuthara's reasoning highlights the inherent interconnection between the sexual and the social; the sexual practices of the early church had a social justice component that is often omitted from explanations of sex and marriage in the early church.

3.3.2 Augustine

Writing in the time of such rigorous ascetic traditions and the view that marriage was an afterthought due to the Fall, Augustine cannot be accused of being the source of pessimism toward sex and marriage that lasted centuries. Against the Manicheans, Augustine argued for the goodness of marriage by identifying that which makes it good: *proles, fides, and sacramentum*. *Proles* refers to the begetting, rearing, and loving of children within the context of the “friendly society created by the marital engendering of

80. Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 124-28.

81. *Ibid.*, 128.

children.”⁸² Augustine begins his treatise, *De bono coniugali*, by placing the good of children within the context of the social dimension of human nature and the marital friendship, which is the first natural bond of human society.⁸³ *Fides* refers to the virtue of fidelity that enables spouses to limit sex to the marital relationship.⁸⁴ The *sacramentum* has a rich and varied usage in Augustine and should be viewed within the context of the Roman usage of the term at the time.

Because Augustine’s works are polemical and not systematic, it is difficult to assign a precise meaning to *sacramentum* in Augustine’s thought. Mackin summarizes Augustine’s varied use of the term:

The marital covenant is the product (*res*) of the *sacramentum*, with the latter apparently the observable ceremonial sign; it is a quality or trait of the marital bond that prevents its dissolution; as such a trait it is found in all marriages, or alternately it is found only in Christian marriages; it is that in the marriages of Christian spouses whereby these image the Christ-Church relationship—or is perhaps the image itself; as such it is the source of the demand that Christian marriages be monogamous; it is analogous to the effect of his ordination in a priest that keeps him a priest all his life, as it is analogous to that effect of a Christian’s baptism that keeps him a Christian even despite his permanent apostasy; it may be identical with the *quiddam conjugale*, the “certain conjugal something,” that remains in the souls of separated Christian spouses and keeps them married until one of them dies; it remains in their souls because both are members of the metaphoric body of Christ. The *sacramentum* was in Adam’s and Eve’s marriage as a foreshadowing of the union of Christ and the Church.⁸⁵

According to Mackin, the *sacramentum* in Augustine implies monogamy, permanency, commitment, and inseparability. Augustine’s use of the term is particularly ambiguous, because sometimes he says it is found only in Christian marriages and at other times he

82. Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 164.

83. Augustine, *De Bono Coniugali: On the Good of Marriage*.
<http://www.newadvent.org/fathers/1309.htm> (accessed August 22, 2014).

84. Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 164.

85. Mackin, *The Marital Sacrament*, 226-27.

predicates it of all marriages.⁸⁶ Despite its unsystematic use, *sacramentum* in Augustine “designates the perseverance, the permanence of the marriage commitment, even the unbreakable character of the marital bond.”⁸⁷ The sacrament in Augustine’s thought is intimately tied to “the commitment-bond,” which could mean the spouses’ commitment to one another or to God or perhaps both.⁸⁸ Schillebeeckx reinforces this intimate connection between sacrament and commitment:

The basic meaning of this word in secular Latin usage was “religious commitment” or “*engagement*,” and it was from this that all the other meanings were derived—*sacramentum* as an initiation (which, of course, necessarily involves personal commitment), as an oath or *iuramentum* (the oath pointing to the legal aspect of this personal commitment), and finally as the legal and sacral bond resulting from the obligations undertaken under oath.⁸⁹

In his study of ancient non-Christian uses of *sacramentum*, Daniel Van Slyke concludes that “the vast majority of non-Christian evidence for the meaning of *sacramentum* points more or less directly to the military oath of the Roman soldiery.”⁹⁰ The military sacrament was highly regarded and its meanings could be transferred to a Christian context. Van Slyke asserts, “The military sacrament put one into a new set of responsibilities occasioned by a new set of relationships: with the emperor, with one’s fellow soldiers, with the citizens of Rome, and even with Rome’s enemies.”⁹¹ In Van Slyke’s translation of the Roman military sacrament into its Christian usage, it becomes

86. Theodore Mackin, *Divorce and Remarriage*, Marriage in the Catholic Church (New York: Paulist Press, 1984), 216.

87. Theodore Mackin, *What is Marriage?* Marriage in the Catholic Church (New York: Paulist Press, 1982), 139.

88. *Ibid.*

89. Schillebeeckx, *Marriage: Human Reality and Saving Mystery*, 284-85.

90. Daniel G. Van Slyke, “*Sacramentum* in Ancient Non-Christian Authors,” *Antiphon* 9.2 (2005): 205.

91. *Ibid.*

apparent how this understanding could prove beneficial in relating the marital commitment in consent to the sacrament:

Through the Christian sacrament, one enters upon a new set of relations and responsibilities with Christ, with one's fellow Christians, and with the enemies of Christ. The very concept of sacrament provided a means of Romanizing or Latinizing the covenantal relationship that Christians perceived between themselves and their God, and likewise amongst themselves, enabling them to express it in the discourse of Roman culture. Entering into a sacrament with God entailed responsibilities on the part of the Christian, but it also entailed promises on the part of God, which are manifest in the typology of scripture and the rites of early Christian communities. This may explain why, from an early point in the history of Latin Christian literature, so many dimensions of faith came to be called sacraments.⁹²

The Christian sacrament, particularly marriage, implies commitment and the assuming of new responsibilities due to the creation of new relationships.

3.3.3 Middle Ages

From the time of Augustine until the early Scholastics, minimal development in the understanding of the marital sacrament occurred. Huge socio-political changes in the church and Roman civilization did not provide the stability needed for development in theological thought. The invasions of different peoples and encounters with indigenous groups along with the fracturing of civilization into feudal society stifled the possibility of theological progress. Marriage continued to be viewed as a good gift from God but a lower state compared to consecrated virginity due to the pleasure and irrational desire associated with sex. Development in the theology of marriage was not as important in a clerical world in which consecrated virginity is seen as a higher state.⁹³ However,

92. Van Slyke, "*Sacramentum* in Ancient Non-Christian Authors," 205-6.

93. Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 226. It is difficult to imagine how the theology of marriage can develop in official church teaching when the superiority of consecrated virginity and celibacy continues to be extolled. See *Lumen Gentium* 42 and John Paul II, *Familiaris Consortio*, 16, as only a few examples.

liturgically, at the end of the first millennium, marriage had moved primarily into the domain of the church. Marriages were to be created publicly with the permission of the parents and the priest's blessing. By this time, Roman government had deteriorated causing the bishops to gain jurisdictional control and authority over marriage in the West. With the infiltration of largely Germanic peoples, conflict occurred over the legitimate procedure for marrying. Roman law required the consent of the parties alone for its creation and *maritalis affectio* for its sustenance. European groups and ethnicities entering Christian communities had their own customs and traditions for marrying, which consisted of multi-step processes. Variation occurred among different tribes, but a general pattern can be delineated.⁹⁴ The process began with the man's or his father's petition for the woman's hand (*peititio*). If the petition was accepted, the woman was betrothed to the man (*desponsatio*). The betrothal was a public agreement between the parties' families that the woman would be handed over to the man (*traditio*). Within this contractual exchange, the power transferred from the father or guardian to the bridegroom to protect and represent the bride, the *mundium*, was a key element. In order to be effective, provision of a dowry was made to the woman's family (*dotatio*). The dowry served as a form of collateral should either party fail to fulfill the promise to marry. For the Germanic peoples, the betrothal was fulfilled in the *traditio*. Sexual intercourse was a crucial step in the process of marrying. Mackin states, "Where the tradition of the *mundium* was neglected, the beginning itself of cohabitation replaced the *traditio* as the moment creating the marriage. In this case it was said of the bride,

94. John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000), 1236.

ambulavit ad maritum—‘she has walked (or gone over) to her husband.’”⁹⁵ This Roman-European dispute centered upon whether it is consent or sexual intercourse that creates marriage and at what point in a Christian marriage it images the indestructible union of Christ and the church.

This dispute continued into the eleventh and twelfth centuries with two schools of thought representing the divergent positions. The theologians of the University of Paris argued for the Roman position that consent by the parties makes marriage. The second school of thought centered upon the canonists of the University of Bologna. Gratian argued that consent forms an inchoate marriage which is made *ratum et consummatum*, complete and indissoluble, through sexual intercourse. To this distinction Mackin adds that “this completeness is found in its being a *sacramentum* of Christ and the Church.”⁹⁶ Here again is the connection between the sacrament as permanent pledge and commitment and sexual intercourse. The dispute was resolved in the judgments of Pope Alexander III in which he ruled that consent *de praesenti* creates a true marriage, but only a marriage consummated by sexual intercourse after consent is truly indissoluble. His judgments and doctrines were confirmed by succeeding popes and concretized in canon law.

By the beginning of the thirteenth century, marriage was accepted as one of the seven sacraments. With marriage cases under the jurisdiction of the church, clearly defined legal and theological categories were needed. During this period of classical canon law, the church’s concept of marriage was systematized, structured, and classified

95. Mackin, *Divorce and Remarriage*, 275.

96. *Ibid.*, 285.

both juridically and theologically. Although marriage was not deemed a contract in ancient Rome, the model of consensual contract from classical Roman law provided such seemingly neat legal categories. As a consensual contract, marriage required no formal ceremony and allowed for the freedom of the parties to choose whom to marry. John Witte explains, “Although the Fourth Lateran Council of 1215 and later canon laws strongly encouraged the couple to seek the consent of their parents, to publish their banns for marriage in the church, to solemnize their union with the blessing of the priest, to invite witnesses to the wedding, and to comply with the marital customs of their domicile, none of these steps were absolute requirements.”⁹⁷ For Christians, this natural and contractual institution of marriage was considered a sacrament, a sign of the invisible union of Christ and the church.

3.3.4 Aquinas

Aquinas held that the sacrament is intrinsic to marriage, and although he does not specifically identify the minister of the sacrament, he implies that the spouses are.⁹⁸ Within Aquinas’s work, the matter and the form of the sacrament of marriage are not clearly delineated. In his *Commentary on the Sentences of Peter Lombard*, Aquinas states,

The words in which the matrimonial consent is expressed are the form of this sacrament, not the blessing of the priest, which is a certain sacramental. The sacrament of matrimony is completed by the action of the one who avails himself (*uti*) of this sacrament, just like penance; and thus, as penance does not have any

97. John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, The Family, Religion, and Culture, ed. Don S. Browning and Ian S. Evison (Louisville, KY: Westminster John Knox Press, 1997), 26.

98. Aquinas, *In IV Sent.*, Distinction 28, Question 1, art. 3. Translation is found in Beth M. Mortensen, "The Relation of the Juridical and Sacramental in Matrimony According to Thomas Aquinas" (PhD diss., Freiburg-Schweiz, 2012).

other matter than those sensible acts themselves which are in place of a material element, so it is with marriage.⁹⁹

For Aquinas, the essence of marriage is a non-sensible relation, which is a “conjoining.”¹⁰⁰ Although the essence of marriage is not sensible, the efficient cause of marriage, that is consent, is sensible. He purports, “But the words expressing consent, which are the *sacramentum tantum* and the cause of the aforementioned conjoining, are sensible.”¹⁰¹ In a way that is left unexplained, the sign of marriage, composed of matter and form, is the *sacramentum tantum*, the words expressing consent. According to Mackin, Aquinas identified the matter of the sacrament as each spouse’s expression of consent both at the wedding ceremony and also during the life of the marriage as each spouse’s will to be married. For Aquinas, this *materia* is “in-formed, not by any words or actions of the priest, as in baptism, but by the reciprocal consent of the other spouse.”¹⁰² In this way, the words of consent constitute a mutual giving and receiving, which causes the *res et sacramentum*, “the bond of obligation.”¹⁰³ This bond (*vinculum*) is the cause of grace, *res tantum*. By the fourteenth century, much of the nuance and delicate precision of Aquinas’s theology had settled into legal terminology. Marriage was primarily considered a contract consisting of the mutual exchange of rights resulting in the creation

99. Aquinas, *In IV Sent.*, Distinction 26, Question 2, art. 1, ad 1, 2.

100. Aquinas, *In IV Sent.*, Distinction 27, Question 1, art. 1.

101. Aquinas, *In IV Sent.*, Distinction 27, Question 1, art. 1, qc. 1, ad 2.

102. Mackin, *The Marital Sacrament*, 347.

103. Aquinas, *In IV Sent.*, Distinction 26, Question 2, art. 3, ad 2.

of the marital bond (*vinculum*), which is the very essence of marriage. The Roman understanding of marriage as a union of wills gave way to a solely juridical definition.¹⁰⁴

3.3.5 The Reformers and the Council of Trent

In the sixteenth century Martin Luther and the early reformers questioned the Church's authority to regulate Christian marriage. Witte claims, "The Catholic Church's jurisdiction over marriage was, for the reformers, a particularly flagrant example of the Church's usurpation of the magistrate's authority. The Catholic sacramental concept of marriage, on which the Church predicated its jurisdiction, raised deep questions of sacramental theology and scriptural interpretation."¹⁰⁵ For the reformers, marriage was not a means of grace and redemption, but rather a natural and social estate for the good of the earthly kingdom which should be under the governance of civil rulers.¹⁰⁶ The Catholic Church responded to the claims of the reformers through the Council of Trent (1545-1563). In a series of canons, the Catholic Church anathematized the opinion of anyone who denied that marriage is a sacrament and belongs to the order of grace. Therefore, the church has the power to regulate the marriages of its people and to grant dispensations, dissolutions, and declarations of nullity. To control the problem of clandestine marriages, the council imposed the necessity of the presence of an authorized priest and two witnesses at the giving of consent for the validity of the marriage. Spouses were still considered the ministers of the sacrament, now with the priest present to witness and record the contract. Örsy states that "the very idea of adding a 'canonical

104. Mackin, *What is Marriage?* 186.

105. Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 42; Mackin, *Divorce and Remarriage*, 377.

106. Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 51.

form' to the theological structure of a sacrament was a new departure.”¹⁰⁷ Mandating canonical form was effectively issuing a juridical response to a practical problem. The practice was difficult to implement at first and raised more theological questions regarding the relationship of the contract to the sacrament. Mackin concurs by stating that the theologies of marriage in the centuries following Trent until the Second Vatican Council could be viewed as attempts to find theological bases for the Tridentine decrees.¹⁰⁸

3.3.6 The Emerging Personalist Theology of Marriage and Codification

By the time of the promulgation of Pope Leo XIII's encyclical *Arcanum divinae sapientiae* in 1880, changes in “the pre-theological appreciation of marriage” had contributed to an emerging personalist theology of marriage.¹⁰⁹ Those priests who wrote and taught about marriage, while not themselves married, had more frequent and pastoral contact with married persons. Greater real knowledge of the experiences of married persons led eventually to a more authentic picture of married love.¹¹⁰ Leo's *Arcanum* recognized the injustice incurred by women in marriages, the mutual love and companionship of spouses, and the ways in which marriage can make the lives of spouses better.¹¹¹ Despite the gradual movement toward a personalist theology of marriage, the codification of canon law in 1917 crystallized precise juridical terms and definitions

107. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 34.

108. Mackin, *The Marital Sacrament*, 435.

109. *Ibid.*, 494.

110. *Ibid.*, 494-96.

111. Leo XIII, *Encyclical of Pope Leo XIII on Christian Marriage Arcanum Divinae Sapientiae*. February 10, 1880, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_10021880_arcanum_en.html (accessed June 20, 2008).

somewhat removed from the real experiences of married persons. The Code emphasized procreation as the primary end of the institution of marriage and the right to one another's acts that lead to procreation (*ius in corpus*) as the object of marital consent. According to the Code, the essential traits of the marriage contract are unity (meaning sexually exclusive monogamy) and indissolubility; both traits are necessary in order that the marriage reach its primary extrinsic end, namely procreation and nurture of children. While all marriages are indissoluble, this indissolubility gains a "unique firmness" in Christian marriage due to the sacrament.¹¹² All of these juridical statements required practical application and theological explication and justification.

While emphasizing the child as the primary blessing of marriage, *Casti connubii* promulgated by Pope Pius XI in 1930 advanced theological thinking concerning marriage by explicitly maintaining that conjugal faith is a holy kind of love that expresses itself in action. Essentially, Pius is arguing that the loving actions of spouses contribute to their sanctification and holiness. Marriage as sacrament can have a truly salvific role in the lives of husbands and wives:

This outward expression of love in the home demands not only mutual help but must go further; must have as its primary purpose that man and wife help each other day by day in forming and perfecting themselves in the interior life, so that through their partnership in life they may advance ever more and more in virtue, and above all that they may grow in true love toward God and their neighbor, on which indeed "dependeth the whole Law and the Prophets."¹¹³

112. Mackin, *The Marital Sacrament*, 530.

113. Pius XI, *Encyclical of Pope Pius XI on Christian Marriage Casti Connubii*. December 31, 1930, Libreria Editrice Vaticana, no. 23, http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html (accessed June 20, 2008).

He continues by stating that this mutual effort to perfect each other can be the “chief reason and purpose of matrimony.”¹¹⁴ The movement toward a personalist theology of marriage becomes even clearer in the work of Dietrich von Hildebrand and Herbert Doms who find marriage’s ultimate meaning in the community of love that marriage is. In other words, the most significant value of marriage is intrinsic and not instrumental.¹¹⁵ In spite of the fact that Doms’ work was indirectly condemned by the Congregation of the Holy Office in 1944, this person-centered theology of marriage found expression in the documents of Vatican II.

3.3.7 The Second Vatican Council and the Revised Code of Canon Law

As discussed in Chapter Two, the emerging communion ecclesiology prior to the council opened the doors for a new vision of marriage, one that emphasized covenant and conjugal love. In the theology of Vatican II, there is no mention of hierarchically ordered ends to marriage, and technical, juridical language is avoided. Those in the Central Preparatory Commission who objected to the use of overly juridical language in the schema on marriage (which was eventually rejected) did so due to the “many damaging mistakes” in pastoral practice incurred when marriage is treated “in an exclusively negative and juridically analytic way rather than in a spirit of charity and concern.”¹¹⁶ Theology and pastoral practice must come together in a way that meets the real needs of the church community. The need for effective, authentic practical application should drive theological thinking.

114. Pius XI, *Encyclical of Pope Pius XI on Christian Marriage Casti Connubii*, no. 24.

115. Mackin, *What is Marriage?* 226.

116. *Ibid.*, 253.

The theology of marriage and family that can be gleaned from the Second Vatican Council was the end result of much debate and innovation, particularly the chapter on marriage in *Gaudium et spes*. Mackin claims that the absence of contractual language and the hierarchy of ends in describing marriage must be intentional.¹¹⁷ The absence of such language spurred many questions in the years following the council. Did traditional Catholic doctrine on marriage substantially change at the Second Vatican Council? Does the fact that *Gaudium et spes* is a pastoral document addressed to the world alter the doctrinal weight of its teachings? Is juridical language regarding marriage essential to Catholic doctrine? Finally, is the traditional way of speaking about marriage really the product of an underlying philosophical matrix that no longer makes sense to contemporary spouses? How does theological and canonical language coexist in describing the truth of what the marital sacrament is?

Nearly twenty years passed before the theology of Vatican II was translated into canon law. Since the promulgation of the new Code in 1983, canonical decisions have applied these translations of the meaning of marriage and the sacrament into the concrete lives of Christian spouses. These practical judgments must then make sense within a theological horizon. Identifying and understanding what marriage is, what the sacrament is, what consent is, and the what the effects of marriage are—these are the tasks not merely of this dissertation but of the living church today.

117. Mackin, *The Marital Sacrament*, 539.

3.4 Consent Creates Marriage

3.4.1 *Matrimonium in fieri*

In articulating the holiness of marriage and family, *Gaudium et spes* affirms that marriage begins in the human act of personal consent. *Matrimonium in fieri*, or marriage in the act of being constituted or in the time of becoming, is the act of consent which brings about *matrimonium in facto esse*, marriage as it is lived out. Of course, the meaning of “consent” is rich and, therefore, the focus of this study. Nevertheless, the council fathers uphold the fundamental teaching that marriage begins in consent:

The intimate partnership of life and the love which constitutes the married state has been established by the creator and endowed by him with its own proper laws: it is rooted in the contract of its partners, that is, in their irrevocable personal consent. It is an institution confirmed by the divine law and receiving its stability, even in the eyes of society, from the human act by which the partners mutually surrender themselves to each other; for the good of the partners, of the children, and of society this sacred bond no longer depends on human decision alone.¹¹⁸

Clearly, something new is expressed in Catholic teaching regarding marriage and family at Vatican II. The personalist vision of marriage earlier deemed suspect is woven into an institutional understanding with elements of each remaining. In the preceding text alone, marriage is described as an “intimate partnership of life” constituted by love; yet at the same time, marriage is deemed a “state” and an “institution” “with its own proper laws.” First, to the objection that *Gaudium et spes* carries reduced doctrinal weight due to its pastoral nature, Huizing replies that such an assertion is antithetical to the intentions of John XXIII and the document itself. His reply is that “the Church’s doctrinal teaching is

118. *The Church in the Modern World Gaudium et Spes* in *Vatican Council II: The Conciliar and Post Conciliar Documents*, new rev. ed., Austin Flannery (Northport, NY: Costello Publishing Company, 1996), no. 48. All references to the documents of Vatican II will be from this text.

pastoral” and “its magisterium is predominantly pastoral in character.”¹¹⁹ He continues by noting the intermingling of the personalist understanding of marriage with the institutional and sees no reason why they should not coexist.¹²⁰ As the pastoral constitution plainly states, marriage is personally good for the spouses and their children, and it is good for society as a whole. An institution is good for society, because it makes sense out of complex patterns of behavior causing other behavior to appear chaotic. In this case, marriage as an institution makes sense out of human sexual behavior and provides innumerable benefits to all as previously listed in Chapter One. The personalist and institutional aspects of marriage sustain one another so that marriage is beneficial for all. Klaus Lüdicke explains how these personalist and institutional aspects converge in consent:

Considerations directed at the community revolve around its detachment from human caprice, especially as regards the indissolubility of marriage, as well its institutional orientation towards the procreation and education of offspring. In this way, the institution is not made subordinate to the personal dimension as if it were possible for the spouses to change the institution of marriage or to subject it to their personal necessities. But the basis for the existence of the institution is the partners’ personal acceptance of one another, the consent for one another.¹²¹

The very personal and human act that constitutes marriage is consent.

The Latin *consensus* implies that two people are of one mind and will. The prefix “con” signals mutuality, a with-ness. *Consensus* means feeling with, sensing with, and understanding with. It is a kind of mutual agreement that creates a bond of commitment

119. Peter J. Huizing, “Canonical Implications of the Conception of Marriage in the Conciliar Constitution *Gaudium Et Spes*,” in *Commitment to Partnership: Explorations of the Theology of Marriage*, ed. William P. Roberts (New York, NY: Paulist Press, 1987), 106.

120. *Ibid.*, 107.

121. 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): 484.

or obligation. Peter Elliott reinforces this point by commenting that “it seems tautologous even to say ‘mutual consent,’ although the adjective is added for emphasis, to underline the mutuality of this unique kind of consent.”¹²² To state that consent is a human act means that it is done with sufficient awareness and deliberation. A human act, *actus humanus*, is juxtaposed with an act of a human, *actus hominis*, based upon the level of knowledge and freedom with which the act is performed. Human acts are the focus of moral theology and both civil and canon law. The difficulty with understanding and evaluating human acts, such as consent, is that most acts fall between the two extremes of a purely *actus humanus* and a strictly *actus hominis*.¹²³ How free are we in any given act? How much awareness do we really have as we act in the world? Consent can be impeded or defective due to some lack in one’s capacity, in one’s knowledge, or in one’s will. These distinctions will be significant as the meaning of consent in canon law is articulated more fully in Chapter Five.

According to *Gaudium et spes*, marriage is “rooted in” the spouses’ irrevocable personal consent. Such language implies that the spouses’ consent contains the potential for all the marriage is going to be as it grows, or possibly fails to grow. As Martin Lavin points out, *matrimonium in fieri* and *matrimonium in facto esse* are not strictly temporal categories:

In Thomistic thought, however, *matrimonium in fieri* and *in facto esse* must exist simultaneously in their possibility (*in potentia*) *ab initio*. The realization, the living out, of the *in facto esse* comes about temporally after the consent is voiced *in fieri* at the wedding; but the possibility for realizing the *in facto esse* afterwards must be there at the wedding also. *Matrimonium in fieri* and *in facto esse* are two

122. Elliott, *What God Has Joined: The Sacramentality of Marriage*, 120.

123. Timothy E. O’Connell, *Principles for a Catholic Morality*, revised edition (New York, NY: HarperCollins Publishers, 1990), 53.

sides of the same coin which—to follow through on the wedding jingle—both bride and groom must have on their persons during the wedding.¹²⁴

Matrimonium in fieri and *in facto esse* are intimately connected, with the former containing all that the latter can be. *Gaudium et spes* 48 claims such consent is irrevocable. In other words, although consent is a human act, once it is given, it no longer depends upon human will. This is a decisive and often divisive Catholic teaching that will be explored in depth in later chapters.

3.4.2 Contract and Covenant

Although Flannery's translation of *Gaudium et spes* 48 states that marriage is rooted in the "contract" of its partners, the Latin *foedus* is better translated "covenant." Contractual language was not used of marriage until the Scholastic period and later concretized in the 1917 Code of Canon Law where the object of the consensual contract was named the *ius in corpus*. Marriage as a contract depicts a static view of marriage centered upon the moment of consent and the exchange of rights and obligations in a juridical agreement. The contractual description of marriage in the 1917 Code was based upon a restrictive theology of marriage devoid of any personalist elements of marriage that would emerge later. Because of the prior baptism of the spouses, the contract of marriage was declared a sacrament. Deliberately, the use of contractual language was avoided at the Second Vatican Council. Marriage as sacrament participates in the union of Christ and the church, which could hardly be called a contract. Additionally, the council wanted to avoid this term to remain in agreement with the Eastern Church.¹²⁵

124. Martin E. Lavin, "Approaches to Traditional Grounds and the *Bonum Coniugum*: Something Old, Something New, Something Borrowed, Something Askew," *CLSA Proceedings* 55 (1993): 123-24.

125. Peter Jeffery, *The Mystery of Christian Marriage* (Mahwah, NJ: Paulist Press, 2006), 51-52.

Although *foedus* could be translated “agreement, compact, pact, treaty, or alliance,” the more biblical and theological term is covenant.¹²⁶

Covenant expresses Yahweh’s relationship with His people and Christ’s union with the church. It is a relationship begun in a profound promise of fidelity and care. Michael Lawler articulates the connection between consent, covenant, and commitment, both in marriage and the divine-human relationship. “To covenant is to consent and to promise, so that both parties, equal or unequal in other respects, are mutually committed to one another solemnly and radically.”¹²⁷ Marriage as covenant is a symbol of the Christ-church relationship. Kasper asserts that “covenant is the reality of salvation as such.”¹²⁸ Jesus Christ as the union and unconditional acceptance of humanity with divinity is God’s covenant.¹²⁹ To say that marriage is a symbol or sacrament of God’s love is more consistent with marriage as covenant than contract. Covenants, like marriages, are complex, multi-faceted relationships. They are personal and institutional, private and public, theological and legal.¹³⁰ The marriage covenant is an irrevocable, mutual giving and receiving of persons. Mackin expounds,

This notion of the reciprocal gifting of persons is a charged one. It is biblical; it is pre-judicial and pre-contractual. Indeed it excludes contractuality because precisely what an act of contracting is not is an exchange of gifts. What is given under contract, or given initially to create a contract, is not intended as a gift. It is

126. Elliott, *What God Has Joined: The Sacramentality of Marriage*, 176.

127. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (Collegeville, Minnesota: The Liturgical Press, 2002), 201-2.

128. Kasper, *Theology of Christian Marriage*, 34.

129. *Ibid.*, 35.

130. *Ibid.*, 41.

intended either to create an obligation in commutative justice or to fulfill this obligation.¹³¹

Mackin's assertion raises an interesting question. Are covenanting and contracting mutually exclusive? Since covenants, particularly marriages, involve gifts of self and love, is contractual language involving rights, obligations, and justice wholly inaccurate? It would be more accurate to say that contractual language *alone* is *insufficient* rather than inaccurate, because contract expresses the minimum of covenant. The contractual elements of marriage can be incorporated into the view of marriage as covenant which is richer and deeper. Örsy articulates this movement in the theology of marriage at Vatican II. "This new relationship between contract and covenant is best understood if the move from contract to covenant is considered as a move to a higher viewpoint. Nothing is lost, everything is enriched; contract is contained in the covenant but does not exhaust it."¹³² Örsy's language of lower and higher, or minimum and maximum, more adequately describes the relationship of contract and covenant. They are not mutually exclusive. In a similar way, obligation and justice are minimal terms pertaining to relationships, whereas gift and love are maximal. Love includes justice, and giving freely of oneself creates rights and obligations, the exchange of which is the very minimum of the giving. The contractual understanding of marriage speaks of the giving and receiving of *rights and obligations*; whereas the covenantal conception proposes the giving of *persons*. Of course, "the giving of persons" is a very nebulous expression. Precisely what that means, particularly in the concrete discipline of canon law, will be

131. Theodore Mackin, "How to Understand the Sacrament of Marriage," in *Commitment to Partnership: Explorations of the Theology of Marriage*, ed. William P. Roberts (New York, NY: Paulist Press, 1987), 46.

132. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 50.

fleshed out later. Kenneth Himes and James Coriden convey the difference between marriage as contract versus covenant succinctly. “When viewed as a covenant, marriage asks not the minimum (do not betray me) but the maximum (be devoted to me).”¹³³

Perhaps the difficulty in the use of contractual language for marriage can be traced to the Enlightenment model of marriage in which “the essence of marriage was the voluntary bargain struck between two parties who wanted to come together into an intimate association.”¹³⁴ The terms of the contract are in the hands of the parties themselves free from any predetermined definition of marriage from church or nature. Present debates over same-sex marriage and divorce and remarriage can be seen as the direct descendents of the Enlightenment contractual model of marriage. In this model, the terms of the marital contract must respect “the life, liberty, and property interests” of the other party while at the same time upholding “general standards of health, safety, and welfare in the community.”¹³⁵ It is this capricious notion of contract that seems at odds with marriage as sacrament. Ordinary married persons often speak freely and without trepidation of the contractual aspects of marriage. Married persons “tie the knot” and “get hitched” and know they are in some way bound to one another for life. Elliott states, “Unlike some theologians, they are not uncomfortable with the human dimension of contract in this sacrament. If Our Lord can use bread, wine, oil, water, words, why can he not incorporate the human contract into a sacrament?”¹³⁶ However, this marital

133. Kenneth R. Himes and James Coriden, "The Indissolubility of Marriage: Reasons to Reconsider," *Theological Studies* 65 (2004): 479.

134. Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 10.

135. *Ibid.*

136. Elliott, *What God Has Joined: The Sacramentality of Marriage*, 130.

contract has a certain basic structure that the spouses cannot alter for themselves. Determining the precise content of this basic structure is the very difficult task of canonists together with theologians, both ordained and non-ordained.

3.4.3 Faith and Intention

Marriage, which is rooted in the *foedus* of its partners, is a relationship begun and sustained in faith. Geoffrey Robinson notes “the word *foedus* comes from the same root as *fides* and *fidelitas*.”¹³⁷ It is a covenant based upon faith and trust, in which both partners hope for love that is given and received for a lifetime. All marriages are based upon faith in the other partner, while sacramental marriages are founded in faith in God, also. Robinson contends that whereas “contract implies the possibility of revocation,” “covenant essentially involves personal commitment and cannot be revoked.”¹³⁸ The possibility of rescinding the commitment once given implies that the relationship is something less than a covenant. The covenant God establishes with His people is created to endure for all time. The biblical understanding of covenant cannot be applied unilaterally to marriage, because the God-human covenant exists between unequal parties, whereas husband and wife are equal in dignity. That being said, the biblical view of covenant illuminates human marriage through their similarities. First, the establishing of a covenant is a gift. The offer and creation of a covenant is not an obligation or requirement, but rather a free, undeserved gift. God’s great covenant in Jesus is pure gift. In human marriage, the gift of self is mutual as it is a relationship of equals. However, just as God bent low or gave more to remain faithful and loving in His commitment, so

137. Geoffrey Robinson, "Unresolved Questions in the Theology of Marriage," *The Jurist* 43, no. 1 (1983): 96.

138. *Ibid.*

also must spouses sometimes give and forgive more in the context of the relationship. Second, the covenantal gift of self can only be received in faith. Each partner trusts the other and hopes one's gift of love will be received and returned. Indeed, faith is the bedrock of a covenant. Third, in the sacrament of marriage, the spouses believe that God will remain faithful to the covenant established with them as a couple. They believe not only in each other, but also in God who can and will sustain their love.

Because the sacraments are graced interactions between God and the participant, faith is necessary not only for the fruitful reception of the sacraments, but also for their validity. *Sacrosanctum concilium* teaches regarding the sacraments, "They not only presuppose faith, but by words and objects they also nourish, strengthen, and express it. That is why they are called 'sacraments of faith.'"¹³⁹ Faith is both a virtue and an act, a readiness to believe and an act of trusting. Juan Alfaro describes the "organic interrelation" of faith's many aspects and its fundamental character:

Faith is not so much an act or a series of acts as a basic and total attitude of the person, giving life a new, definitive direction. It comes from depths of human freedom, where man has received the interior invitation of grace to enter the intimacy of God; it embraces his whole being—intellect, will, all that he does (submission to the mystery, the love, and the law of Christ).¹⁴⁰

Faith, as a fundamental life direction, is essential to the sacraments. So much so that it is meaningless to speak of sacramental action without faith. However, it is not faith alone that makes marriage a sacrament. God's actions through Christ in the Holy Spirit make marriage a prophetic symbol of God's love for His people. Faith *recognizes* that through Christ, spouses become capable of loving each other as God intended and of manifesting

139. *Sacrosanctum Concilium*, no. 59.

140. Juan Alfaro, "Faith," in *Sacramentum Mundi: An Encyclopedia of Theology*, vol. 2 (New York, NY: Herder and Herder, 1968), 313, 319.

to the world God's covenantal love. The International Theological Commission states, "The sacramentality of Christian marriage becomes apparent in faith. . . . The spouses attest within the Church that they are committed to a conjugal life and expect from Christ the force to accomplish this form of love that without him would perish."¹⁴¹ Faith makes it possible to see and experience this human relationship as an encounter with the divine.

Of critical importance in sacramental theology is the notion of *intention*. A person must intend to do what the church does in the sacramental rite. Lawler explicates, "The intention necessary to participate in a sacrament is the intention to participate in a rite that gives salvation, a God-in-Christ and Christ-in-the-Church event."¹⁴² One's knowledge and freedom must be engaged in order to intend the sacrament as the church does. Persons must cooperate and participate in the sacraments for them to be valid and efficacious. "A sacrament is a sign not only of the gracing action of God in Christ (*opus operatum*), but also of the free faith of the participant cooperating with grace in this ritual (*opus operantis*)."¹⁴³ The salvific action of God and the faith of the participant work together in the sacrament in much the same way that the divine offer and human acceptance of God's love come together in Christ, the primordial sacrament. Faith and intention are not identical but are intrinsically related. The intention that is necessary for sacramental validity "is born from and feeds on living faith."¹⁴⁴ In the sacrament of

141. International Theological Commission, *Christological Theses on the Sacrament of Marriage*. 1977, no. 7, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html (accessed Feb 23, 2013).

142. Lawler, *Marriage and the Catholic Church: Disputed Questions*, 53.

143. *Ibid.*, 50.

144. International Theological Commission, *Propositions on the Doctrine of Christian Marriage*, prop. 2.3.

marriage in the West, the spouses are the ministers of the sacrament, and both must have the intention “as an integral element of their consensus or mutual consent, of entering into their marriage in the Lord.”¹⁴⁵ They must intend to enter a lifelong, exclusive, and procreative union.

If the validity of sacramental action depends upon right intention, what constitutes this intention? Kasper answers,

According to the traditional teaching of the Church, it does not need to be consciously present at the moment; all that is required is that it should be virtually present. It must, however, not be purely externally orientated towards the performance of external actions under the customary circumstances (the place, time, dress, and so on). Nor does it need to be a special or deeply reflected intention; . . . It is sufficient to have a general and direct intention to do what Christians are in the habit of doing in the rite in question.¹⁴⁶

This minimalist explanation of sacramental intention leaves the theological question open to further thinking; consequently, an open theological position leads to practical uncertainties and pastoral challenges, which then lead to more theological questions. The practical problem this position creates is that of baptized nonbelievers. According to the Code, “a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament.”¹⁴⁷ The difficulty lies in the fact that the baptismal rite alone does not guarantee that baptismal commitment will follow. The practical problem to be addressed becomes: how do we measure faith in order that the faith necessary for sacramental intention is assuredly present? Pope John Paul II declares that the couple’s consent to a permanent and faithful union is a sufficient demonstration of their faith:

145. Kasper, *Theology of Christian Marriage*, 82.

146. *Ibid.*

147. Canon 1055 §2.

Therefore the decision of a man and a woman to marry in accordance with this divine plan, that is to say, the decision to commit by their irrevocable conjugal consent their whole lives in indissoluble love and unconditional fidelity, really involves, even if not in a fully conscious way, an attitude of profound obedience to the will of God, an attitude which cannot exist without God's grace. They have thus already begun what is in a true and proper sense a journey towards salvation, a journey which the celebration of the sacrament and the immediate preparation for it can complement and bring to completion, given the uprightness of their intention.¹⁴⁸

The decision to marry in the church is an implicit act of faith. John Paul II describes the preparation for marriage and the rite as the beginning of a journey of faith. In the above passage, he explicitly identifies consent with a commitment to life-long love and fidelity. Consent so understood implies a posture of faith. Further, he warns that the identification of criteria concerning faith would present "grave risks" including making "discriminatory judgments" and "causing doubts about the validity of marriages already celebrated."¹⁴⁹

The only grounds for refusing couples to the celebration of marriage is their *explicit and formal rejection* of what the church intends to do when the marriage of baptized persons is celebrated, which essentially means lack of right intention. Evidence of formal and explicit rejection of the faith by one or both of the spouses means participation in the sacrament of marriage is impossible; however, as canon law currently exists, a valid matrimonial contract cannot exist without the sacrament. Therefore, baptized nonbelievers are deprived of their natural right to marry, because as baptized persons they cannot marry without the sacrament, yet as nonbelievers they cannot participate in a sacrament of faith. How this practical problem may or may not be resolved theologically and juridically will be addressed in the later chapters.

148. John Paul II, *Apostolic Exhortation of Pope John Paul II Familiaris Consortio*, November 22, 1981, no. 68, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html (accessed July 24, 2005).

149. Ibid.

3.4.4 *Ratum et Consummatum*

As explained previously, consent alone creates *matrimonium ratum*. For marriage to be considered *ratum et consummatum* the couple must engage in sexual intercourse completed in a human manner that is suitable for procreation and allows the couple to become one flesh, a permanent union. Elliott designates consent as “consent for consummation.”¹⁵⁰ He describes consent as “a choice for ‘one flesh,’ expressed and made permanent by sexual union.”¹⁵¹ In the current law and theology of the magisterial church, consent initiates marriage which is then completed, fulfilled, accomplished, that is, consummated in nuptial sexual intercourse. Consent for consummation highlights the deeper meaning of marital consent as a choice to give oneself to the other together with the choice to accept the other in return. The giving and receiving of marital love expressed in sexual intercourse symbolizes the mutual and reciprocal love of Christ and the church. In nuptial sexual love, spouses accept one another in all their concrete reality and specificity and not as “some imaginary ideal figure.”¹⁵²

Real concern has been expressed by theologians and canonists as to how the fullness of married love can reach its completion in one act of sexual intercourse usually occurring within twenty-four hours after consent is expressed. Bernard Cooke anticipates the future of such a theology in practice. “It is true that for two people deeply in love, there is often profound meaning in their first full sexual intimacy, but theirs will be a sad married life if they do not progress in their self-giving far beyond this first

150. Elliott, *What God Has Joined: The Sacramentality of Marriage*, 138.

151. *Ibid.*

152. *Ibid.*, 139.

experience.”¹⁵³ Himes and Coriden argue for a rethinking of consummation. In a purely contractual understanding of marriage, giving and assuming the *ius in corpus* constitutes *matrimonium ratum*, and the giving and receiving of those acts suitable to procreation constitutes *matrimonium ratum et consummatum*. They state, “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.”¹⁵⁴ In a personalist understanding of marriage as covenant, are there other ways of articulating what constitutes consummation? Himes and Coriden continue,

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.¹⁵⁵

This is the perennial problem in canonical science: How does the church support, maintain, and protect the fullness of theological values within limited, concrete, specific canons?

Before the translation of theological values into canonical norms can occur, agreement needs to be reached on the theological meaning of consummation. Mackin asserts that to consummate a marriage means “to bring the marital relationship to its fullness.”¹⁵⁶ Lawler concurs and adds, “A marriage and, therefore, a sacrament of

153. Bernard Cooke, “Indissolubility: Guiding Ideal or Existential Reality?” in *Commitment to Partnership: Explorations of the Theology of Marriage*, ed. William P. Roberts (New York, NY: Paulist Press, 1987), 73.

154. Himes and Coriden, “The Indissolubility of Marriage: Reasons to Reconsider,” 484.

155. *Ibid.*

156. Mackin, *The Marital Sacrament*, 674.

marriage reach perfection only when the faith-informed love that undergirds them reaches perfection, only when marital love has reached such fullness that the spouses would not place it second to any other human reality.”¹⁵⁷ Obtaining clarification regarding the content and meaning of marital consummation is significant, because only marriages consummated as a sacrament are considered intrinsically and extrinsically indissoluble. This is referred to as radical or absolute indissolubility. The primary reason given for this absolute indissolubility is the symbolizing function of sacramental and consummated marriage. Because the bond between Christ and the church is indissoluble, the sacramental, consummated marriages of men and women are deemed indissoluble. With a greater emphasis on the experience of marriage and its personalist aspects, Mackin views marriage, consent, consummation, and indissolubility as processual. He explains, “Just as not all spouses create the sacrament instantaneously by the same one act of consent that creates marriage, and just as they do not consummate their sacramental marriage by a single intercourse, but *may* do the first gradually and *can* do the second only gradually, so they build immunity into their marriage only gradually.”¹⁵⁸ He sees a couple’s sacramental marriage as immune to dissolution when the trust and love in their relationship are so solid that the marriage is incapable of being destroyed, by themselves or any other power. He argues that the image of Christ’s metaphoric marriage with the church does not have a causative, ontological effect on real marriages, but rather a deontological effect. The symbolizing function of the Christ-church relationship establishes a moral imperative, not an ontological impossibility of

157. Michael G. Lawler, "Blessed Are Spouses Who Love, for Their Marriages Will Be Permanent: A Theology of the Bonds in Marriage," *The Jurist* 55 (1995): 236.

158. Mackin, *The Marital Sacrament*, 673.

dissolution. In his view, a marriage that is immune to dissolution is one that has been consummated by repeated acts of love and trust over a lifetime creating marital virtues that support a “habitual will for the other’s well-being.”¹⁵⁹ The union of spouses together with God grows to become so strong that it becomes “functionally impossible” for either spouse to destroy their union through refusal to love and trust.¹⁶⁰

Rather than viewing consummation as the perfection or fulfillment of the marital covenant, other theologians seeking to defend the position of the magisterial Church on indissolubility present consummation differently. In a reply to Himes and Coriden, Peter Ryan and Germain Grisez state that the first act of marital intercourse following consent is not the “symbol of consummation”¹⁶¹ but rather the completion of the “spouses’ contribution to the *coming-to-be* of their two-in-one-flesh covenantal union.”¹⁶² In their view, consent signifies the free and total self-giving of the spouses, the full reality of which comes into being in the first act of marital intercourse. Referring back to the teaching of John Paul II and the Genesis passage of two-in-one-flesh (Gen 2:24), Ryan and Grisez maintain that conjugal intercourse completes consent and joins the couple indissolubly to God and one another. They argue that to uphold the view that consummation means the perfection of the love relationship leads to uncertainty, ambiguity, and confusion. It seems that one could argue that in the view of the magisterial Church and those that defend her position, consummation occurs at the beginning of marriage and constitutes the cause of the marital covenant. On the other

159. Mackin, *The Marital Sacrament*, 675.

160. *Ibid.*, 674.

161. Himes and Coriden, "The Indissolubility of Marriage: Reasons to Reconsider," 484.

162. Peter F. Ryan and Germain Grisez, "Indissoluble Marriage: A Reply to Kenneth Himes and James Coriden," *Theological Studies* 72 (2011): 382.

hand, one might infer from the arguments of Mackin, Lawler, Himes, and Coriden that consummation is evident (or not) at the end of the marriage, with the death of one of the spouses, and is the effect of the growth and development of the couple's faith and love over a lifetime. Mackin explains,

To consummate a marriage is not to enter a final marital category. It is to bring the marital relationship to its fullness. For two reasons this fullness is not a fixed and final point. First, the substance of a marital relationship is the spouses' caring love for one another. But such love has no fixed and final degree—unless perhaps it is the same degree to which Christ took his love by giving up his life. Second, for Christians the marital relationship is sacramental in that it participates in Christ's redemptive work. The only final form and degree conceivable for this work is also a replication of Christ's death. The move toward completion in both senses is always a process, a development that need end only with death.¹⁶³

Lawler concurs with this position, adding that the criterion for the verification of marital consummation is personal rather than juridical and, consequently, inexact. Lawler states, "Both marriage and the sacrament of marriage reach their perfection or consummation, and become permanent or indissoluble, only when the faith-informed mutual love of the spouses on which they are founded becomes perfect, or consummated and permanent, or indissoluble."¹⁶⁴ Is there a way in which these two views may coincide? Must juridical and personalist views of marital consent and consummation be mutually exclusive? Such questions can be better addressed only after completing this study of the theology of sacramental marriage and how it relates to canon law.

163. Mackin, *The Marital Sacrament*, 674.

164. Lawler, "Blessed Are Spouses Who Love, for Their Marriages Will Be Permanent: A Theology of the Bonds in Marriage," 241.

3.5 Encountering God in Sacramental Marriage – Grace

3.5.1 *Matrimonium in facto esse*

As previously explained when discussing Aquinas, the immediate effect of the *sacramentum tantum*, consent, is not supernatural grace, but rather the *res et sacramentum*, the conjugal bond. The bond of marriage, which is the key or centerpiece to a sacramental theology of marriage, has not yet been clearly defined. Again, the importance of theological and canonical precision is paramount “for the sake of those who eventually will have to carry in real life the burden of our theoretical conclusions.”¹⁶⁵ As Kasper explains, the bond “is an intersubjective ontological intention and determination made in freedom through which a man and a woman reach their definitive status in and through their bond of unity.”¹⁶⁶ This ontological change in and between the persons is lasting and bears some comparison to the indelible character imparted in baptism, confirmation, and orders. The bond is ontological yet not separable from the couple. Using scholastic terminology, Örsy explains that the bond is not a substance, but rather an accident, a relation, that finds its being in the substances of the spouses:

The bond is the specific marital relationship of a man to a woman and vice versa, an *esse ad*; that is, a general orientation in the world of their intentionality; an orientation that permeates and dominates their judgments and decisions. Quite appropriately it could be called “conversion” (turning to in a radical sense) to another person. In the case of a sacramental marriage God himself grants a special grace-filled dimension to this bond.¹⁶⁷

165. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 205n.

166. Kasper, *Theology of Christian Marriage*, 23.

167. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 204n.

Örsy identifies the bond as a “relationship of obligation.”¹⁶⁸ The conjugal bond, *vinculum* meaning “chain,” makes the man and woman spouses by binding them to one another. Ultimately, the Holy Spirit effects this bond of unity by consecrating the spouses to one another and God. Through fidelity to their bond (*res et sacramentum*), spouses are able to experience the grace of God (*res tantum*) in their married lives.

Because the conjugal bond is the key link between consent together with consummation as the sign of marriage and the continual offer of grace to spouses in the lived sacrament, some theological clarity is necessary. Lawler describes the multi-faceted nature of the bond as a “triple bond of love, of law, and of sacrament” in which “each succeeding dimension of that triple bond strengthens the spouses in the preceding bond.”¹⁶⁹ He explains, “Their mutual love binds them together in an interpersonal relationship, which is a bond and obligation of love. Their wedding binds them together in a civil relationship, which is a bond and obligation of law. Their marriage as sacrament binds them together in a religious relationship, which is a bond and obligation of divine grace.”¹⁷⁰ These intertwining bonds, like a durable rope, unite the man and woman as husband and wife. The bond *inheres in* the couple; it is the relationship of love, law, and sacrament that orients and unites them for life.

The conjugal bond is central to a theology of sacramental marriage, because it is in and through their nuptial relationship that the couple is empowered by the Spirit to experience grace. Encountering God in sacramental marriage occurs not only on their

168. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 205n.

169. Lawler, "Blessed Are Spouses Who Love, for Their Marriages Will Be Permanent: A Theology of the Bonds in Marriage," 229.

170. *Ibid.*, 228.

wedding day (*matrimonium in fieri*) but primarily throughout the spouses' living out of their marital commitment in daily life (*matrimonium in facto esse*). In *Familiaris consortio*, the bond is described as a "Christian communion of two persons because it represents the mystery of Christ's incarnation and the mystery of His covenant."¹⁷¹ This conjugal communion is total and "aims at a deeply personal unity, the unity that, beyond union in one flesh, leads to forming one heart and soul."¹⁷² Theologically, marriage is *communio vitae*, the interpersonal relationship of husband and wife. *Gaudium et spes* 12 affirms, "This partnership of man and woman constitutes the first form of communion between persons. For by his innermost nature man is a social being; and if he does not enter into relations with others he can neither live nor develop gifts." Human persons, being made in the image of God, are created for communion. The capacity for *communio* forms the most basic criterion for what it means to be a person. *Communio vitae* is understood in the profound biblical sense in which man and woman have established an entire orientation to their lives as one with each other by their personal pledge and commitment.

3.5.2 Trinitarian Character of Sacramental Marriage

As sacrament, the *communio* of married life is reflective of the *communio* of the Triune God, thus enabling the couple to participate in the grace of God. The human person created *imago Dei* means every person is made capable of real unity with the Other (God and human) and ordered to such an end. John Paul II in his apostolic letter *Mulieris dignitatem* infers that we are made in the *image* of God through our intellect and

171. John Paul II, *Familiaris Consortio*, no. 13.

172. *Ibid.*

will, and we are made in the *likeness* of God through our vocation to interpersonal communion. “For every individual is made in the image of God, insofar as he or she is a rational and free creature capable of knowing God and loving him. Moreover, we read that man cannot exist ‘alone’ (cf. Gen 2:18); he can exist only as a ‘unity of the two’, and therefore *in relation to another human person*.” Further on John Paul II asserts, “This ‘unity of the two’, which is a sign of interpersonal communion, *shows that the creation of man is also marked by a certain likeness to the divine communion (‘communio’)*. This likeness is a quality of the personal being of both man and woman, and is also a call and a task.”¹⁷³ Human persons are created in the image of God with reason and free will in order that we may be made more fully into God’s likeness through communion with God and one another. Being engendered signifies the ontology of personhood which means existing in relationship as God does. This does not mean that God is engendered; rather, our bodies as symbols of our selves make present our capacity for interpersonal communion and love. “Being a person means striving towards self-realization (the Council text speaks of self-discovery), which can only be achieved ‘*through a sincere gift of self*’. The model for this interpretation of the person is God himself as Trinity, as a communion of Persons.”¹⁷⁴

Based on the early fathers and the Orthodox tradition, John Zizioulas constructs a theology of personhood and communion which can shed further light on the *communio vitae* of marriage, although he does not do so explicitly. His patristic and Eastern

173. John Paul II, *Apostolic Letter of Pope John Paul II Mulieris Dignitatem*. August 15, 1988, no. 7, http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html (accessed May 1, 2013).

174. *Ibid.*

perspective emphasizes the freedom of personhood embedded in the very being of God as communion. Zizioulas states, “It would be unthinkable to speak of the ‘one God’ before speaking of the God who is ‘communion,’ that is to say, of the Holy Trinity.” He continues, “The substance of God, ‘God,’ has no ontological content, no true being, apart from communion.”¹⁷⁵ The communion of God is not the primordial ontological category. The communion that is God arises from a *Person*, the Father, who is not only uncreated but also ungenerated:

Just like “substance,” “communion” does not exist by itself: it is the *Father* who is the “cause” of it. . . . The fact that God exists because of the Father shows that His existence, His being is the consequence of a free person; which means, in the last analysis, that not only communion but also *freedom*, the free person, constitutes true being. True being comes only from the free person, from the person who loves freely—that is, who freely affirms his being, his identity, by means of an event of communion with other persons.¹⁷⁶

Only a person, characterized by self-possession and self-determination, can become a gift to another in love. It is persons that create communion, made possible by God as *communio*, and such communion is life. *Gaudium et spes* 24 teaches,

Furthermore, the Lord Jesus, when praying to the Father “that they may all be one . . . even as we are one” (Jn 17: 21-22), has opened up new horizons closed to human reason by implying that there is a certain parallel between the union existing among the divine persons and the union of the sons of God in truth and love. It follows, then, that if man is the only creature on earth that God has wanted for its own sake, man can fully discover his true self only in a sincere giving of himself.¹⁷⁷

Although much is learned about personhood through the human sciences, priority is given to revelation. We know what it means to be a person based upon God’s revelation

175. John D. Zizioulas, *Being as Communion: Studies in Personhood and the Church*, vol. 4 of *Contemporary Greek Theologians* (Crestwood, NY: St. Vladimir's Seminary Press, 1985), 17.

176. *Ibid.*, 17-18.

177. *Gaudium et Spes*, no. 24.

of God as communion. The importance of this thesis will become apparent in a theology of marital commitment. That is to say, we can use the analogical method to learn about the Trinity from our experiential knowledge of the family, but in our present context we can also use the kataphatic method to learn about the family through the revelation of the Trinity.¹⁷⁸ It is precisely this point of the freedom and self-determination of the person that will prove pivotal for a theology of marital commitment.¹⁷⁹

The revelation that God is a tri-unity and not only a unity of the two communicates something significant about the nature of love in which all are called to participate. The Holy Spirit opens and universalizes the particular love of the Father and the Son so that all are welcome. William Thompson articulates the beauty and relevance of trinitarian doctrine:

The divine ground (Father/Mother) is not mute, but a self-communicative reality (*Logos/Word*), not hoarding its self-communication, but intrinsically a participative, inclusivistic reality (Spirit). The “one” God of Christianity seems to be a “Subject” of and through “interpersonal relations.” If we express this in the more traditional terms of love, coming down partly from at least one strand of Augustine and Richard of St. Victor, as well as from the Eastern theologians, we might say that the reality of the “Spirit” points to the fact that the dialogue between Father and Son is not locked up in itself, a kind of exclusive club. Rather

178. Marc Oullet, *Divine Likeness: Toward a Trinitarian Anthropology of the Family*, trans. Philip Milligan and Linda M. Ciccone, Ressourcement, ed. David L. Schindler (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2006), 15.

179. Zizioulas fleshes out the connection of personhood to life and love in a way that could prove to be enlightening to a theology of marriage. He states, “The person does not simply want to be, to exist ‘eternally,’ that is, to possess an ontological content. It wants something more: to exist as a *concrete, unique and unrepeatable* entity. The person cannot be understood simply as the ‘ecstasy’ of the substance; it must necessarily be regarded also as a *hypostasis* of the substance, as a concrete and unique identity.” He continues, “The life of God is eternal because it is personal, that is to say, it is realized as an expression of free communion, as love. Life and love are identified in the person: the person does not die only because it is loved and loves; outside the communion of love the person loses its uniqueness and becomes a being like other beings, a ‘thing’ without absolute ‘identity’ and ‘name,’ without a face. Death for a person means ceasing to love and to be loved, ceasing to be unique and unrepeatable, whereas life for the person means survival of the uniqueness of its hypostasis, which is affirmed and maintained by love.” Zizioulas, *Being as Communion: Studies in Personhood and the Church*, 46-47, 49. The marital commitment to love another for life is recognition and affirmation of the uniqueness and unrepeatability of one’s spouse; life is found in the communion of love where in self-giving one becomes uniquely oneself, a person.

is it inclusive: sharable love. The Father's and Son's "bond" (the Spirit) is our "bond" with them. The Spirit—the "Third"—points to the non-selfish nature of the Divine. Which is why we, too, can participate in the "great conversation."¹⁸⁰

The bond of marriage, the *res et sacramentum*, is exclusive and permanent yet at the same time it is inclusive and dynamic due to the grace of the Holy Spirit, the paradigmatic bond of divine love. This opening of love must occur for love to be what it is. Because *communio* is tri-unity, conjugal love becomes other than itself, fruitful. Kasper explains, "The fruitfulness of marriage comes from the inner essence of personal love itself. If it is essential for love to empty itself, it must therefore be impossible for true love to stay with itself. It is inevitably impelled to realization, objectivization and embodiment in a shared third party."¹⁸¹ This dynamic tension in marriage between exclusivity and inclusivity, giving and receiving, changing and remaining the same is present because sacramental marriage is reflective of God's mysterious communion.

3.5.3 Families as Domestic Churches

The grace of God offered to spouses in the sacrament is accepted or rejected within the living out of the sacrament, *matrimonium in facto esse*. It would be misleading to translate the preceding Latin phrase as "the state of marriage." *Matrimonium in facto esse* is anything but a state; rather, it connotes marriage existing in actuality as a lived relationship. While it is true that the marital sacrament is reflective of and a participation in trinitarian communion, the marital relationship is decidedly human, corporeal, and finite. A theology of marriage that focuses primarily on the ideal can leave real-life spouses feeling disappointed, frustrated, and inadequate. The biblical and

180. William M. Thompson, *Christology and Spirituality* (New York, NY: Crossroad, 1991), 33.

181. Kasper, *Theology of Christian Marriage*, 18.

patristic image of family as domestic church, church in miniature, or little church provides a beneficial symbolic expression of the reality of marriage. The family as domestic church is an ecclesial reality on mission and embodying the priestly, prophetic, and kingly ecclesial functions derived from Christ.¹⁸² As Florence Caffrey Bourg states, “It should function first and foremost to stimulate imaginations to a deeper appreciation of the mystery of the Church and of how family life figures into God’s plan of gracious presence in history.”¹⁸³ The family as domestic church “is a living image and historical representation of the mystery of the Church.”¹⁸⁴ The image of family as domestic church educes from the imagination the varied range of experiences in families. “Domestic churches are characteristically caught up in the tension between ideal and actual, between the attractiveness of their life’s goals and the mediocrity of their journey toward those goals.”¹⁸⁵ *Matrimonium in facto esse* is a dynamic relationship, a journey, a sacrament directed toward the highest goal of communion with God and one another while limping slowly there day by day. Frederick Parrella articulates this tension between the ideal and real in domestic churches in his spirituality of the family:

In the family, too, are the theological ideal of the human person and the paradigm of human community, a community which has as its only basis of unity the fatherhood of God. Our individual experiences of family, however, are often very different from this ideal. Families are more often expressions of human fragility and estrangement than human models of divine goodness; more often communities of competition, self-seclusion, or unspoken hostility than relationships of love and mutual concern. Although this is not as it should be, it is

182. Ennio Pasquale Mastroianni, "Christian Family as Church? Inquiry, Analysis, and Pastoral Implications" (PhD diss., Duquesne University, 1999).

183. Florence Caffrey Bourg, *Where Two or Three Are Gathered: Christian Families as Domestic Churches* (Notre Dame, Indiana: University of Notre Dame Press, 2004), 25.

184. John Paul II, *Familiaris Consortio*, no. 49.

185. Bourg, *Where Two or Three Are Gathered: Christian Families as Domestic Churches*, 52.

perhaps the way it must be. Just as the Cross of Christ is both the supreme gift of God and the absolute offer of grace, and at the same time the historical crystallization of sinfulness, so, too, the family is at once both the image of the divine life and of human estrangement and sin.¹⁸⁶

Given that families live in the tension between the ideal and actual, Bourg argues that the sacramental foundation of domestic church should be marriage and baptism as interlaced with baptism being primary.¹⁸⁷ “Sacramental marriage is a public renewal and specification of one’s baptismal commitment.”¹⁸⁸ Bourg states that the “paschal’ sort of love” entailed in living in the reality of married love with dying to self and rising again is “best symbolized in baptism.”¹⁸⁹ Ideally, faith will be deepened and nurtured in the marital sacrament, yet due to our freedom there is always the risk that grace will be rejected. Eschatologically, domestic church is an example of the already but not yet of the kingdom.¹⁹⁰

The image of marriage as domestic church aligns with the understanding of church as a pilgrim on earth necessary for salvation.¹⁹¹ The reality is that there are many marriages within a marriage, meaning spouses traverse stages over a lifetime together. The grace offered in the sacrament is new each day, because each marriage is in a

186. Frederick J. Parrella, "Towards a Spirituality of the Family," *Communio: International Catholic Review* 9 (Summer 1982): 138.

187. Bourg, *Where Two or Three Are Gathered: Christian Families as Domestic Churches*, 79.

188. *Ibid.*, 80.

189. *Ibid.*, 79. One may wonder why the mention of a paschal love does not lead Bourg to give primacy to the Eucharist in domestic church. However, Bourg explains the reason why baptism is considered domestic church’s sacramental foundation. “It affirms baptism as the root of every Christian vocation to holiness. It can appeal to any Christian denomination, and especially to interchurch families whose members participate in more than one Christian tradition.” Bourg, 78.

190. Ideally, families as domestic churches should spring from sacramental marriage, but in reality many do not. However, it is beyond the scope of this dissertation to analyze the theological bases of domestic churches existing outside the sacrament of marriage.

191. *Lumen Gentium*, no. 14.

continual process of change and development. The call and challenge in marriage is to embrace “fidelity in change.”¹⁹² While change is inevitable, growth and maturation are optional. Persons change due to the complex interaction among transitional life events, aging processes, and personal decisions. As each spouse changes, so does the relationship which must adjust to ever new terrain. Specific experiences of change interrupt the flow of life and force the couple to reevaluate and renegotiate so as to move to a “new marriage” within their marriage. These times of transition, or crises, imply decision, threat, promise, endings, and beginnings. “In New Testament terms, a crisis is thus a time of decision in which we may expect to lose something and to enter into God’s presence. Crises as religious disruptions are how God gets into our life.”¹⁹³ Barbara Markey states that couples can successfully move through these times of ambiguity through remembering and learning from past experiences, enlisting the support of good mentors, and committing to the process.¹⁹⁴ According to Markey, the stages of the marriage life cycle include: the childhood experience of marriage, adolescent and young adult experience of the male/female relationship, leaving home and the decision to marry, being newly married, building marriage with young children, refocusing midlife marriage with adolescents, launching children and moving on, and shaping later life in marriage.¹⁹⁵ Transitions to each stage “can become either destabilizing events or normative

192. Evelyn Eaton Whitehead and James D. Whitehead, *Marrying Well: Stages on the Journey of Christian Marriage* (Garden City, New York: Image Books, 1981), xiii.

193. *Ibid.*, 428-29.

194. Barbara Markey, "The Lifecycle Stages of a Marriage" (paper presented at the Colloquium of Social Scientists and Theologians sponsored by the USCCB on Promoting and Sustaining Marriage as a Community of Life and Love, Creighton University, Omaha, NE, October 24-25, 2005), 3.

195. *Ibid.*, 4-5.

development.”¹⁹⁶ Awareness of the many marriages within a marriage through the image of domestic church as pilgrim can help spouses to experience peace in the liminal experiences of the sacrament.

3.5.4 God in Sex—Identity, Vocation, and Intimacy

The very human and concrete character of marriage is epitomized in sex. A theology of marriage that fails to give due consideration to the meaning of our sexuality or the role of sex in marriage is deficient. In theologies of marriage, there is a tendency either to spiritualize our sexuality through the profuse use of terms like ‘self-gift’ or to narrowly focus on specific controversial topics in sexual ethics like contraception and homosexuality. From the ecstatic pleasure of sexual union to the shameful embarrassment experienced in sexual dysfunction, our sexuality forces us to confront our humanity. Sexual difference and sexual attraction have been the source of profound hope and joy and at the same time of exploitation and discrimination. Our sexual selves serve as a constant reminder of our creatureliness and yet our capacity for profound communion. The great difficulty in articulating a theology of sex and marriage or making judgments in sexual ethics is finding balance between the spiritual character of sex opening one to terrific heights and the determinate, physical character of sex that also contains us within our bodies.

Sexuality is a key element of personal identity. In order for sex to be self-gift, there must be a *self* to give. Personal identity “is a matter of consistency—between my present and my past, and between my inner experience of myself and the expectations

196. Markey, "The Lifecycle Stages of a Marriage," 1.

that others have of me.”¹⁹⁷ It means clarity about who I am, and at the same time, flexibility, so that rigidity and defensiveness do not enter in when faced with conflict. “It means I am confident that being close to others will not destroy me.”¹⁹⁸ Strength in personal identity includes knowledge and acceptance of our bodiliness and how we should relate to others. For personal identity is not for us alone, but also for the sake of others. Our vocation, which springs from our identity, is a unique call from God and our response to that call in freedom. “It is the particular way I find myself called to love, to care for the world and to witness to Christian faith.”¹⁹⁹ In faith, one can gradually come to see the invitation to live a certain kind of life through knowledge of Christian values and one’s own strengths and weaknesses. Ideally, strength in personal identity flows into vocational awareness and decision. “Without the strength of a (somewhat) clear sense of who I am, my choices and commitments in life will be responses to external pressures.” Whitehead and Whitehead continue, “Fidelity to another person is grounded in the ability to be faithful to myself. Often we speak of this as integrity or authenticity, but we may also use the word fidelity to describe this faithfulness to my vocation that, in turn, prepares me to be faithful to a marriage commitment.”²⁰⁰

Although few would question that sexuality is a fundamental element of personal identity, there is great debate and little agreement over what it means to be made male or

197. Whitehead and Whitehead, *Marrying Well: Stages on the Journey of Christian Marriage*, 197.

198. *Ibid.*, 199.

199. *Ibid.*

200. *Ibid.*, 211.

female.²⁰¹ Does the differential embodiment of males and females influence their way of being in the world due to social and cultural forces or due to essential differences in their being? Perhaps an either/or answer confounds instead of clarifies. Even though women's experiences of self differ based upon geographic and historical location, is there not something unique that women know, or a unique way that women know, due to their experiences *as women*? For example, do the experiences of pregnancy, birth, and lactation in any place and time create a distinctive way of knowing? Bonnie Miller-McLemore states,

Women's embodiment, specifically the bodily and still painful experience of birth, as well as pregnancy and lactation, represents a distinct perspective and may evoke particular ways of perceiving and thinking.

I say "may evoke" because I am not trying to depict a universal or essential characteristic of all women and mothers. Not all birthing, nursing women inherently share one distinct mode of knowing. Nor should this common female experience dictate limited social roles which, given human freedom, remain extremely malleable.²⁰²

Male or female embodiment should not constrain and restrict a person in a way that is detrimental to human dignity, yet at the same time it is through one's particular human body that one comes to know and love in a specific way. For example, the belief that women are naturally more nurturing or self-sacrificing serves only to limit and define, not only women but also men, in opposing social roles. Perhaps women have become nurturing and self-sacrificing not simply because they are women, but because they have been the ones to care for children and those that cannot care for themselves, a role that can and should be shared with men. What it means to be male or female largely depends

201. The meaning and significance of intersexed individuals in a theology of sex and gender is complex and beyond the scope of this dissertation.

202. Bonnie J. Miller-McLemore, *Also a Mother: Work and Family as Theological Dilemma* (Nashville, TN: Abingdon Press, 1994), 135.

upon culture, but this meaning cannot become disembodied and indeterminate. The fact that pregnancy, birth, and lactation cannot be shared reinforces the connection to the body in defining personal identity. Discovering one's identity in the givenness of life and creating it in freedom reveal for those called to marriage the invitation to intimacy.

Every person is called to intimacy with God, but the vocation to marriage implies that this intimacy is intended to occur in and through the relationship between the spouses. The story of Jacob wrestling with Yahweh (Gn 32:24-31) exemplifies the risk, vulnerability, conflict, and change involved in intimate encounters. Similar to Jacob's encounter, marriage is a process in which the spouses may be hurt, but will definitely be changed, just as Jacob's name was changed to Israel. In an intimate relationship, spouses are willing to change and be changed, and in the process, to receive blessing. "Intimacy involves an overlapping of space, a willingness to be influenced, an openness to the possibility of change. It invites me beyond myself. But only with a strong and flexible sense of self can I accept the invitation."²⁰³ True intimacy is only possible when one's personal identity is known and vocation is followed. Whitehead and Whitehead connect intimacy with the commitment that sustains it:

It is intimacy that makes a *particular* commitment possible. I am not married to "most men" or to "most women" but to *this* person. And over the course of marriage I may come to recognize ways in which this person who is my spouse is limited and even flawed—just as I am. If our marriage is to survive this realization, I must be able to commit myself to *this* person in *our* marriage—aware of the limitation and incompleteness that are involved. I draw on intimacy resources to make this commitment and, again, to live it out.²⁰⁴

203. Whitehead and Whitehead, *Marrying Well: Stages on the Journey of Christian Marriage*, 227.

204. *Ibid.*, 229.

In this way, intimacy is both a virtue in marriage and an intrinsic meaning of human sexuality. In a truly intimate relationship, the persons involved are familiar with most aspects of each other and continue to persevere in love. I would alter the Whiteheads' statement by asserting intimacy makes commitment *easier*, yet commitment makes intimacy *possible*. The risk of truly being known by another can only happen within the safety of a commitment where one is free to reveal even the ugliness of self without the fear of rejection or abandonment.

Lisa Sowle Cahill identifies reproduction, pleasure, and intimacy as the three values of human sexuality that should be enhanced in the institution of marriage.²⁰⁵ She states,

Deficient moral behavior or inadequate moral analysis can result from the truncation or division of the pleasurable, intimate, and procreative meanings. Human sexual experience is complex and complete when all three bodily dimensions of sex are developed through the three levels (bodily, personal, social) and integrated in relationships over time.²⁰⁶

Marriage protects and promotes these values by providing an environment in which physical intimacy can express mutual love, commitment, respect, and care not only for each other but for any children brought into the family. For centuries, procreation has been named the primary end of sex, and in the last century Paul VI in *Humane vitae* deemed the procreative and unitive meanings co-equal and essential to the goodness of every sex act.²⁰⁷ Conversely, over the centuries, the pleasure of sex was associated with the unruly sexual appetite and sin. Identifying pleasure as one of the intrinsic values of

205. Lisa Sowle Cahill, *Sex, Gender, and Christian Ethics*, New Studies in Christian Ethics, ed. Robin Gill (New York, NY: Cambridge University Press, 1996), 110.

206. *Ibid.*, 113.

207. Paul VI, *Encyclical Letter of Pope Paul VI on the Regulation of Birth: Humanae Vitae* (July 25, 1968; reprint, Washington, D.C.: United States Catholic Conference, 1995), no. 12.

sex could affect canon law, because theological values once identified need to be appropriated through norms and structures that contribute to the growth of human persons and the spiritual development of the community. As Moore argues, “Pleasure is not what is sought after as the end of the activity, but what is experienced in performing the activity. So to seek a particular pleasure, the pleasure of doing a particular thing, is just to seek to do that thing.”²⁰⁸ Seeking the pleasure of sex is a natural human good that contributes to our well-being that, like any good, needs to be balanced among other goods:

When the Christian tradition condemns sex for pleasure alone, this is not well understood as a condemnation of friends doing something pleasurable together because it is pleasurable. Rather, it is a way of stressing the interpersonal nature of shared sexual activity and of reminding us that the pleasures of sex cannot be reduced to having a range of sensations; they are, at the very least, the pleasures of doing pleasant things together with a friend. A sexual encounter that neglects the importance of friendship is therefore defective, as is the pleasure that is derived from it.²⁰⁹

The other values of sexual activity, intimacy and procreation, are interpersonal in essence indicating that for sexual pleasure to be a natural *human* good, the nature, duration, and quality of the personal relationship makes a great difference.²¹⁰ If we begin from the premise that sex, like every natural human good, is a gift from God, then it would be disrespectful to misuse this gift.²¹¹ Sex as an expression of self and of the relationship naturally discloses the intimacy shared between the couple. At the same time, some of

208. Moore, *The Body in Context: Sex and Catholicism*, 67.

209. *Ibid.*, 55.

210. According to Kochuthara, “Sexual pleasure is not seen as a value to be sought independent of other values, not because it is inferior to other values, but because when it is sought for its own sake or contrary to other values, it becomes destructive. Love is the supreme Christian value.” Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 431.

211. Moore, *The Body in Context: Sex and Catholicism*, 87.

those acts lead to the creation of new life. Sex naturally belongs in a lifelong, committed relationship, because it is the most intimate, physical expression of love and friendship with another person, which at the same time opens the possibility of children into the relationship. Moore continues,

It is not natural to us to embrace those to whom we are not close. In such circumstances the embrace would be emptied of its natural significance; it would be meaningless. Because, as I have argued, an embrace has a natural significance, the meaninglessness of this particular embrace would not be the absence of an optional extra, but a loss of meaning; the embrace would be as it were denatured, dehumanized. And, because meaning is so central to our humanity, that in turn would mean that the embracers would suffer loss and be diminished.²¹²

This is not to say that every sexual act must clearly communicate the total self-gift of one to another. Rather, each act, however humanly expressed, should occur within the context of a loving, committed, lifelong relationship. The meaning of those acts derives from the overall context of the relationship. Cahill articulates the risk to couples in purporting an overly spiritual and unrealistic theology of sex:

The idea that each act is a total self-gift depends upon a very romanticized depiction of sex, and even of marital love. Certainly there will be times when an act of sexual sharing is hampered or disturbed by factors, intrinsically or extrinsically generated, which impinge, either temporarily or permanently, on the couple's relationship. They are stressed by economic difficulties, an ongoing disagreement about a family matter, blind spots in seeing one another's emotional needs, a crying child, lack of sleep, or an important project due at work. But even more than that, in the *most* ideal of circumstances, human beings rarely if ever accomplish "total self-gift." And the level of self-gift we do accomplish is rarely required to manifest itself, all or nothing, in a single action, much less in every one of a series of actions that we perform regularly.²¹³

Instead of offering support and encouragement to couples as they grow in love and intimacy, a theology of sex that inordinately focuses on the idea of 'self-gift' places

212. Moore, *The Body in Context: Sex and Catholicism*, 110.

213. Cahill, *Sex, Gender, and Christian Ethics*, 203.

undue expectations and demands on spouses. The use of idealist language needs to be balanced with real experiences and circumstances. Within a relationship begun and sustained in marital commitment, there is room for play, forgiveness, patience, and the complex gamut of graced interactions that constitute a loving relationship.

3.5.5 Love in Marriage

In contemporary American marriages, it is plainly assumed that love is the foundation, context, motivation, goal, and end of marriage. Marriage without love is unthinkable in today's American mentality. Without denying the personalist understanding of sex and marriage previously discussed, a theology of sex, love, and marriage should avoid the danger of what David Matzko McCarthy calls "theological romanticism."²¹⁴ McCarthy argues that sex and love in marriage has the benefit of fitting within the context of ordinary shared life in the household of a multitude of relationships with family, friends, and neighbors. For that reason, "any particular sexual encounter need not say anything earth shattering; it need not point to the fullness or full meaning of a sexual relationship."²¹⁵ Because sex in marriage is "a minor episode in a larger story," spouses are free to celebrate the ordinary. "The chief problem in this personalist account of sex is, not that it goes wrong, but that it says too much to be right. Every sexual act is defined as full and total, so that sex has no room to be ordinary."²¹⁶ Conjugal love is experienced in sex and in many other quotidian moments of life: diapering babies, sweeping the floor, paying the bills, sharing meals with friends and neighbors, and

214. David Matzko McCarthy, *Sex and Love in the Home: A Theology of the Household*, 2nd ed. (St Albans Place, London: SCM Press, 2004), 64.

215. *Ibid.*, 8.

216. *Ibid.*, 43.

disciplining children. Theological romanticism occurs when conjugal love is defined solely as sexual intercourse as total self-gift leaving real spouses frustrated and disappointed when comparing such a theology to the mundane. McCarthy expounds,

The impossible ideal, it seems to me, is a consequence of the idea that marriage is a complete communion. It is impractical to hope that one person can be completed by another, or that one's spouse would be able to receive the "total" personality and texture of the other. We should hope that friends and co-workers will tease out and cultivate personal qualities and make demands that our husbands and wives cannot. Even if marriage is a primary source of one's identity, it is quite a different matter to assume that we can exhaust one another's "total" self.²¹⁷

Marital love is rich with significance so that the various meanings need not exclude one another. Marital love can be common and exceptional at the same time. It can mean extraordinary efforts in forgiveness and the daily sharing of the newspaper. Because marital love is lived over a lifetime, a single act or experience need not define and encompass the entire relationship. That is not to say that there can never be acts that are so extraordinary that they define, alter, or reverse the course of a relationship. This line of reasoning is reminiscent of what constitutes one's fundamental option in moral theology. Those acts of marital love or lack thereof that define a relationship are very rare and difficult to identify. The meaning of sex in marriage is derived from the context of the total relationship which has a beginning, middle, and end.

Whereas we use one word for the many meanings of love, the Greeks had different words to indicate the different ways in which we love. Contemporary American marriages often begin in *eros* or the love called desire. Lawler explains, "*Eros* is love of another person for my good."²¹⁸ It usually implies sexual desire but need not be limited

217. McCarthy, *Sex and Love in the Home: A Theology of the Household*, 123.

218. Lawler, *Marriage and the Catholic Church: Disputed Questions*, 22.

in that way. *Eros* finds something beautiful, attractive, desirable in the beloved causing the lover to become pre-occupied but delightfully so. This attraction or desire can become overwhelming which leads to the feeling of falling in love, the passive experience of being swept away into a new world which is the beloved. *Eros* wants to consume and be consumed. Many associate romantic love with marital love so much so that when *eros* wanes, as it does with the tedium and familiarity of long-term relationships, many believe that there is no longer love in the marriage. Although marriage may begin with *eros*, it is sustained by the other loves, specifically *agape* and *philia*.

Agape is “universal, unconditional, impartial, non-preferential love.”²¹⁹ It is willingly self-sacrificing for the good of the beloved without expectation of reciprocation. Customarily, Christian love has been associated with *agape*; however, love has many dimensions that can emerge based upon one’s perspective or during different times in a relationship. Benedict XVI articulates how the respective ascending and descending loves of *eros* and *agape* are united:

Even if *eros* is at first mainly covetous and ascending, a fascination for the great promise of happiness, in drawing near to the other, it is less and less concerned with itself, increasingly seeks the happiness of the other, is concerned more and more with the beloved, bestows itself and wants to “be there for” the other. The element of *agape* thus enters into this love, for otherwise *eros* is impoverished and even loses its own nature. On the other hand, man cannot live by oblation, descending love alone. He cannot always give, he must also receive. Anyone who wishes to give love must also receive love as a gift.²²⁰

219. Todd A. Salzman, “Friendship, Sacrament, and Marriage: The Distinction between Christian Marital Friendship and Non-Christian Marital Friendship,” in *Marriage in the Catholic Tradition: Scripture, Tradition, and Experience*, ed. Todd A. Salzman, Thomas M. Kelly, and John J. O’Keefe (New York, NY: The Crossroad Publishing Company, 2004), 116.

220. Benedict XVI, *Encyclical Letter of Pope Benedict XVI on Christian Love: Deus Caritas Est*. December 25, 2005, no. 7, http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html (accessed January 9, 2008).

Eros and *agape* meet in mutual love and fulfillment. Perhaps this meeting place could be called *philia*. *Philia* is friendship, that is, love that is particular, mutual, and reciprocal, which seeks the good of both persons and the relationship itself.²²¹ It is love that has been returned creating a true communion. Initially friends are drawn to one another through a mutual interest or activity, but eventually, in close friendships, the friendship itself binds them together. Lawler points out, “The problem in history, especially post-Enlightenment history, is that *agape* was enthroned as the norm of all love and *philia* did not measure up to that norm. *Agape*, however, is not the norm of love; God is the norm of all love, both *agape* and *philia*.”²²² God’s universal love for all (*agape*) is particularized in the Abrahamic covenant and even further in the Incarnation.²²³ God is the norm and source of all kinds of love that are present throughout the life cycle of marriage. Todd Salzman contends, “As we shall see, marriage as sacrament can be defined in terms of a friendship bond (*philia*) shared as a lifelong commitment between husband and wife in union with Christ, which is universally shared (*agape*). It is *agape* which can strengthen the friendship bond, sustain that bond through difficult times, and extend it to all human relationships.”²²⁴ In exploring *eros* and *agape* in *Deus caritas est*, Joann Heaney-Hunter affirms that the union of *eros* and *agape* in the sacrament of marriage is not for the good of the couple alone; sacramental couples are to be

221. Lawler, *Marriage and the Catholic Church: Disputed Questions*, 22.

222. *Ibid.*, 147.

223. Salzman, “Friendship, Sacrament, and Marriage: The Distinction between Christian Marital Friendship and Non-Christian Marital Friendship,” 117.

224. *Ibid.*, 117-18.

Eucharistic people.²²⁵ “In the spirit of Christ’s radical gift of self to all, couples are called to create a Eucharistic culture in their homes—a culture of covenantal spirituality (blessing), intimacy (which inevitably involves brokenness), and generosity (sharing).”²²⁶ As John Paul II teaches, “Thus, far from being closed in on itself, the family is by nature and vocation open to other families and to society, and undertakes its social role.”²²⁷ Sacramental couples are called to transform the world around them.

All the loves work together for the mutual good of the family in marriage. The ecstatic and overwhelming passion of *eros* can ignite marital love in the beginning and after reconciliation. *Storge*, or affection, is the humblest of loves providing comfort in the familiarity of one’s family, particularly the relationship of parents and children.²²⁸ It provides that feeling of “at home-ness” in the voice, eyes, or simple presence of loved ones. *Agape* does the hard work of forgiveness, self-sacrifice, generativity, and hospitality. Because justice is the minimum of love, agapic love should not encompass the whole of married love for either spouse. *Agape* repairs and reorients love that has become asymmetrical. Browning offers recommendations for properly integrating self-sacrificial love with mutual love, essentially *agape* and *philia*:

First, both husbands and wives should take part in the drama of sacrificial or self-giving love needed to energize families for lifelong commitments. Second, sacrificial love is not the whole of love, even in the Christian tradition. Sacrificial

225. Joann Heaney-Hunter, “*Eros and Agape: Expressions of Love in Sacramental Marriage*” (paper presented at the Theological Colloquium sponsored by the USCCB on Understanding and Communicating the Sacramentality of Marriage in Our Contemporary Culture, University of Notre Dame, South Bend, IN, October 4-5, 2006), 10.

226. *Ibid.*, 14.

227. John Paul II, *Familiaris Consortio*, no. 42.

228. C.S. Lewis, *The Four Loves* (New York, NY: Harcourt Brace Jovanovich Publishers, 1960), 31-56.

love is an important moment within a wider context of love as equal regard. . . . Third, to keep the proper balance between love as sacrificial and love as equal regard, it is useful to see love and marriage as life-cycle phenomena in which love takes slightly different form depending on where a family is in its cycle.²²⁹

Agape ensures that the marital relationship is always unconditional; *eros* and *storge* keep it embodied and companionate; *philia* promises mutuality, respect, and care. God's offer of the love and grace necessary to sustain the sacrament is always present. Each spouse has the freedom to accept or reject this offer at anytime. The elements of freedom, choice, commitment, and love will be explored in greater detail, then viewed within the juridical context of marital consent.

229. Don. S. Browning, *Equality and the Family: A Fundamental, Practical Theology of Children, Mothers, and Fathers in Modern Societies*, Religion, Marriage, and Family, ed. Don. S. Browning and John Witte Jr. (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2007), 188-89.

CHAPTER FOUR

A THEOLOGY OF MARITAL COMMITMENT

4.1 Culture, Commitment, and Freedom in American Life

4.1.1 The Mark of Individualism in Culture

The explanations for the crisis of marital and family breakup that have predominated in theological and social scientific discourse are interrelated and include: cultural factors, economic factors, psychological factors, and socio-political factors. They interact so intimately that they cannot be completely separated in analysis. Culture as a multi-layered construct is inclusive of the other factors. Robert Bellah and his colleagues describe culture as “those patterns of meaning that any group or society uses to interpret and evaluate itself and its situation.”¹ Culture is constitutive of all human action, because a particular group’s worldview and values are embedded and expressed in its symbols, stories, myths, customs, rites, roles, language, art, music, entertainment, technology, and social structures. Culture influences social and economic organization along with the psychological structures of those living within the culture. These cultural influences can be interpreted through theological lenses in order to better understand and respond to the reality of marital and family disintegration. When considering cultural changes that have had a significant impact on family formation and fragmentation, individualism stands out as central.

Individualism differs from individuality based upon the manner in which the individual is viewed and ordered in relation to God and others. A healthy sense of

1. Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 3rd ed. (Berkeley, CA: University of California Press, 2008), 333.

individuality honors the uniqueness and inherent dignity of each human person and works against systems of oppression and injustice directed toward minorities. On the other hand, individualism systematically treats the individual as primary with social and theological aspects as secondary or insignificant. A culture of individualism poses the constant threat of exploitation and oppression of the vulnerable. Bellah and his colleagues argue that inordinate focus on the self has contributed to a loss of commitment and community. Individualism, the ideology “in which the self has become the main form of reality”² leads to isolation and withdrawal into one’s enclosed sphere of family and friends.³ Utilitarian individualism, a worldview based heavily upon self-reliance and the pursuit of self-interest in the economy, characterizes public life; whereas, expressive individualism, an ideology that overemphasizes the feelings and intuition of the unique individual, distinguishes private life.⁴ In the last two hundred years, the transition from an agrarian society to an industrial society accompanied the rise of romantic love, which is “the quintessential form of expressive individualism,”⁵ as the basis for marriage. Whether or not they are causally related, both of these historical events factored into the retreat of the family into private life in the nineteenth century that continues today.

The demarcation and separation of the socio-political and productive world of work from the psycho-social consumptive world of family affects the very notion of

2. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 143. Because this text was originally written in 1985 (with subsequent revised editions), it could be argued that it is a dated commentary on current cultural values in American life. I disagree. Although the cultural landscape has changed tremendously in the last decades, the threat of individualism has not waned, because ultimately it is a theological problem. The inordinate concern for the self and one’s own immediate situation was discussed in Chapter One in relation to Lonergan’s concept of bias and will be related to the theology of commitment developed in this study.

3. *Ibid.*, 37.

4. *Ibid.*, 45-46.

5. *Ibid.*, 73.

community and family. Family becomes a place of psychological self-fulfillment and economic consumption and leisure. Bellah and his colleagues warn that when romantic love becomes the basis for marriage, marriage tends to become a “lifestyle enclave.”⁶ “Whereas a community attempts to be an inclusive whole, celebrating the interdependence of public and private life and of the different calling of all, lifestyle is fundamentally segmental and celebrates the narcissism of similarity.”⁷ The fracturing of American society into private and public spheres contributes to alienation between men and women. Not only patriarchal structures but also natural asymmetrical reproductive patterns have left women associated with the private world of love, children, and intimate relationships. Alternatively, men have been associated with the public world of work, creativity, and technical relationships. One may argue that in today’s culture of equal opportunity legislation and rapid technological communication, there is not so great a divide between work and home, public and private, or men and women. Although the gaps may be closing, the history of this fragmentation can still be sensed and experienced. If anything, our mobile forms of communication pose the threat of work enveloping family when mothers and fathers are continuously available to engage in work-related activities whether at home or work.⁸ In many families, mothers and fathers work increasingly long hours so as to provide financially for the wishes, rather than the needs, of their children (or themselves alone). This critique is directed toward families in

6. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 74.

7. *Ibid.*, 72.

8. Mobile forms of communication have been beneficial in terms of ease, efficiency, and accessibility in both personal and professional capacities. However, the ways in which these mobile and digital forms of communication have radically altered the very meaning of interpersonal communication and relationship, particularly for the younger generations cannot be underestimated. The effects of mass digital communication upon dating and interfamilial communication need further collaborative study from psychologists, anthropologists, theologians, sociologists, and many others.

Western, upper-middle and upper classes that live as lifestyle enclaves in which work is a mere means to amass wealth for their immediate loved ones. An emphasis on the intrinsic value and availability of meaningful work, which is essentially one's contribution to the common good, can aid in transforming the American culture of individualism into a culture of community and commitment.⁹

4.1.2 Cultural Decline and Sin

The preceding cultural critique presumes the presence of sin and grace. The culture of individualism that contributes to the fragmentation of families exists due to the human proclivity to sin. This is not to deny the countless examples of graced self-sacrifice, commitment, solidarity, compassion, and care that exist within and between families. The recognition of sin as a theological datum in the cultural situation is to clarify that individualism and individualistic tendencies are not the result of a dated and oft-repeated cultural critique, but rather that sin is the factor that inhibits personal and communal progress. This social and cultural decline is a result of the three biases identified by Lonergan that were discussed in Chapter One. The complex interaction of all three of these biases is the reason why the crisis in sacramental marriage cannot be easily explained nor resolved. Individual bias is a refusal of self-transcendence, that is, the refusal to allow concern for others and the common good to direct and order one's

9. The introduction of work into this study demonstrates the interconnection that should exist between sexual ethics and social ethics. Theologies of marriage and family must address theological meanings of work, including unpaid work traditionally associated with women both in the home and in the community (civic participation), and especially the availability of meaningful work for the common good of all, particularly the poor. See Bonnie J. Miller-McLemore, *Also a Mother: Work and Family as Theological Dilemma* (Nashville, TN: Abingdon Press, 1994); Don S. Browning et al., *From Culture Wars to Common Ground: Religion and the American Family Debate*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2000); Bonnie J. Miller-McLemore, *Let the Children Come: Reimagining Childhood from a Christian Perspective*, The Families and Faith Series, ed. Diana R. Garland and J. Bradley Wigger (San Francisco, CA: Jossey-Bass, 2003); Jean Bethke Elshtain, "Families and Civic Goods: Connecting Private Lives and Civic Goods," annual conference of the Family Institute at Duquesne University (Duquesne University, Pittsburgh, PA, November 10, 1998).

understanding and practical living. The egoist,¹⁰ or individualist, stunts the growth of his own understanding by refusing to raise questions beyond those which originate from his own desires and fears. Individual bias is a “self-deception,” although the egoist is not totally unaware of such deception. Lonergan describes it as a “conscious self-orientation,”¹¹ because sin always involves the will in some way. Hope for escaping sin lies in “the egoist’s uneasy conscience.”¹² Recognition and reversal of this individualistic slant is grace mediated through the church as community, where conscience is formed and strengthened. What is needed is a redemptive community, because sin is more than individual. Group bias “defines the alienation of group from group and from the general social order.”¹³ The interests of one’s particular group are placed above other groups and the common good. Although a social phenomenon, group bias as sin engages the will. “The sins of group bias may be secret and almost unconscious. But what originally was a neglected possibility, in time becomes grotesquely distorted reality.”¹⁴ Group bias manifests itself in unequal power distribution among groups. Finally, all human persons are subject to the general bias of common sense, which is an incomplete set of insights

10. By referencing Lonergan’s term “egoist,” I am in no way implying that there is a strict dichotomy between egoists and altruists in the world. Every human person has proclivities toward the threat of sin and proclivities toward the call of grace. The degree to which we are all egoists varies on a continuum, essentially known only to God.

11. Bernard Lonergan, *Insight: A Study of Human Understanding*, 5th ed., ed. Frederick E. Crowe and Robert M. Doran, vol. 3 of *Collected Works of Bernard Lonergan* (Toronto, Canada: University of Toronto Press, 1992), 246.

12. *Ibid.*, 247.

13. Joseph A. Komonchak, “Foundations in Ecclesiology,” ed. Fred Lawrence, supplementary issue, *Lonergan Workshop Journal* 11 (1995): 129.

14. Lonergan, *Insight: A Study of Human Understanding*, 250.

concerned with immediate, particular practical problems of ordinary, daily living.¹⁵

Though common, there are “differentiations of common sense.” Lonergan explicates,

Such, then, is the specialization of common sense. At once, it adapts individuals in every walk of life to the work they have chosen or the lot that has befallen them, and no less, it generates all those minute differences of viewpoint and mentality that separate men and women, old and young, town and country, until in the limit one reaches the cumulative differences and mutual incomprehension of different strata of society, different nations, different civilizations, and different epochs of human history.¹⁶

The general bias means the inability of common sense to judge itself and take into consideration “larger issues” and “long-term results.”¹⁷ Without incorporation of a long and far-reaching view, myopic, uncritical concentration on the immediate leads to decline of the social situation in which individuals and groups are self-centered and short-sighted. Individual, group, and general bias describe the refusal to look beyond one’s own self, group, or immediate situation in order to live attentively, intelligently, reasonably, and responsibly.

Cultural, social, economic and political explanations of American family disintegration and change are insufficient without incorporating a theological lens of sin through which to evaluate empirical and historical findings. From a theological point of view, a culture of individualism which bifurcates men from women, public from private, work from home, and haves from have-nots is the result of sin. Browning and his colleagues argue precisely this point:

A theological point of view locates the deeper problem of families in the fallibility and fault of the human will: in the susceptibility of the human spirit to

15. Lonergan, *Insight: A Study of Human Understanding*, 199-201.

16. *Ibid.*, 203.

17. *Ibid.*, 251.

distortion and self-preoccupation. By *fault*, we mean the human tendency toward inordinate self-protection in the face of anxiety that manifests itself in both pride and, as feminists have argued, self-effacement or self-loss. The language of fallibility and fault, borrowed from Paul Ricoeur, is a more abstract way of talking about the Christian concept of sin.¹⁸

It is necessary to acknowledge the interaction of all factors in order to formulate a more effective and pastoral response. Browning and his colleagues add, “Unless social-science explanations are informed by the reality of sin, causes are converted into *excuses*. Yet, mean-spirited moralism can be avoided if we place the reality of sin within the context of the multiple pressures that work upon it.”¹⁹ What has changed in American marriages and families cannot be explained simply by deterministic cultural or economic forces. At the heart of the situation is freedom.²⁰

4.1.3 Freedom From Versus Freedom For

For most Americans, freedom is the most treasured value, but unfortunately the reigning culture of individualism has skewed the intrinsic meaning of freedom. In a culture that reveres self-sufficiency and autonomy, freedom has come to mean essentially *freedom from*. Bellah and his colleagues color an accurate picture of the social situation:

Yet freedom turns out to mean being left alone by others, not having other people’s values, ideas, or styles of life forced upon one, being free of arbitrary authority in work, family, and political life. What it is that one might do with that freedom is much more difficult for Americans to define. And if the entire social world is made up of individuals, each endowed with the right to be free of others’ demands, it becomes hard to forge bonds of attachment to, or cooperation with,

18. Browning et al., *From Culture Wars to Common Ground: Religion and the American Family Debate*, 70.

19. *Ibid.*, 71.

20. The focus on freedom in this study does not imply that all people are conscious and deliberate in their actions. On the contrary, it will be argued that many people do precisely the opposite in order to escape living morally and confronting one’s conscience. From a social perspective, it could be due to lack of vigorous social debate as well.

other people, since such bonds would imply obligations that necessarily impinge on one's freedom.²¹

This negative understanding of freedom implies separation and detachment. Freedom is worshipped as an ultimate value or "a virtual end in itself."²² "The people of our time prize freedom very highly and strive eagerly for it. In this they are right. Yet they often cherish it improperly, as if it gave them leave to do anything they like, even when it is evil."²³ However, such freedom is without content and "presumes the existence of an absolutely empty unencumbered and improvisational self."²⁴ Such an understanding is a deformation not only of freedom but also of the human person. What is needed is a positive account of freedom and the will.

The human person is a knower and a doer. It is apparent that knowing and doing are different operations and that doing does not necessarily flow from knowing the proper course of action. Human lives are filled with inconsistency between knowing and doing. Moral and rational life consists in living by the transcendental precepts where deciding and doing follow from what one understands and judges to be the right course of action. Self-transcendence can only occur when finally "by deliberation, evaluation, decision, action, we can know and do, not just what pleases us, but what truly is good, worthwhile."²⁵ Living morally is admittedly a difficult task from which persons attempt to escape. Lonergan identifies three escapes from consistently doing what one knows to

21. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 23.

22. *Ibid.*, 25.

23. *Gaudium et Spes*, no. 17.

24. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 80.

25. Bernard Lonergan, *Method in Theology* (Toronto, Canada: University of Toronto Press, 2007), 35.

be the right thing to do. The first is to avoid self-consciousness, which is ultimately creating an illusion. In order to know the right thing to do, one must intimately know oneself, an arduous discipline. “How finely tempered must one’s sincerity be if one is to know oneself as one is, to know not a character sketch that explains one in terms of ancestry and environment, but a moral analysis of one’s deeds, one’s words, one’s mixed motives.”²⁶ The second escape from living morally is rationalization, that is, to alter one’s knowing to align with one’s doing instead of vice-versa. Such a tactic is a deception in which the person shifts the “inconsistency between knowing and doing into inconsistency within knowing itself.”²⁷ The third escape is moral renunciation. “It is ready to confess its wrongdoing, but it has given up any hope of amending its ways.”²⁸ Here, the person simply gives up. These three escapes embody the mentality of *freedom from*.

True freedom, rather than a faulty notion of *freedom from*, is possible, because essential to the human person is the capacity to choose among objects presented to the intellect. This capacity is the will. Some may argue that by naming distinct capacities, the human person is artificially divided as in faculty psychology. Admittedly, Lonergan has moved beyond faculty psychology to intentionality analysis when examining the inner life of the human person:

From the very first chapter we have moved out of a faculty psychology with its options between intellectualism and voluntarism, and into an intentionality analysis that distinguishes four levels of conscious and intentional operations, where each successive level sublates previous levels by going beyond them, by

26. Lonergan, *Insight: A Study of Human Understanding*, 622.

27. *Ibid.*, 623.

28. *Ibid.*

setting up a higher principle, by introducing new operations, and by preserving the integrity of previous levels, while extending enormously their range and their significance.²⁹

It is not that Lonergan has completely abandoned the idea of the will. On the contrary, in *Insight* he describes the will as “intellectual or spiritual appetite.”³⁰ Instead, he argues that Aristotelian and Scholastic structures in the stages of the historical development of meaning have been surpassed.³¹ Intentional and conscious operations can be transposed into metaphysical terms if needed.³² He is careful to maintain the close connection between the intellect and the will in order to avoid intellectualism or voluntarism.³³ Rather than speaking of the will, Lonergan emphasizes the fourth level of consciousness and intentionality, “the *responsible* level on which we are concerned with ourselves, our own operations, our goals, and so deliberate about possible courses of action, evaluate them, decide, and carry out our decisions.”³⁴ The first three levels of consciousness are the empirical (sensing, perceiving, feeling, moving); the intellectual (inquiring, understanding, indentifying); and the rational (reflecting, judging, evaluating).³⁵ For the sake of clarity, the principal operations of each level can be denoted respectively: experiencing, understanding, judging, and deciding.³⁶ To elucidate the connection

29. Lonergan, *Method in Theology*, 340.

30. Lonergan, *Insight: A Study of Human Understanding*, 621.

31. This point relates to the relationship between theology and canon law and will receive further inquiry in the final chapter.

32. Lonergan, *Method in Theology*, 120.

33. One could argue that Aquinas does the same as well.

34. Lonergan, *Method in Theology*, 9.

35. *Ibid.*

36. *Ibid.*, 14.

between the fourth level of consciousness and the meaning of real freedom versus

freedom from, a lengthy quote from Lonergan's *Method* is needed:

The fourth level, which presupposes, complements, and sublates the other three, is the level of freedom and responsibility, of moral self-transcendence and in that sense of existence, of self-direction and self-control. Its failure to function properly is the uneasy or the bad conscience. Its success is marked by the satisfying feeling that one's duty has been done.

As the fourth level is the principle of self-control, it is responsible for the proper functioning on the first three levels. It fulfills its responsibility or fails to do so in the measure that we are attentive or inattentive in experiencing, that we are intelligent or unintelligent in our investigations, that we are reasonable or unreasonable in our judgments. Therewith vanish two notions: the notion of pure intellect or pure reason that operates on its own without guidance or control from responsible decision; and the notion of will as an arbitrary power indifferently choosing between good and evil.³⁷

There is an intricate relation between knowing and doing, so much so that to separate the two in analysis or living is to make the person less than human. Although the operations are united, they are distinct and distinguishable.

In accordance with the four levels of consciousness and intentionality, Lonergan identifies four elements in a positive account of freedom. The first three elements are the "intellectual antecedents" which culminate in the act of the will.³⁸ The first element is the *underlying sensitive flow* consisting of "sensible presentations and imaginative representations, of affective and aggressive feelings, of conscious bodily movements."³⁹ This is the sensible raw data of human living that is experienced. When the underlying sensitive flow becomes the object of inquiry regarding what is to be done or avoided, the second element emerges, the *practical insight*. "In other words, while speculative and

37. Lonergan, *Method in Theology*, 121.

38. Lonergan, *Insight: A Study of Human Understanding*, 632.

39. *Ibid.*

factual insights are concerned to lead to knowledge of being, practical insights are concerned to lead to the making of being. Their objective is not what is but what is to be done. They reveal, not the unities and relations of things as they are, but the unities and relations of possible courses of action.”⁴⁰ Because action does not immediately follow insight, the third element, namely *practical reflection*, surfaces. In practical reflection, the subject judges and scrutinizes one’s own motives in a possible course of action, possible consequences to oneself and others, and one’s willingness to act. Practical reflection is oriented toward doing, yet it is still simply knowing. Because practical reflection has no internal term, that is, no intrinsic capacity to come to an end on its own, it may go on indefinitely. “What ends the reflection is the decision. As long as I am reflecting, I have not yet decided. Until I have decided, the reflection can be prolonged by further questions. But once I have decided and as long as I remain decided, the reflection is over and done with.”⁴¹ The fourth element in a positive account of freedom is the *decision*. Because Lonergan’s explication of this fourth element is critical not only to an understanding of freedom, but more importantly to a theology of commitment, his argument will be quoted at length:

It is the decision, and one will do well to distinguish between the decision itself and its manifestation whether in execution, or in knowledge, or in expression of that knowledge. For the decision itself is an act of willing. It possesses the internal alternatives of either consenting or refusing. It may also possess external alternatives, when different courses of action are considered simultaneously, and then consent to one and refusal of the others constitute a choice.

The fundamental nature of decision is best revealed by comparing it with judgment. Decision, then, resembles judgment inasmuch as both select one member of a pair of contradictories; as judgment either affirms or denies, so decision either consents or refuses. Again, both decision and judgment are

40. Lonergan, *Insight: A Study of Human Understanding*, 633.

41. *Ibid.*, 635.

concerned with actuality; but judgment is concerned to complete one's knowledge of an actuality that already exists, while decision is concerned to confer actuality upon a course of action that otherwise will not exist. Finally, both decision and judgment are rational, for both deal with objects apprehended by insight, and both occur because of a reflective grasp of reasons.

However, there is a radical difference between the rationality of judgment and the rationality of decision. Judgment is an act of rational consciousness, but decision is an act of rational self-consciousness. The rationality of judgment emerges in the unfolding of the detached and disinterested desire to know in the process towards knowledge of the universe of being. But the rationality of decision emerges in the demand of the rationally conscious subject for consistency between his knowing and his deciding and doing.⁴²

These four elements are not characterized by necessity. There is a particular kind of contingency distinctive of "the laws of spirit."⁴³ "But the laws of spirit reside in the dynamic structure of its cognitional and volitional operations, and their concrete application is effected through spirit's own operations within that dynamic structure."⁴⁴ This dynamic structure is what Lonergan calls "essential freedom."⁴⁵ The human person is essentially free, because there is no necessary step between practical reflection and the decision. Deciding does not necessarily flow from the previous intellectual elements, and even those insights and judgments are contingent upon time, place, person, or group. The possible courses of action could be otherwise, and until one possibility is chosen through rational willing, they remain outside the realm of actuality. Although the human person is essentially free, he is subject to conditions of "effective freedom."⁴⁶ Effective freedom, the operational range of one's essential freedom, is limited by one's external

42. Lonergan, *Insight: A Study of Human Understanding*, 636.

43. *Ibid.*, 641.

44. *Ibid.*

45. *Ibid.*, 643.

46. *Ibid.*, 645.

circumstances, one's psychoneural state, one's speculative and practical intellectual development, and one's antecedent willingness to do consistently that which one knows to be the right course of action.⁴⁷ Within effective freedom, Lonergan denotes horizontal and vertical exercises of freedom. "A horizontal exercise is a decision or choice that occurs within an established horizon. A vertical exercise is the set of judgments and decisions by which we move from one horizon to another."⁴⁸ When a vertical exercise of freedom is dialectical, meaning the old horizon is repudiated and the new one embraced, a moral conversion has occurred and the human person is effectively and essentially choosing the person one is to be. Understood in this way, freedom is not *freedom from*, an arbitrary indeterminism, but rather *freedom for*, a deliberate self-determination.

The notion of effective freedom takes seriously the reality of human finitude and sin. Human persons are conditioned, fragile, and faulty. At times, effective freedom can be so limited that it appears essential freedom is nonexistent. No matter how narrow the operational range that is effective freedom, the human person remains essentially free. Essential freedom is a gift in the sense that it is constitutive of our creatureliness. Together with this gift is responsibility which is indicative of the fourth level of consciousness. Due to the gift of essential freedom, human persons can be co-creators with God in fashioning ourselves and our communities. It is the responsibility of each person to move deliberately and intentionally through the operations of consciousness in order to live authentically and consistently in knowing and doing. The process of moving through these operations does not necessitate a certain number of questions or a particular amount of time. In familiar situations or when "willingness to perform such an act has

47. Lonergan, *Insight: A Study of Human Understanding*, 645-46.

48. Lonergan, *Method in Theology*, 237.

become habitual,⁴⁹ one may move quickly and effortlessly.⁵⁰ Human freedom carries with it the looming threat of sin, the irrational and irresponsible use of human consciousness. Lonergan states,

The reign of sin, then, is the expectation of sin. On a primary level, it is the priority of living to learning how to live, to acquiring the willingness to live rightly, to developing the adaptation that makes right living habitual. On a second level, it is man's awareness of his plight and his self-surrender to it; on each occasion, he could reflect and through reflection avoid sinning; but he cannot bear the burden of perpetual reflection; and long before that burden has mounted to the limit of physical impossibility, he chooses the easy way out.⁵¹

The human person was made to live according to the transcendental precepts, yet repeatedly, from the beginning, fails to do so. This inconsistency is, practically speaking, unbearable; therefore, the human person resorts to the escapes of *self-conscious-less*, *rationalization*, and *moral renunciation*. Sin becomes embedded in the social situation through the persistent failure to attend, to understand, to judge, and to live rationally and responsibly. The cumulative effect that sin creates within the social situation further limits one's effective freedom. The embodiment of sin in the world (individual, group, and general bias) thwarts progress and leads to decline, as explained previously. A culture in decline does not have the tools within itself for recovery. However, the possibility of redemptive recovery given in conversion through the grace of Christ in the church community is ever-present. That hope guards against a reductionist view of the cultural decline in which we live.

49. Lonergan, *Insight: A Study of Human Understanding*, 634.

50. Here Lonergan is talking about habits. Although virtues are not precisely habits, virtue quickens and eases practical reflection. The significance of virtue for marital commitment will be discussed subsequently in this chapter.

51. Lonergan, *Insight: A Study of Human Understanding*, 715.

4.1.4 The Divorce Culture and the Quest for the Soul Mate

The principle of decline has manifested itself in the realm of marriage and family in what Barbara Dafoe Whitehead names “the divorce culture.”⁵² In the twentieth century, divorce in America became a “mass phenomenon.”⁵³ After World War I, wartime separation and mobility along with the rising consumerist economy ushered in “vulgar divorce.”⁵⁴ Divorce became more common, vulgar, due to post-war instability and the changing expectations of women and men regarding roles and their family’s material standard of living. Disputes over material support and socio-economic status hid deeper issues concerning roles, work, power, and equality.⁵⁵ With the advent of the Great Depression, the luxury of divorce was no longer an option for many as they struggled to provide basic needs for their families.⁵⁶ The divorce rate rose considerably once again after World War II. Wartime separation, the emotional fervor of the war, impulsive marriages, and the vast surge of women in the workforce all contributed to this peak in divorce. “The post war campaign for domesticity” waged through popular media and the government stabilized marriage throughout the 1950’s and 1960’s.⁵⁷ Whitehead identifies the advent of the divorce culture marked not only by demographic changes, but more importantly, by a fundamental ideological change in the meaning of marriage and divorce:

52. Barbara Dafoe Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family* (New York: NY: Vintage Books, 1998).

53. *Ibid.*, 18.

54. *Ibid.*, 20.

55. *Ibid.*, 20-39.

56. *Ibid.*, 42.

57. *Ibid.*, 43.

Indeed, the cultural fault line, the B.C. and A.D. of American divorce, can be drawn somewhere in the mid- to late 1960s. Before that time, divorce was contained within a system of marriage and subject to its jurisdiction. After that time, divorce moved outside the government of marriage and established its own institutional jurisdiction over family relationships. Before the mid-1960s, divorce was viewed as a legal, family, and social event with multiple stakeholders; after that time, divorce became an individual event defined by and responsive to the interests of the individual.⁵⁸

This is hardly surprising given the simultaneity of the sexual revolution, although the underpinnings of the separation between sex and marriage began at the end of the nineteenth century according to Glenn Stanton.⁵⁹ However, Shaji George Kochuthara sees the origins of the revolution in the work of eighteenth century philosophers such as Hume, Rousseau, and Malthus.⁶⁰

Several factors coalesced to produce such a cultural change in which the pleasure of sex was valued in itself rather than as a part of marriage. “Taken together, the Flapper, the emergence of dating, the smut magazines, and, to a degree, the explicit marriage manual (by focusing on pleasure as the aim of sexuality) helped our culture view sex as an ‘autonomous domain of pleasure,’ making personal satisfaction the highest goal of the sexual act.”⁶¹ Certainly the vast and rapid availability and acceptance of artificial birth control along with studies devoted to the psychology of sexual behavior contributed to the revolution.⁶² In addition to these factors, Kochuthara highlights the impact of

58. Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family*, 44.

59. Glenn T. Stanton, *Why Marriage Matters: Reasons to Believe in Marriage in a Postmodern Society* (Colorado Springs, CO: Piñon Press, 1997), 34.

60. Shaji George Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition* (Rome, Italy: Gregorian University Press, 2007), 354, Google Play Book.

61. Stanton, *Why Marriage Matters: Reasons to Believe in Marriage in a Postmodern Society*, 38.

62. *Ibid.*, 191n24.

scientific studies into sexual behavior from Kinsey along with Masters and Johnson on sexual mores and views.⁶³ People became more open about discussing sexual matters as sexuality became more overt in public media. During the 1960's and 1970's protests among the youth were ubiquitous, and the second wave of American feminism rolled in with the cry for equality in employment opportunity, pay, and advancement.⁶⁴ It was not until the mid-1970's that "there was a steady growth of feminist scholarship *about*, rather than *against*, the family."⁶⁵ Change in work structure necessarily brings about rethinking of family structure. Interestingly, at the same time work and family were moving to separate public/private realms, sex, which is perhaps the most intimate and private act, was barreling full-force into the public realm.

Although the sexual revolution brought several benefits such as attention to and appreciation of women's sexual experience and the enhancement of marital relationships, it brought with it unprecedented changes in the sexual landscape of America and the shape of family structure. These significant trends, indicated at the beginning of this study, are worth mentioning again. The first trend is the significant increase in the divorce rate:

The incidence of divorce began to increase rapidly during the 1960s. The number of children under age 18 newly affected by parental divorce each year, most of whom have lost a resident father, grew from under 500,000 in 1960 to well over a million in 1975. After peaking around 1980, that number leveled off and remains close to a million new children each year.⁶⁶

63. Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 359.

64. Anne Carr and Mary Stewart Van Leeuwen, eds., *Religion, Feminism, and the Family*, *The Family, Religion, and Culture*, ed. Don S. Browning and Ian S. Evison (Louisville, KY: Westminster John Knox Press, 1996), 15, 34.

65. *Ibid.*, 34.

66. National Marriage Project and Center for Marriage and Families, "Social Indicators of Marital Health & Well-Being: Trends of the Past Five Decades," in *The State of Our Unions* (Charlottesville, VA:

The second trend is the dramatic increase in unmarried births. “Since 1960, the percentage of babies born to unwed mothers has increased more than sevenfold. . . . More than four in ten births and more than two-thirds of black births in 2011, the latest year for which we have complete data, were out-of-wedlock.”⁶⁷ The third significant trend is unmarried cohabitation, which has increased fifteen-fold since 1960. “Slightly more than 40 percent of all children are expected to spend some time in a cohabiting household during their childhood years.”⁶⁸ The divergence of sexual relationships from marital commitment since the 1960’s is evident. The relatively new valuation of sexual pleasure and satisfaction outside of an institutional framework fails to consider all the stakeholders in this new way of thinking, specifically children, precisely those that do not have a choice in the arrangement.⁶⁹

One of the more remarkable aspects of these burgeoning trends is that to most of the general public they appear unremarkable, even normal. Whitehead declares, “. . . [T]he nation’s most dramatic and sustained divorce ‘high’ was unaccompanied by any sense of crisis.”⁷⁰ The sexual revolution intersected with a period of “sustained material affluence” and a “sense of psychological affluence.”⁷¹ The same period of time could be

National Marriage Project and Institute for American Values, 2012), 91.

67. Ibid., 91, 93.

68. National Marriage Project and Center for Marriage and Families, "Social Indicators of Marital Health & Well-Being: Trends of the Past Five Decades," 93.

69. Perhaps one of the most significant changes in the history of sexual practice is the legalization of abortion in the United States in 1973. However, the enormity of the causes and effects of this change is beyond the scope of this study.

70. Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family*, 45.

71. Ibid., 46.

called a “psychological revolution,” in which Americans focused on their inner lives, emotional self-expression, and personal satisfaction.⁷² Although it is difficult to determine precisely, perhaps the sexual revolution is the psychological revolution of the sexual self. In itself, the turn to the inner life of self and psychological understanding is not problematic, and in fact could lead to more just and satisfying relationships. The difficulty arises when the psychological turn becomes expressive individualism. In an individualistic culture, marriage, family, and sexual relationships are largely based upon personal choice and individual psychological and sexual fulfillment. “If love and marriage are seen primarily in terms of psychological gratification, they may fail to fulfill their older social function of providing people with stable, committed relationships that tie them into the larger society.”⁷³ The sexual revolution, which emphasized sexual pleasure over reproduction, changed not only sexual practices and sensitivities but also the choice of partners.⁷⁴ In contemporary America, marriage is primarily viewed as the natural outcome of a romantic relationship. In 2001, a national survey of young men and women in their twenties was conducted for the National Marriage Project by the Gallup Organization. A staggering 94% of never married singles in their twenties agreed with the statement that “when you marry you want your spouse to be your soul mate, first and foremost.”⁷⁵ The survey brought to light that for young Americans the importance of the

72. Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family*, 46.

73. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 85.

74. Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 360.

75. David Popenoe and Barbara Dafoe Whitehead, eds., *The State of Our Unions: The Social Health of Marriage in America, 2001* (New Brunswick, NJ: The National Marriage Project at Rutgers University, June 2001), 6, <http://www.virginia.edu/marriageproject/pdfs/SOOU2001.pdf> (accessed June 26, 2010).

institutional aspects of marriage, namely economic, family, and religious, are declining. Even among Catholics, the soul mate model is prevalent and operative. According to the CARA report, 87% of Catholics in their twenties agreed that “when you marry, you want your spouse to be your soulmate, first and foremost.”⁷⁶ Barbara Dafoe Whitehead and David Popenoe summarize the soul mate model of marriage that is viewed not only as normal, but also normative:

Taken together, these findings paint a portrait of marriage as emotionally deep but socially shallow. While marriage is losing much of its broad public and institutional character, it is gaining popularity as a SuperRelationship, an intensely private spiritualized union, combining sexual fidelity, romantic love, emotional intimacy and togetherness.⁷⁷

Interestingly, Whitehead and Popenoe note that it is possible that the soul mate ideal may be the secular, spiritualized replacement for diminishing religious views of marriage.⁷⁸

Unfortunately, this quest for the soul mate in the psychological age has proven to be arduous, if not impossible. Whitehead observes, “Just as rising economic expectations had bred material dissatisfaction earlier in the century, so now rising emotional expectations fostered a growing sense of emotional dissatisfaction and restlessness in marriage.”⁷⁹ The excessive emotional demands and expectations of the soul mate model of marriage weigh heavily on spouses, and when those demands are not met, many spouses may feel they have not found “the one.” A pseudo-mystical journey to find one’s

76. Mark M. Gray, Paul M. Perl, and Tricia C. Bruce, *Marriage in the Catholic Church: A Survey of U.S. Catholics* (Georgetown University: Center for Applied Research in the Apostolate, October 2007), 65, http://www.usccb.org/laity/marriage/marriage_report.pdf (accessed February 4, 2008).

77. Popenoe and Whitehead, *The State of Our Unions: The Social Health of Marriage in America, 2001*, 13.

78. *Ibid.*

79. Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family*, 50.

“real” soul mate ensues. If emotional and psychological expectations are too high in this model lacking social-structural supports, spouses may believe divorce is the inevitable solution. When marriage is understood as a private, spiritual union of soul mates, the effects of divorce on children, communities, and the economy are not given due weight:

Indeed, in 1994, a nationally representative survey found only 15% of the population agreeing that “when there are children in the family, parents should stay together even if they don’t get along.” And, according to one recent study, the meaning of “not getting along” is being defined down. It’s been estimated that more than half of recent divorces occur, not because of high conflict, but because of “softer” forms of psychological distress and unhappiness. Unfortunately, these are the marriages that might improve over time and with help.⁸⁰

There is further evidence that happiness ebbs and flows, and years later, self-reported unhappily married couples identify themselves as happily married.⁸¹ These empirical findings are manifestations of Lonergan’s general bias of common sense. A culture of expressive individualism makes it more difficult to maintain a broad, long-term view, and a long-term view is precisely what is needed to sustain a marriage.

4.1.5 The Reversal of Cultural Decline through Grace and Conversion

The possibility for the reversal of cultural decline in marriage and family practices is found in the grace and freedom offered in Christ. This redemptive possibility is the potential for intellectual, moral, and religious conversion. Through conversion, persons have the ability to use their *freedom for* self-determination, thoughtful decisions, and responsible action. It is only when minds and hearts are turned (*metanoia*) to God that the threat of the culture of individualism can be overcome. Komonchak expounds,

80. Popenoe and Whitehead, *The State of Our Unions: The Social Health of Marriage in America, 2001*, 16.

81. *Ibid.*

On the Catholic understanding, redemption is the healing of the human mind and heart and the restoration of the basic human potentiality for intelligent and responsible action through its sublation into a supernatural life in imitation of, obedience to, and union with Jesus Christ. To our tendency to lose faith in the powers of our minds to reach the truth (cultural bias) comes the faith which receives the unfailing Word of God. To our tendency to surrender in despair to the endless cycle of power and weakness (group bias) comes the hope that rests on the assurance of Christ's victory over even death and on his promise of the Spirit and eventual triumph. And to the egoism that puts our own interests and good above all others (individual bias) comes the love which finds its highest exemplar in the forgiving and absorbing love of Christ for those who did him evil.⁸²

The possibility of overcoming bias, sin, in marriage practices is found in conversion.

Intellectual and moral conversion enable one to live by the transcendental precepts so that one can know and do what is right, real, and responsible, particularly in relationships.

Only then can one know the real values of marriage and choose them responsibly.

Religious conversion is a dynamic state of being in love that is experienced as a gift yet still operates on the fourth level of intentional consciousness.⁸³ The religiously converted person is able to know, decide, and act with an "easy freedom."⁸⁴ Lonergan admits that "normally it [conversion] is a prolonged process though its explicit acknowledgment may be concentrated in a few momentous judgments and decisions."⁸⁵ It is within this context of conversion that a theology of marital commitment will be explained. Once a more differentiated theology of marital commitment is given, my hope is that it will become clearer how greater attention to commitment can aid in the reversal of an individualistic culture in decline, where commitment is really defined and lived as "a form of self-

82. Komonchak, "Foundations in Ecclesiology," 80-81.

83. Lonergan, *Method in Theology*, 105-07.

84. *Ibid.*, 107.

85. *Ibid.*, 130.

commitment.”⁸⁶ Because all Catholic marriages are currently governed by canon law, the discussion leads to the meaning and significance of marital consent and how that relates to commitment. A theology of commitment must precede this exercise, because as discussed in Chapter Two, theology judges canon law.

4.2 Making a Marital Commitment

4.2.1 Who Can Commit to Love Another for Life?

The beginning of the development of a theology of marital commitment is an inquiry into theological anthropology. It is a look into *who* can make an interpersonal commitment to love another for life. This *who* is the human person theologically understood. The human person is a whole, a single entity, but not an individual as that term has been used to connote an autonomous being separate from location, history, and relationships. The human person theologically understood is body, thought, will, experience, emotion, decision, memory, and relationship, one whose ultimate meaning is found in relationship to God. “Man,⁸⁷ though made of body and soul, is a unity. Through his very bodily condition he sums up in himself the elements of the material world. Through him they are thus brought to their highest perfection and can raise their voice in praise freely given to the creator.”⁸⁸ Because of sin, this unity of the human person is disturbed and the experience of division becomes reality. “Man therefore is divided in himself. As a result, the whole life of men, both individual and social, shows

86. Whitehead, *The Divorce Culture: Rethinking Our Commitments to Marriage and Family*, 49.

87. “Man” is used here to denote humanity or human persons. Although the quoted texts use “he,” “him,” and “himself” in reference to persons, I will use “she,” “her,” and “herself” to offset the overuse of the masculine pronoun when clearly both sexes are implied.

88. *Gaudium et Spes*, no. 14.

itself to be a struggle, and a dramatic one, between good and evil, between light and darkness.”⁸⁹ The human person is the subject of these experiences of division both *ad intra* and *ad extra*. The fullness of what it means to be a human person can be discovered only when all the parts constitutive of the whole are one, which Christian faith holds is only possible when we are one in Christ.

The empirical sciences explain, analyze, and dissect the human person according to the methods of each particular science. As it stands, these sciences can only explain, however accurately, a small part of human personhood, both collectively and individually. Although each science aims to explain the human person as a whole, each is incapable of doing so completely because the human person is a mystery with the capabilities of self-presence, self-awareness, self-transcendence, self-determination, and self-possession. Karl Rahner opines, “Man experiences himself precisely as subject and person insofar as he becomes conscious of himself as the product of what is radically foreign to him.”⁹⁰ By allowing herself to be the object of questions, the human person experiences herself as subject, as the one who questions, knows, or understands. Transcendental experience, “the subjective, unthematic, necessary and unfailing consciousness of the knowing subject that is co-present in every spiritual act of knowledge,”⁹¹ is nonreflexive knowledge characteristic of human personhood. Rahner continues, “In the fact that man raises analytical questions about himself and opens himself to the unlimited horizons of such questioning, he has already transcended himself

89. *Gaudium et Spes*, no. 13.

90. Karl Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity*, trans. William V. Dych (New York, NY: Crossroad, 1993), 29.

91. *Ibid.*, 20.

and every conceivable element of such an analysis or of an empirical reconstruction of himself. In doing this he is affirming himself as more than the sum of such analyzable components of his reality.”⁹² Succinctly, the human person is more than the sum of her parts. The human person is inherently irreducible to her family history, biochemistry, psychological tendencies, or socio-political situatedness. The human person is capable of self-determination:

Being a person, then, means the self-possession of a subject as such in a conscious and free relationship to the totality of itself. This relationship is the condition of possibility and the antecedent horizon for the fact that in his individual empirical experiences and in his individual sciences man has to do with himself as one and as a whole. Because man’s having responsibility for the totality of himself is the condition of his empirical experience of self, it cannot be derived completely from this experience and its objectivities. Even when man would want to shift all responsibility for himself away from himself as someone totally determined from without, and thus would want to explain himself away, *he* is the one who does this and does it knowingly and willingly. *He* is the one who encompasses the sum of all the possible elements of such an explanation, and thus *he* is the one who shows himself to be something other than the subsequent product of such individual elements.⁹³

Rahner continues, “To say that man is person and subject, therefore, means first of all that man is someone who cannot be derived, who cannot be produced completely from elements at our disposal. He is that being who is responsible for himself.”⁹⁴ This is the mystery of the human spirit: each human person is an irreducible and irreplaceable unity capable of communion with God and others through knowing and loving.

Rahner, like Lonergan, emphasizes the freedom of the human person. “When freedom is really understood, it is not the power to be able to do this or that, but the

92. Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity*, 29.

93. *Ibid.*, 30-31.

94. *Ibid.*, 31.

power to decide about oneself and to actualize oneself.”⁹⁵ Self-transcendence in knowing and doing differentiates the human person from the rest of creation. Lonergan relates the distinguishing mark of personhood to the fourth level of consciousness:

But on the final level of questions for deliberation, self-transcendence becomes moral. When we ask whether this or that is worthwhile, whether it is not just apparently good but truly good, then we are inquiring, not about pleasure or pain, not about comfort or ill ease, not about sensitive spontaneity, not about individual or group advantage, but about objective value. Because we can ask such questions, and answer them, and live by the answers, we can effect in our living a moral self-transcendence. That moral self-transcendence is the possibility of benevolence and beneficence, of honest collaboration and of true love, of swinging completely out of the habitat of an animal and of becoming a person in a human society.⁹⁶

It is on this fourth level of conscious and intentional operations that the human person is able to carve out not only her life course but more importantly her core identity. As transcendental knowledge, such knowledge can never be definitively known except by God. The closest one can come to accurate self-awareness is in one’s conscience, “man’s most secret core, and his sanctuary,” where “he is alone with God whose voice echoes in his depths.”⁹⁷

In Scripture, the “heart” refers to the core of the person. Elliott states, “It [the heart] is thus the central organ which integrates the whole person, a rational and volitional center for intentionality and commitment: ‘. . . where your treasure is, there will your heart be also’ (Matthew 6:21). The heart is the source of the commitment of the whole person.”⁹⁸ A few biblical examples support this assertion. “From there you will

95. Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity*, 38.

96. Lonergan, *Method in Theology*, 104.

97. *Gaudium et Spes*, no. 16.

98. Peter J. Elliott, *What God Has Joined: The Sacramentality of Marriage* (New York: Alba House, 1990), 137.

seek the Lord your God, and you will find him if you search after him with all your heart and soul.”⁹⁹ “So now, O Israel, what does the Lord your God require of you? Only to fear the Lord your God, to walk in all his ways, to love him, to serve the Lord your God with all your heart and with all your soul.”¹⁰⁰ “Only fear the Lord, and serve him faithfully with all your heart; for consider what great things he has done for you.”¹⁰¹ “Teach me your way, O Lord, that I may walk in your truth; give me an undivided heart to revere your name.”¹⁰² “Set your heart right and be steadfast, and do not be impetuous in time of calamity.”¹⁰³ “When you search for me, you will find me; if you seek me with all your heart.”¹⁰⁴ “Let us approach with a true heart in full assurance of faith, with our hearts sprinkled clean from an evil conscience and our bodies washed with pure water.”¹⁰⁵ Thus, there is an intimate connection between what it means to be a human person and commitment. Commitments shape and define the heart of the person.

The self-awareness and self-determination characteristic of human personhood always occur in relationship. Persons are not autonomous in the sense of being free from all “social and historical relations,” and the will does not operate without limitations by a smooth and clear application of rationality to moral principles, a view of the moral

99. Dt 4:29.

100. Dt 10:12.

101. 1 Sm 12:24.

102. Ps 86:11.

103. Sir 2:2.

104. Jer 29:13.

105. Heb 10:22.

subject that has been prevalent since the Enlightenment.¹⁰⁶ Although the theology of commitment being developed here emphasizes choice, self-determination, and decision, this view is not so naïve as to fail to take into account the relational quality of being human. To be a human person is to be in relationship. Proving that point is the fact that the ability to mature psychologically and emotionally is very much dependent on the level of nurturing care persons receive in childhood. The capacity for mature self-determination is intimately related to the presence of loving relationships. Margaret Farley argues, “Moreover, freedom and relationality as features of human persons are profoundly *connected* with one another: we cannot grow in freedom except in some nurturing relationships; and freedom ultimately is for the sake of relationships—the loves, the relationships we finally choose to identify with in our deepest selves.”¹⁰⁷ As indicated in Chapter Three, the divine persons are distinguished based upon their relationship to each other and to the world. Persons are only persons in communion. Even the hermit who has seemingly taken himself out of the world of relationships is committing to a particular kind of relationship to God and others. A life of contemplation apart from the world places the hermit in a relationship of prayer toward the world. The statement that to be a person means to be in relationship requires clarification regarding the nature of the relationship. Some relationships can annihilate persons, while others can enhance and even create persons. Of particular importance in understanding an interpersonal commitment to love another for life is the meaning of love.

106. Ruth L. Smith, "Feminism and the Moral Subject," in *Women's Consciousness, Women's Conscience: A Reader in Feminist Ethics*, ed. Barbara Hilkert Andolsen, Christine E. Gudorf and Mary D. Pellauer (San Francisco: Harper & Row Publishers, 1985), 246.

107. Margaret A. Farley, *Just Love: A Framework for Christian Sexual Ethics* (New York, NY: The Continuum International Publishing Group, Inc., 2006), 214.

As discussed in Chapter Three, the kind of relationship that is intrinsic to personhood is one of love. John Paul II teaches,

God is love and in Himself He lives a mystery of personal communion. Creating the human race in His own image and continually keeping it in being, God inscribed in the humanity of man and woman the vocation, and thus the capacity and responsibility, of love and communion. Love is therefore the fundamental and innate vocation of every human being.¹⁰⁸

Because it is so central to a theology of marital commitment, further nuance and clarification needs to be added to an understanding of love. The assumption that love is most accurately described as complete and total, disinterested self-giving has been challenged in the last century, particularly in feminist theology. In her article that served as catalyst for further challenges to a one-sided view of love, Valerie Saiving Goldstein questions descriptions of love that have been “constructed primarily upon the basis of masculine experience and thus view the human condition from the male standpoint.”¹⁰⁹ She argues that despite variations in culture and time, there exist real differences between the masculine and feminine experiences that cannot be attributed to conventional and arbitrary definitions of the sexes. Due to these inherent differences, “the temptations of woman *as woman* are not the same as the temptations of man *as man*, and the specifically feminine forms of sin—‘feminine’ not because they are confined to women or because women are incapable of sinning in other ways but because they are outgrowths of the basic feminine character structure—have a quality which can never be encompassed by such terms as ‘pride’ and ‘will-to-power.’”¹¹⁰ Feminine forms of sin, such as

108. John Paul II, *Familiaris Consortio*, no. 11.

109. Valerie Saiving Goldstein, "The Human Situation: A Feminine View," *The Journal of Religion* 40, no. 2 (April 1960): 101.

110. *Ibid.*, 108-9.

“underdevelopment or negation of the self,”¹¹¹ cannot be redeemed through an understanding of love as complete self-giving. Rather, love as selflessness can only further perpetuate feminine forms of sin. Whether one agrees or disagrees with such a characterization of engendered forms of sin, the challenge remains to a unilateral specification of love.

Using Goldstein’s article as a foundation for rethinking “traditional”¹¹² articulations of agapic love, Christine Gudorf utilizes her own experience as a mother to reimagine love as essentially mutual. Rather than envisioning the impossible ideal of the love of God in Christ as “agape, disinterested, self-sacrificing love,”¹¹³ Gudorf argues that love is essentially mutual, reflected in the intimate Abba relationship that Jesus enjoys and seeks to share with others.¹¹⁴ She asserts, “All love both involves sacrifice and aims at mutuality.”¹¹⁵ Instead of elevating self-sacrifice as the highest ideal of human and divine love, Gudorf argues that “the moments of self-sacrifice, such as we find in the crucifixion of Jesus, are just that—moments in a process designed to end in mutual love.”¹¹⁶ According to Gudorf, to understand self-sacrificial love as anything

111. Goldstein, "The Human Situation: A Feminine View," 109.

112. In a footnote, Gudorf explains that prior to Luther, Christian love did not necessarily mean the exclusion and negation of self. In other words, Christian love and self-love were not considered mutually exclusive. See Christine E. Gudorf, "Parenting, Mutual Love, and Sacrifice," in *Women's Consciousness, Women's Conscience: A Reader in Feminist Ethics*, ed. Barbara Hilkert Andolsen, Christine E. Gudorf and Mary D. Pellauer (San Francisco: Harper & Row Publishers, 1985), 182n.

113. *Ibid.*, 182.

114. *Ibid.*, 185.

115. *Ibid.*, 182.

116. *Ibid.*, 186.

other than a part of a larger relationship of mutual love is “to condone and even encourage the worst abuses of human dignity.”¹¹⁷

Like Gudorf, Sally Purvis uses her experience of mother-love as an alternative model for agapic love which replaces the view of *agape* as disinterested, self-sacrificial love.¹¹⁸ Her analysis of the characteristics of mother-love¹¹⁹ and “traditional” views of *agape* lead her to conclude, “If the ‘self’ that the mainstream agapic tradition has described as the model for *agape* is remote, distant, detached, the self that expresses mother-love is present, connected, involved, intensely caring.”¹²⁰ Purvis argues that the model of mother-love for *agape* challenges a view of love in which the lover is disinterested, impartial and self-sacrificing. For Purvis, *agape* is a love that is intensely personal, concrete, particular, and mutual.¹²¹ Fleshing out the qualities of mother-love that illumine *agape*, Purvis states that it is inclusive, meaning, “it is dependent upon the mother-child relationship but is independent of the specific characteristics of the child.”¹²² It is the relationship that establishes the context for the “fundamental commitment” to the good of the other regardless of one’s lovableness at any given

117. Gudorf, "Parenting, Mutual Love, and Sacrifice," 183.

118. Sally B. Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," *Journal of Feminist Studies in Religion* 7, no. 1 (Spring 1991): 19-34.

119. Purvis warns of the dangers of idealizing motherhood and clarifies the distinction between the various experiences and behaviors of mothering and their underlying mother-love. In addition, she does not claim this is the most precise model, nor is it particularly relevant to nonmothers. However, it is useful as a heuristic device for mothers and those who have received true mother-love. See Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," 24, 33.

120. *Ibid.*, 32.

121. *Ibid.*, 33.

122. *Ibid.*, 26.

time.¹²³ A second quality is “the love is both intensely involved and other-regarding” in which “there is no clear line between the needs of the lover and the needs of the beloved.”¹²⁴ Although there are times when the needs of each conflict, the relationship is fundamentally cooperative in structure versus competitive. Rather than understanding *agape* and self-love as oppositional as in Nygren,¹²⁵ this view of *agape* claims an essential unity of self-love and neighbor love. Stephen Pope analyzes the relationship between self-love and neighbor love in Thomas Aquinas, particularly in the *Summa Theologiae*. His conclusion coincides with the understanding that they need not necessarily conflict. Pope maintains,

True self-love for Thomas is the basis of and model for neighbor-love. The neighbor is loved as alter ego (I-II, 28, 1; II-II, 26, 4), as both similar to, or having things in common with, the self and in the manner in which the self loves itself. A person’s love for herself is the model of her love for another, and since “the model exceeds the copy,” Thomas reasons, the former ought to exceed the latter (II-II, 26, 4). If “we have friendship with others it is because we do unto them as we do unto ourselves, hence we read in Ethic. ix. 4, 8, that ‘the origin of friendly relations with others lies in our relations to ourselves’” (II-II, 25, 4). Rather than eliminating the self, neighbor love builds on and has as its necessary condition self-love. The fulfillment of one person is intrinsically connected to the fulfillment of others.¹²⁶

Pope demonstrates that in Thomas the love of others and the love of self are not inherently conflictual. Pope concludes, “Christian love of the other does not demand forfeiting the needs, claims, and value of the self, let alone require servility or contempt for the self. Rather than self-sacrifice, *agape* calls the self to an ever-increasing

123. Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," 26.

124. Ibid., 26-27.

125. Anders Nygren, *Agape and Eros*, trans. Philip S. Watson (Philadelphia: The Westminster Press, 1953).

126. Stephen Pope, "Expressive Individualism and True Self-Love: A Thomistic Perspective," *The Journal of Religion* 71, no. 3 (July 1991): 393.

participation in the good of communion.”¹²⁷ Finally, Purvis contends that mother-love as a model for *agape* is unconditional. Although it is specific to the particularity of the beloved, it is not at the mercy of the actions of the beloved.¹²⁸ Utilizing the Lucan account of the Good Samaritan,¹²⁹ Purvis demonstrates how “neighbor” is a behavioral category and not a social category. The neighbor responds to one in need like a loving family member would.¹³⁰ In this way, *agape* can be both intensely personal and concrete while, at the same time, universal.¹³¹

While these feminist critiques and reconstructions of *agape* offer much needed correctives to “traditional” views of agapic love that do not resonate with the experience of all, they can be problematic. Although Anders Nygren has been widely criticized for developing a complete contrast between *eros* and *agape*, Colin Grant argues that Nygren’s insistence on the uniqueness of *agape* deserves to be heard. He claims that many critiques of Nygren have led to the complete reversal of the priority of *agape* so that “eros displaces agape.”¹³² The pendulum swings in the opposite direction and *eros* is overvalued to the disservice of *agape*. Gudorf does so explicitly. She asserts, “Acts of no matter how much self-sacrifice, which support or encourage unloving actions or attitudes, are not acts of love. Agape is valuable in the service of eros and does not exist

127. Pope, "Expressive Individualism and True Self-Love: A Thomistic Perspective," 398-99.

128. Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," 27.

129. Lk 10:29-37.

130. Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," 30.

131. Admittedly, Purvis does not deal with the problem of finitude, that is, the fact that the needs of those close to us may conflict with the needs of others. Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," 31n31.

132. Colin Grant, "For the Love of God: Agape," *The Journal of Religious Ethics* 24, no. 1 (Spring 1996): 5.

otherwise.”¹³³ Because *eros* is used only twice in Scripture and *agape* is used over one hundred times, *eros* cannot displace *agape* in describing God’s love.¹³⁴

Another problematic area that Grant draws attention to is the displacement of *agape* by *philia*. The focus on love as mutuality can create a utopian view of human relationships lacking practical means of achieving such mutuality among sinful human persons. Grant elucidates why *philia* cannot displace the uniqueness of *agape*:

The egalitarian tone of mutuality and the challenge to face our own vulnerability evoke a sympathetic response amid the post-modern suspicion of imperialistic overtones of hierarchy. However, the vision of a society of mutually supportive persons, sensitive enough to one another’s needs to provide the security for people to expose their own vulnerability will be doomed to remain a romantic illusion unless there are individuals who are strong enough to initiate these exchanges. . . . The point is that such mutuality is elicited and sustained only through the generosity of *agape*.¹³⁵

Although personhood is constituted by relationships of mutual love, descriptions of love as mutual friendship cannot replace *agape*. While incorporating *philia* and *eros* into an understanding of divine love is important, the theological significance of *agape* cannot be lost.¹³⁶ *Agape* “represents the divine extravagance of giving that does not take the self into account.”¹³⁷ It is the kind of love that does not make sense within a purely ethical horizon, like forgiveness within a relationship. “The justice orientation of ethics finds its

133. Gudorf, "Parenting, Mutual Love, and Sacrifice," 190.

134. Benedict XVI, *Deus Caritas Est*, no. 3; Grant, "For the Love of God: Agape," 8.

135. Grant, "For the Love of God: Agape," 9-10.

136. In a footnote, Purvis offers a helpful qualification to the claim that *agape* or neighbor love is rooted in a theological context. “What we can establish is that love for one’s neighbor is normatively fashioned as inexorably tied to love for God. Thus, on the experiential level, claims about *agape* are confined to those who love God. Agapic lovers are not, of course, exclusively Christian. They are, however, theocentric.” See Purvis, "Mothers, Neighbors and Strangers: Another Look at Agape," 26n24.

137. Grant, "For the Love of God: Agape," 19.

completion in, but is also in fundamental ways contradicted by, religious forgiveness.”¹³⁸ God is found in that unfathomable place where justice and mercy meet,¹³⁹ where divine plentitude touches human void. However, it is not in the God-human relationship that mutual love as giving and receiving originates. The capacity for giving and receiving in love is found in God as divine community. In reimagining love as primarily mutual, Gudorf seems to come to a different conclusion. Gudorf’s conviction that all love is directed at mutuality drives and defines her theology of God. She states,

If God is love, then he/she needs an object for his/her love; he/she needs us. The community within the Trinity was not alone sufficient, for one person of the Trinity, the Son, presupposes in his historical function our existence, and the third member of the Trinity, the Spirit, presupposes in her historical function both the Son and us. Moreover, the history of our interaction with God has been one of God’s making known to us his/her desire for a relationship of mutual love.¹⁴⁰

A theology of God that introduces the *need* for human persons and the insufficiency of the divine community alone presents the danger of reducing love to a necessity rather than pure grace. There is in the totality of love the perfect balance of giving and receiving which originates in God alone and not in the God-human relationship.

C.S. Lewis provides a useful distinction within his explication of *agape*, namely, Gift-love and Need-love. He identifies God with Gift-love and articulates a theology of God that is in sharp contrast to Gudorf’s theology:

In God there is no hunger that needs to be filled, only plenteousness that desires to give. The doctrine that God was under no necessity to create is not a piece of dry scholastic speculation. It is essential. Without it we can hardly avoid the conception of what I can only call a “managerial” God; a Being whose function or nature is to “run” the universe, who stands to it as a head-master to a school or a

138. Grant, "For the Love of God: Agape," 17.

139. Ps 85:11.

140. Gudorf, "Parenting, Mutual Love, and Sacrifice," 185-86.

hotelier to a hotel. But to be sovereign of the universe is no great matter to God. In Himself, at home in “the land of the Trinity,” he is Sovereign of a far greater realm.¹⁴¹

Although Lewis envisions God as Gift-love, he opines that God imparts on us Gift-loves, which resemble Himself, and Need-loves, which are opposites. Lewis expands, “They [Need-loves] are rather correlatives, opposites; not as evil is the opposite of good, of course, but as the form of the blanc-mange is an opposite to the form of the mould.”¹⁴² In a sense, the Gift-loves shape the Need-loves, or rather shape the beloved. Lewis holds that God graces human persons with divine Gift-love which enables us to give to God the only thing we can withhold, our hearts, and to love in others what is intrinsically unlovable.¹⁴³ In addition, God bestows divine Need-love of Himself and of one another. Our need for God is already given in the structure of our createdness, but God graces persons with a Need-love by which we can graciously recognize and accept our need for God.¹⁴⁴ *Agape* as divine Need-love of one another is the intrinsic correlative of divine Gift-love. Lewis provides an austere example of how divine Need-love is a true grace and blessing:

How difficult it is to receive, and to go on receiving, from others a love that does not depend on our own attraction can be seen from an extreme case. Suppose yourself a man struck down shortly after marriage by an incurable disease which may not kill you for many years; useless, impotent, hideous, disgusting; dependent on your wife’s earnings; impoverishing where you hoped to enrich; impaired even in intellect and shaken by gusts of uncontrollable temper, full of unavoidable demands. And suppose your wife’s care and pity to be inexhaustible. The man who can take this sweetly, who can receive all and give nothing without

141. C.S. Lewis, *The Four Loves* (New York, NY: Harcourt Brace Jovanovich Publishers, 1960), 126-27.

142. *Ibid.*, 127-28.

143. *Ibid.*, 128.

144. *Ibid.*, 130.

resentment, who can abstain even from those tiresome self-depreciations which are really only a demand for petting and reassurance, is doing something which Need-love in its merely natural condition could not attain.¹⁴⁵

Although Lewis does not say so explicitly, one could argue that this divine Need-love is inscribed in the very structure of God as communion. This is true not in the sense that anything in God is unlovable, but rather that in the graceful, divine *perichoresis* of the Trinity is perfect gift and receptivity. Christologically, *agape*, as divine Gift-love and Need-love, is revealed. In the Incarnation, the Son is not only the gift of God to the world but also the gracious acceptance of the world's need for God.

This theology of commitment presumes that it is persons, capable of self-awareness, self-determination, and self-transcendence created to be in relationships of mutual love with God and others, who make marital commitments. Due to finitude and sin, sacrifice is inevitable, and the grace of God's love is evident when such sacrifice is given and received generously. It is in the context of our finite, sinful world that commitment is necessary. However, before exploring *why* persons make marital commitments, an examination into exactly *what* persons are doing when they make a marital commitment is required.

4.2.2 What Are We Doing When We Commit to Love Another for Life?

The question of *what* persons do when making a marital commitment is explored in depth by Margaret Farley, and it is upon her work that I rely heavily. In her work, *Personal Commitments: Beginning, Keeping, Changing*, she parses the structure of an interpersonal commitment to love another for life.¹⁴⁶ Farley specifies that a marital

145. Lewis, *The Four Loves*, 132.

146. Margaret A. Farley, *Personal Commitments: Beginning, Keeping, Changing* (New York, NY: HarperCollins Publishers, 1986).

commitment is an example of an “explicit, expressed, interpersonal commitment,” otherwise known as “promises, contracts, covenants, vows.”¹⁴⁷ A marital commitment is not simply an internal decision, but also an explicit choice externally demonstrable to the world. She clarifies that it is not a *prediction*, where one is not responsible for the future outcome, nor is it a *resolution*, where the obligation concerns only oneself.¹⁴⁸ A marital commitment or promise is an act of giving my word. Farley explains,

To give my word is to “place” a part of myself, or something that belongs to me, into another person’s “keeping.” It is to give the other person a claim over me, a claim to perform the action that I have committed myself to perform. When I “give my word,” I do not simply give it away. It is given not as a gift (or paid like a fine), but as a pledge. It still belongs to me, but now it is held by the one to whom I have yielded it. It claims my faithfulness, my constancy, not just because I have spoken it to myself, but because it now calls to me from the other person who has received it.¹⁴⁹

Etymologically, the word “commitment” derives from the Latin *mittere* meaning “to send.” In the act of committing, I create a new relationship by means of sending my word into another. Farley elucidates, “When I make a commitment to another person, I dwell in the other by means of my word.”¹⁵⁰ In giving my word to another, it always remains mine yet I hand it over to another:

What we give to the other in a commitment, then, is something of ourselves—something that belongs to us or that is part of our very selves. It remains ours, though it is entrusted to another. “What is mine becomes thine, but it is still mine,” and that is why if we “break our word” we stand to lose something that is ours—a material possession, a framework for activity, our reputation, our integrity.¹⁵¹

147. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 15.

148. *Ibid.*, 16.

149. *Ibid.*, 16-17.

150. *Ibid.*, 17.

151. Margaret A. Farley, “The Concept of Commitment as Applied to Questions of Marriage and

A commitment implies risk and vulnerability. The mutual commitment of marriage, this reciprocal sending and receiving of one's word to another, creates a unique bond by what is shared, the word of each as a symbol of oneself.¹⁵² Because giving our word creates a new relationship and marks something new in the history of a relationship, persons want to "incarnate" or "concretize" the word itself.¹⁵³ In marriage, the primary means of doing so are the expression of consent at the wedding along with subsequent consummation of the marriage. As body and spirit, human persons need to make real externally what is real internally. Commitment occurs at the fourth level of conscious intentionality. By committing to another, we are *doing* something new, giving our word to another. A marital commitment is an act of rational self-consciousness and self-determination.

Theologically, this notion of "giving my word" in a marital commitment can uncover a considerable number of parallels in christology, only a few of which will be fleshed out here. In Hebrew, *dabar* can be translated either "word" or "deed."¹⁵⁴ George Worgul maintains, "In the Old Testament, *dabar* concurrently means *word* and *event*. The unity of these two elements reaches its climax in the divine *dabar*, the divine proclamation and deed. When God speaks his word, what is spoken transpires. Divine utterance is, at the same time, a divine happening. In a real sense the divine *dabar* is a

Divorce," *CLSA Proceedings* 54 (1992): 89.

152. The understanding of symbol used here was explained in Chapter Three in reference to George Worgul's work. A person's word given to another in a promise is a symbolic gesture or action that expresses who he or she is while reaching out to another. See George S. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments* (New York, NY: Paulist Press, 1980).

153. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 17.

154. John Macquarrie, "Word and Idea," *International Journal for Philosophy of Religion* 1, no. 2 (Summer 1970): 75.

creative reality.”¹⁵⁵ John Macquarrie points out the dynamic character of the word. “A time comes when the ideas break out into deeds.”¹⁵⁶ The Incarnation is the embodied Word, dynamically and creatively enacted into the world. Christological insights that can be gleaned from the Prologue to the Gospel of John give credence to the significance of “giving my word” in marital commitment. The Prologue poetically introduces the key themes and concepts of the Gospel narrative regarding Jesus’ identity such as: life, light, truth, preexistence, and revelation.¹⁵⁷ These themes are lived out in the works of Jesus, particularly the sign-miracles. Although biblical scholars are not in complete agreement about the background of the Logos, or Word, in the Johannine Prologue,¹⁵⁸ the Word “is essentially about communication.”¹⁵⁹ Genesis 1:3 and Isaiah 55:9-11 reveal how the creative and effective Word of God is sent by God to accomplish a purpose, to fulfill that purpose, and to return to God.¹⁶⁰ This same Word of God is specifically identified with Jesus Christ in the Prologue. In exegeting the passage, Herman Waetjen clarifies that the English translation, “and the Word was *with* God,” is inadequate. The Greek *πρός* indicates a dynamic movement *towards* or *into* rather than a static standing alongside.¹⁶¹

155. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 130.

156. Macquarrie, "Word and Idea," 75.

157. Stephen S. Kim, "The Literary and Theological Significance of the Johannine Prologue," *Bibliotheca Sacra* 166 (Oct-Dec 2009): 424.

158. The Logos of the Prologue is introduced without explanation or definition and is presumed to be known by the audience. Stephen Kim identifies three possible sources: (1) the Logos in Greek philosophy (Stoicism and Philo); (2) the Logos as the personification of Wisdom in Jewish literature and the apocrypha; (3) The Logos in the Old Testament. See Kim, 425-26.

159. Kim, "The Literary and Theological Significance of the Johannine Prologue," 427.

160. *Ibid.*, 426n18.

161. Herman C. Waetjen, "Logos *pros* Ton Theon and the Objectification of Truth in the Prologue of the Fourth Gospel," *The Catholic Biblical Quarterly* 63, no. 2 (April 2001): 268.

The Logos is differentiated from God and united with God in an “oscillating interaction.”¹⁶² Waetjen skillfully articulates the hermeneutical function of the Word sent by God into the world. “If the Logos is God’s activity of speech, and if the light that it engenders is identified as its hermeneutical performance, then their opposite, the darkness, must symbolize all the powers and usages of language in society which suppress the truth, distort reality, and foster false consciousness.”¹⁶³ The Word, being one with God, accurately communicates and interprets God to the world. Climactically, John 1:14 declares that the Word that creates and organizes the world united indissolubly with flesh while remaining indissolubly united with God. In the Incarnation, the Word of God heard by the faithful in the Old Testament is the same Word seen in the works of Christ in the New Testament. Waetjen continues,

Rather, the eye has been integrated with the ear, and together these two physical organs of sense constitute the epistemological foundation of the knowledge of God. Consequently, the words and works of the incarnate Logos should be interchangeable, manifesting the integrity of the Creator whose words are deeds and whose deeds are words. But that integration and the integrity it displays must await their materialization in the day-to-day human existence which the Gospel’s narrative world will reveal.¹⁶⁴

Although my word is not a distinct person as in the triune God, nevertheless, like the Word of God, my word represents me as I entrust it to another. My word communicates who I am as I give it to another in love and trust, and, in many ways, others can interpret who I am through my word. Like the incarnate Logos, my given word seeks to be tangible in the world because we are. In marriage, my word is given in consent expressed

162. Waetjen, "Logos *pros Ton Theon* and the Objectification of Truth in the Prologue of the Fourth Gospel," 269.

163. *Ibid.*, 271-72.

164. *Ibid.*, 278-79.

and made incarnate through sexual consummation. In Christ, the Word of God and the works of the incarnate Word are perfectly integrated. As sinful, finite persons, the same cannot be said of us, yet that is the goal in Christ. Through the perfect Word, there is hope that our given word will be true so that our words and works will form a cohesive whole throughout our own life narrative. For marriage, that means that our word given in consent and consummation will be one with the daily faithful and fruitful works of marriage lived over a lifetime. That is the hope and reason marriage is a sacrament.¹⁶⁵ That hope of integration is made possible by the Word, by the grace of the sacrament.¹⁶⁶

In his explication of religious meaning and expression, Lonergan expounds upon the word. His discussion teases out the personal, social, and historical aspects of the word. Lonergan holds that God's word speaks to each one of us immediately "flooding our hearts with his love."¹⁶⁷ The prior and immediate word is outwardly expressed, and therefore, historically conditioned. It becomes embedded in a context and language which may vary depending upon time and place. In addition, the word spoken is social, because it unites what is disparate not only within us, but also among us. Through the word, God gathers a people. The word that is historical and social is at the same time intensely personal. Lonergan uses the love between a man and a woman to develop this point:

165. The understanding of sacrament used in this study is based upon Worgul's definition, which corresponds roughly to the structure of Chapter Three: "Sacraments are symbols arising from the ministry of Christ and continued in and through the Church, which received in faith, are encounters with God, Father, Son and Holy Spirit." See Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 123. Through the symbolic activity of the word given and received in faith, Christ is made present not only at the wedding but also through the many acts of faith and love throughout the marriage.

166. This is not to say that only those in sacramental marriages are capable of faithful love and integrity. It is the Word acting in all marriages, however implicitly, that makes possible the unity envisioned here.

167. Lonergan, *Method in Theology*, 112.

One must not conclude that the outward word is something incidental. For it has a constitutive role. When a man and a woman love each other but do not avow their love, they are not yet in love. Their very silence means that their love has not reached the point of self-surrender and self-donation. It is the love that each freely and fully reveals to the other that brings about the radically new situation of being in love and that begins the unfolding of its life-long implications.¹⁶⁸

Lonergan's insights into the word call attention to the social and historical aspects of marital commitment and consent. Giving one's word in marital commitment is social, creating a family and uniting families. Witnesses to the marriage can claim to have a stake in the marriage in that our actions are never isolated. The commitment is also historically conditioned. The words of consent are spoken at a specific time and place. Questions regarding the variability of expressed commitment due to our historical and cultural situatedness loom large. What aspects of commitment and consent are perennial and which are alterable? These are significant questions for canon law to be addressed in the next chapter; however, at this point I want to call attention to the statement that the word is constitutive. The expression of their love and commitment, Lonergan claims, brings about something new in their relationship.

Farley explains that *what* we are doing in making a commitment is creating a new relationship in the present in order to direct my freedom in the future. Making a commitment produces a moral obligation. Farley states explicitly, "What commitment *does* is produce an 'ought.' It effects a form of relationship in which I am morally bound (not physically, not just legally, not just in terms of pragmatic considerations, but *morally* bound) to keep my word—to act in accordance with the word I have given."¹⁶⁹ She continues by explaining that the moral obligation then creates a new relationship

168. Lonergan, *Method in Theology*, 112-13.

169. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 71.

characterized by claims of justice. In the previous chapter regarding marriage as contract and covenant, obligation and justice were described as minimal terms, whereas gift and love were seen as maximal. In making a marital commitment, the minimum threshold is the relationship as obligating. Farley states,

If I, in and through commitment, give someone a claim over me, then it is a matter of “justice” that I honor the claim (according to the limits of the commitment). Something now is “due” that person. What I have given to her is a new “right” in relation to me. If I fail to give what is thereby due, I “violate” her right (unless my failure can be “justified” in some way). I contradict something that now is constitutive of the relationship between us. In “breaking faith,” I “break my word,” and so break, contradict, my own integrity as a person. I wrong the other person, failing to acknowledge the true claim that is hers. I do a kind of violence to the bond between us.¹⁷⁰

Of course, there are many questions surrounding what are “the limits of the commitment” and how failure to give what is due is “justified,” but the point remains that making a marital commitment is not simply a matter of love, but also a matter of justice, because justice is the minimum demand of love. The content of what is due will be discussed in greater detail in Chapter Five. Suffice it to say that the essential elements of an interpersonal commitment are “an intention regarding future action and the undertaking of an obligation to another regarding that intended action.”¹⁷¹ Although all relationships have a history, they may or may not have a future. A commitment to love another for life directs my decisions and actions in the present so that the relationship will have a future. It establishes a new trajectory on the lifecycle of both persons. Farley elaborates, “With

170. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 71.

171. *Ibid.*, 18.

commitment, a *new relationship* begins in the present. And it is this relationship, bound by my word, that *moves into the future*.¹⁷²

Commitment is a fundamental choice. Using Lonergan's language, it is a choice effecting action on the fourth level of conscious and intentional operations. Farley states it in this way, "What, then, does free choice effect? It effects action. It represents my power to take hold of my very understandings and desires and to identify with them *by my freedom* and to translate them into action."¹⁷³ Marital commitment is a choice to love another for life. Because love involves deciding, acting, doing, Farley describes love as an emotion that includes affective affirmation, affective union, and affective response.¹⁷⁴ Loving is more than feeling, yet it certainly includes various feelings. Farley maintains that it is an affective affirmation of the other's goodness and well-being. In love, I affirm another in that "I am willing to do the deeds of love insofar as they are called for and possible."¹⁷⁵ Secondly, loving is an affective union through which we are attached, bonded, connected, and joined. Again, feelings of being united may come and go, yet love remains in the choice to continue to affirm and work toward greater union. Finally, loving is a passive, affective response to the lovable to another. This is *eros* as described previously. Farley answers to the objection that the greatest love is *agape*, loving the unlovable, and not essentially a responding to what we receive and perceive as valuable, beautiful, or lovable:

172. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 43.

173. *Ibid.*, 27.

174. *Ibid.*, 30-32.

175. *Ibid.*, 30.

To “love the un-lovable” makes sense only if it means that we can or ought to love persons whose beauty is not immediately evident to us, whose lovableness is hidden by some terrible evil or some superficial distortion that occasions our inability to see. In such instances, we are not enjoined to love what is literally unable-to-be loved, but to *believe* what we cannot readily see—to believe that there is worth and beauty, dignity and lovableness, in a person as a person and as this unique person who claims our love. It can be enough for us to receive the lovableness of the other through the eyes of faith, human or divine.¹⁷⁶

Thus, the deep connection between faith and love is introduced and acknowledged.¹⁷⁷ In these three aspects Farley identifies, love is “simultaneously passion and action, receiving and giving.”¹⁷⁸ Even *eros*, love that is essentially passive and responsive, can “offer itself (so to speak) to freedom” by choosing to see what is lovable and good in another.¹⁷⁹ Love includes choice, and love that lasts a lifetime does so in and through commitment, which is fundamentally a choice.

More specifically, marital commitment can be described as the choice to give up other choices. It is the willful acceptance of our finitude through self-appointed limits. A leading scholar in the study of commitment, Scott Stanley, describes marital commitment in this way. “You are choosing to give up the other options, in the words of the vow, ‘forsaking all others.’ Hence, *commitment involves making the choice to give up some choices*. Further, *really sticking with your commitment will require you to protect the choice you have made in the context of life’s demands*.”¹⁸⁰ Farley concurs that the choice

176. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 31.

177. The interconnection among faith, hope, and love in living one’s marital commitment will be more fully developed in the final chapter.

178. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 32.

179. *Ibid.*

180. Scott M. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage* (Nashville, TN: Thomas Nelson, Inc., 1998), 27.

to give up other choices or options narrows the scope of our freedom in the present but does not “*eliminate* future free choices even in regard to what we promise.”¹⁸¹ That is why a marital commitment needs to be protected and nurtured. My present decision does not necessitate future choices. Farley explains,

Commitments do limit the possibilities of our future in a serious way, of course. For example, as my committed relationship moves into the future, I must choose again and again to ratify it or not; but because of my commitment, the choice is not a “neutral” one. Insofar as the commitment remains binding, my new choices are qualified as choices of fidelity or betrayal.¹⁸²

Although limiting one’s freedom through commitment may appear restrictive and confining, it opens up new possibilities that would not have arisen had the “de-cision” not cut off other alternatives.¹⁸³ One of the most rewarding and relevant new possibilities that opens through commitment is intimacy. As explained in the previous chapter, commitment makes intimacy possible.¹⁸⁴ In his empirical research, Stanley has discovered that there is more self-disclosure in relationships with greater levels of dedication. He explains, “That’s because commitment in the form of dedication provides the fundamental framework of safety and trust that promotes closeness and openness.”¹⁸⁵

181. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 44. Stated another way, commitment is the choice to actualize one potential course of action among many potentials. Freedom can only be realized in moving from the potential to the real particular.

182. *Ibid.*

183. *Ibid.*, 44-45.

184. Unfortunately in today’s hook-up culture, it is sexual intimacy with or without a “commitment” that is seen as possibly creating relationships. This misunderstanding leaves many feeling hurt and rejected when intimacy that involves the whole person does not follow and the “relationship” of variable duration ends. For an excellent explanation of the five fundamental dynamics involved in attachment and creating relationship bonds, see John Van Epp, *How to Avoid Falling in Love with a Jerk: The Foolproof Way to Follow Your Heart Without Losing Your Mind* (New York, NY: McGraw Hill, 2007).

185. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 27.

One of the great threats to the quality and longevity of a marriage is “alternative monitoring,” which is “the degree to which people *think about what it would be like to be with people other than their mates.*”¹⁸⁶ Stanley reports that of all factors “thinking seriously about alternatives is the most sensitive to how happy one is with a mate at the present time.”¹⁸⁷ A vicious cycle can ensue when one in a perceived unhappy marriage begins to consider alternatives, and then the evaluating of these attractive alternatives leads to greater unhappiness in the marriage. Failure to choose to give up other choices, to cut off those attractive alternatives as a viable option in one’s life course, can lead to restlessness and unease. The de-cision of commitment guards against living in a perpetual state of practical reflection weighing options; intimacy with another is simply not possible in this state.

In describing *what* commitment is, a valuable distinction is provided by Stanley and his colleagues. The psychological dynamics of “wanting to” and “having to” in a committed relationship lend itself to the distinction between two kinds of commitment: dedication and constraint, respectively. Commitment as dedication “implies an internal state of devotion to a person or project. Dedication conveys the sense of a forward-moving force, a motivation based in thoughtful decisions to follow a certain path and give it your best.”¹⁸⁸ On the other hand, commitment as constraint refers to the forces and factors “that would be costs if the present course is abandoned.”¹⁸⁹ The forces and

186. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 49.

187. *Ibid.*, 50.

188. *Ibid.*, 11.

189. *Ibid.*

factors that comprise constraint commitment include: economic investments, material possessions, concern for children's welfare, social pressure, termination procedures, moral values regarding divorce, and perceived quality of alternatives.¹⁹⁰ In describing commitment as the choice to give up other choices, Stanley and his colleagues note that "commitment can be seen as an act of choosing to be increasingly constrained because of the desire to persist, exclusively, on the chosen path."¹⁹¹ Constraint is generally not perceived by happy couples to be a negative force in their lives. Those shared resources and constraining forces are perceived positively and serve to remind couples of their original dedication when dissatisfaction in the relationship sets in.¹⁹² If dedication to one's spouse were perfectly realized, then constraints would still exist but would not be felt as limiting, confining, obliging, or constricting. Constraints keep relationships alive when dedication falls short, and they are necessary in relationships between finite, sinful¹⁹³ persons.¹⁹⁴ There is a key dimension of dedication that Stanley elucidates and that is "metacommitment."¹⁹⁵ He describes it in this way: "In other words, it's

190. Scott M. Stanley et al., "Sacrifice as a Predictor of Marital Outcomes," *Family Process* 45, no. 3 (2006): 503.

191. Scott M. Stanley, Galena K. Rhoades, and Sarah W. Whitton, "Commitment: Functions, Formation, and the Securing of Romantic Attachment," *Journal of Family Theory and Review* 2, no. 4 (December 2010): 243-57, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3039217/pdf/nihms215945.pdf> (accessed Aug. 15, 2013).

192. *Ibid.*, 3.

193. The theological fact that human persons sin, that we misuse our freedom, is mentioned here, because there may be the temptation to flee when the marriage is difficult or the temptation of novelty may come to haunt a marital relationship. During those times, constraint commitment holds one to the promise made even when the feeling of love and dedication seems absent.

194. The distinction between dedication and constraint commitment is extremely relevant to discussions on cohabitation. Therefore, this distinction will be revisited in the final chapter when the experience of cohabitation is discussed in relation to marital consent.

195. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 20.

commitment to commitment. It's the belief that you finish what you start. Many people strongly hold this value regardless of religious or philosophical background. It's a commitment to personal responsibility."¹⁹⁶ Some may refer to one who fervently adheres to metacommitment as a person of integrity or good character. Although it is true that integrity is not exclusive to Christian faith, the connection between commitment and conversion cannot be overlooked in a theology of commitment.

4.2.3 Why Do We Commit to Love Another for Life?

After clarifying what marital commitment is, the reasons for marital commitment need to be understood; in other words, *why* do persons commit to love another for life? First, the great gift of essential freedom and the reality of sin make necessary an expressed and explicit interpersonal commitment to love another for life. The human will is unreliable. As Kasper theorizes, our freedom implies a basic openness to the world so that we are capable of self-determination:

It is, however, freedom that enables human beings to give themselves a definitive form. In this respect, freedom is the opposite of arbitrary choice, which acts in the name of freedom, but believes that it is possible always to begin at the beginning and again and again to cancel every decision in which people realize themselves. This arbitrary and dissipated bachelor form of freedom is perhaps the greatest threat to true freedom, since, if nothing is definitive and everything can be changed again and again, everything assumes an equal importance or lack of importance and nothing is taken seriously. It is only when there are really irreversible decisions that life becomes a real risk and a genuine adventure. True freedom is realized in faithfulness.¹⁹⁷

As argued previously in this chapter, true freedom is not found in arbitrary indeterminism but in faithfulness to one's commitment. Kasper continues, "The marital bond in

196. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 20.

197. Walter Kasper, *Theology of Christian Marriage* (New York, NY: Crossroad, 1983), 21-22.

freedom makes the partners free in a new way. Above all, it makes them free from the moods and fickleness of the moment. In this way, faithfulness is a victory over time.”¹⁹⁸ Because there is that separation between knowing and doing, we do not always do what we know to be right, and we need commitment to strengthen our wills throughout time.¹⁹⁹ Farley asserts, “Because we know our own inconsistencies, we need a way to *strengthen ourselves* for fulfilling our present intentions in an otherwise uncertain future.”²⁰⁰

The second reason *why* we commit to love another for life in marriage is to reassure others of our intentions. Due to our unreliable wills, commitment not only strengthens us to decide and do what we intend, but also provides assurance to others regarding what they can expect from us.²⁰¹ Giving my word to another in a commitment creates an obligation and a relationship of trust. Again, there is no necessary connection between knowing and doing; we simply trust that others will do what they say they will. Trust is indispensable to every relationship, particularly a marital one, and commitment weaves the fabric of trust that supports the possibility of community. Because this point is integral to a theology of commitment, I will quote Farley at length:

When we fail to be faithful to our promises, we not only *wrong* one another as persons; we can truly *harm* each other and many others beyond us. This is the central concern of those who argue that promises must be kept because of the bad consequences that follow from breaking them. “Harm” may take many forms, but there is one which is always a possibility when a commitment is broken. That is,

198. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 22.

199. Consistency between knowing the right course of action and actually doing it is psychological maturity and moral integrity. The question of maturity in marital commitment will be addressed in the next chapter. Inconsistency between knowing and doing could be either lack of maturity or sin depending upon the level of one’s awareness and intentionality. These will vary greatly depending upon age and psychological maturity. However, one cannot rule out the possibility that one’s lack of maturity is, in fact, intentional through one’s implicit decision to refuse self-consciousness.

200. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 19.

201. *Ibid.*

commitments provide a basis of trust in our relationships, whether they are with individuals or are broadly communal and social. To the extent that commitments are ignored or broken without clearly justifying reasons, trust is eroded. When we fail to keep a promise, those who counted on us may lose faith not only in us but in all others who seek their trust. They may experience themselves (as I have already noted) as exploited, used, deceived, as coerced or abandoned because their own choices were made in the light of their earlier trust in our promises to them. As a result, alienation, resentment, suspicion can enter in. Moreover, we who break our promises may find ourselves becoming the kind of persons who are more and more irresponsible as we attend less and less to the conditions of accountability. Less responsible (that is, more irresponsible), we are paradoxically less free to enter into human relationships, less free to collaborate in human endeavors.²⁰²

Making commitments and keeping those promises is elementary in establishing trust and communion. As Farley notes, a commitment to marry exists to reassure *others* of my intention, not simply my future spouse.²⁰³ “But in a Christian construal of what marriage is a commitment is also made to God and to a community of persons (to the Church and to the wider society).”²⁰⁴ Clearly, marriage is a commitment to persons, but it is also “a commitment to a certain framework of life in relation to persons.”²⁰⁵ This framework has various levels: generic form, cultural model, and particular form specific to this couple. Farley notes that often the first level is explicitly articulated and the other two levels are implicit.²⁰⁶ This can be problematic, because while it may be clear to whom one is committing, it may not be as clear as to what they are committing. Certainly, this is

202. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 72.

203. The commitment changes one’s relationship with others. Once the commitment is made, others should not be viewed or approached as a potential spouse and those others should not view or approach that person as a potential spouse or sexual partner either.

204. Farley, “The Concept of Commitment as Applied to Questions of Marriage and Divorce,” 90.

205. *Ibid.*

206. *Ibid.*

where canon law comes into play in sacramental marriages, and this point will be developed in the next chapter.

The final reason *why* we make marital commitments is to express and make present the fullness of our love as it grows into completion. In love, we desire affirmation of and total union with our beloved. It is the reason we use language such as total self-gift, because somehow to desire anything less with another seems less than love. An expressed and explicit, interpersonal commitment to love another for life is a way to “give” the totality of our lives in the present moment where we live:

We know that freedom cannot once and for all determine its future affirmation of love. No free choice can settle all future free choices for the continuation of love. Yet sometimes we love in a way that makes us yearn to gather up our *whole future* and place it in affirmation of the one we love. Though we know it is impossible because our lives are stretched out in time, we long to seal our love now and forever. By commitment to unconditional love we attempt to make love irrevocable and to communicate it so.²⁰⁷

Lawler so intimately ties love to commitment that he states, “As a freely willed act, love is a species of promise or commitment, the giving of my word to do something, namely, to will the good of another.”²⁰⁸ Within this commitment to love is the intention of permanence. “We mutually commit to one another as lovers to make our love permanent and to communicate it as permanent.”²⁰⁹ Because love implies intransience, immovability, and eternalness, a marital commitment symbolizes this love, expressing it and making it present. Because our lives are incomplete and open to change, marriage is a sacrament, where the eternal touches the temporal.

207. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 34.

208. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (Collegeville, Minnesota: The Liturgical Press, 2002), 21.

209. *Ibid.*

4.2.4 How Do We Commit to Love Another for Life?

Having articulated *why* we make a commitment to love another for life, I turn to *how* we make such a commitment. As previously explained, commitment occurs on the fourth level of conscious and intentional operations. It is principally a decision, an act of willing that follows from knowing but not necessarily so. As a conscious and intentional operation, commitment occurs internally. The commitment is mental and spiritual. Lonergan states, “For the decision itself is an act of willing. It possesses the internal alternatives of either consenting or refusing.”²¹⁰ As a practical course of action is illumined, namely the possibility of loving another for life, one may either consent to do so or refuse. However, the commitment does not occur only internally. Commitment occurs externally as well. Physically and socially, the commitment is manifested, expressed, and executed. To say the commitment is a purely internal occurrence is to deny our corporeality and sociality. Until the commitment is born into the world, externally, it remains incomplete. A personal resolution may remain internal, but a mutual commitment may not because it occurs *between* two people. The external manifestation of marital commitment is consent given and received at the wedding (and consummation).²¹¹

Marital commitment occurs in ritual celebration. In Chapter Three the anthropological and theological dimensions of the sacraments were touched upon, particularly the significance of ritual celebrations. At a sacramental wedding celebration,

210. Lonergan, *Insight: A Study of Human Understanding*, 636.

211. Consummation is listed parenthetically due to the ambiguity regarding the term as previously explained. Consent creates marriage, yet it is not intrinsically and extrinsically indissoluble until consummation. This ambiguity and the consequences that follow will be addressed again in the final chapter.

the reality of the couple's love for each other along with Christ's love for them (and His church) is expressed and made present. To say that their love is expressed and made present assumes that their love and commitment has already begun and is invited to grow through their consent. Through symbolic ritual behavior, the intention to love one another completely throughout a lifetime is celebrated, for one can only celebrate what is real.²¹² As finite, bodily persons, the expression and actualization of love that forgives, reconciles, and elevates in the death, resurrection, and ascension of Christ becomes real through sacramental behavior. Utilizing a celebration model of the sacraments, one can affirm and presuppose the reality-event being celebrated.²¹³ Through the celebration of the sacrament of marriage, the reality-event, the love of Christ for His church, "becomes more real, more intensely present."²¹⁴ The extraordinary pledge, commitment, to love another through life and death symbolically re-presents the enduring love of Christ for His church. There is a temporal character to the sacramental celebration of marriage in that the unfailing love of God for, in, and through the couple is recalled (*anamnesis*) and realized in the present moment (*kairos*) with the hope that it will endure forever (*eschaton*).²¹⁵ In this way, the sacrament gathers up and expresses the fullness of conjugal love lived throughout the lifecycle, a task that is only possible in ritual and symbolic activity.

The significance of the symbolic function of marriage is demonstrated in the work of Stanley and his colleagues on commitment and romantic attachment. According to

212. Worgul, *From Magic to Metaphor: A Validation of Christian Sacraments*, 213-21.

213. *Ibid.*, 213.

214. *Ibid.*

215. *Ibid.*, 214-15.

Stanley et al., the critical distinction between the two is found in one's intention. Whereas romantic attachment "implies depth of emotional connection," commitment "highlights an intention to persist in the relationship."²¹⁶ They argue that for couples to feel secure in their romantic relationships, expressions of commitment must be mutual and clear. "Commitment cannot secure romantic attachment unless it both exists in each partner and is signaled between partners."²¹⁷ Couples "signal" to one another their level of commitment through "cultural emblems" such as engagement and marriage. Stanley and his colleagues express the significance of the use of cultural emblems of commitment, which further highlights the symbolic function of marriage:

The widespread use of cultural emblems of commitment may be diminishing in industrialized nations (a theme discussed in Stanley, 2002). This should have consequences because of the potency of such emblems for securing romantic attachment; they move beyond what one person does to what both partners are willing to signal to the world. The commitment level of one partner can be miscoded by the other, but it would be much harder for either partner to miscode a public, cultural emblem such as engagement. Therefore, where cultural emblems of commitment diminish (e.g., "going steady" has mostly gone away), we predict there should be an increase in the situations where one partner misinterprets the commitment level of the other.

Marriage is a culturally imbued, societally sanctioned emblem with high signal value with regard to commitment.²¹⁸

Both engagement and marriage symbolically express clearly and mutually the intention to commit to another for life, the former does so in the future while the latter does so in the present. The significance of the symbolic function of marriage will be further addressed in the final chapter in relation to cohabitation and commitment.

216. Stanley, Rhoades, and Whitton, "Commitment: Functions, Formation, and the Securing of Romantic Attachment," 9.

217. Ibid.

218. Ibid.

4.2.5 When Do We Commit to Love Another for Life?

Finally, answering *when* couples make a marital commitment is not as simple as it first appears. The obvious response is on their wedding day. During the exchange of consent, their commitment is externally and publicly manifested. For sacramental marriages in which at least one partner is Catholic, the ritual is to take place in a parish church or another church or oratory with the permission of the local ordinary.²¹⁹ The designation of place is to reinforce that the sacrament is a public expression of the work of God and not merely a private, individualized fantasy of the couple. The liturgical form of the wedding is to be celebrated in accordance with *The Rite of Marriage* with couples offered some options in terms of readings, prayers, and blessings.²²⁰ The stability of liturgical form expresses the belief that couples are being created in the sacrament, within something larger than they are. David Blankenhorn laments the trend of composing one's own vows which often downplays marital permanence, a trend occurring in many American Protestant and Evangelical weddings:

But the essence of this change reflects a dramatic shrinking of our idea of marriage. With the new vows, the robust expectation of marital permanence shrinks to frail, often unstated hope. Marriage as a vital communal institution shrinks to marriage as a purely private relationship. Marriage as something that defines me shrinks to something that I define.²²¹

For couples marrying in the Catholic Church, “the vow is prior to the couple,” and in a sense, “the vow helps to create the couple.”²²² The standardized ritual inserts the couple

219. Canon 1118.

220. Canon 1119.

221. David Blankenhorn, "I Do?" *First Things* (November 1997): 3, http://www.firstthings.com/print/article/2008/09/004-i-do-29?keepThis=true&TB_iframe=true&height=500&width=700 (accessed Aug 15, 2013).

222. Blankenhorn, "I Do?" 3.

into a larger story of a faithful God and His people. An aid to couples preparing for the wedding liturgy, *Together for Life*, clearly articulates why couples are not free to write their own vows. “Although the wedding liturgy that you celebrate belongs to you, it also belongs to the whole Church. While your vows are deeply personal, they are not private. Rather, they are public expressions of your love and faithfulness.”²²³ Unfortunately, the meaning of the commitment expressed on the wedding day is often obscured by the inordinate focus on the externals of the ceremony itself. In a work of investigative journalism and social critique, Rebecca Mead probes the historical origins and trappings of the wedding industry to reveal the culture into which Americans marry and many brides, in particular, buy into. Mead reports that in 2006 the wedding industry was estimated to be worth \$161 billion to the United States economy, and instead of celebrating what is real, the wedding industry is selling a fantasy.²²⁴ While watching a beachfront, vow-renewal ceremony, Mead evocatively conveys the culture of the American wedding, the product of a consumerist economy and a ravenous industry:

And this, I realized as I watched them on the sand, was the wedding package they were really buying into. It was the same wedding package sold to every American bride and groom by the American wedding industry, which provides not just the products and services for weddings, but the compelling fantasies upon which their use is grounded. This husband and wife were saying “I do” to the long white gown and the tiered cake and the wreaths of flowers—the trappings of the traditionalesque, bizarrely transferred in their case to the tropics. They were saying “I do” to the sentimental murmurings of a minister-for-hire, an official with whom they had no past and no future; “I do” to being, for a fleeting moment, the center of attention, and to having that moment ritually preserved by the flashing of cameras. They were saying “I do” to their celebration as individuals whose own tastes and desires were paramount, trumping the practices of the past and the oversight of religious institutions and familial authorities; and “I do” to their

223. Joseph M. Champlin and Peter A. Jarret C.S.C., *Together for Life*, 5th ed., Celebrating and Living the Sacrament (Notre Dame, Indiana: Ave Maria Press, 2012), 8.

224. Rebecca Mead, *One Perfect Day: The Selling of the American Wedding* (New York, NY: The Penguin Press, 2007), 10.

consecration as a world unto themselves, there in romantic isolation at the water's edge, about to invent their future together. And they were saying "I do" to the wedding industry's own assumptions of nuptial authority, administered through bridal magazines, bridal stores, department-store wedding registries, and all the other avenues in which romance and commerce have become inextricably entwined.²²⁵

Although some of these entrapments are avoided by couples marrying according to the Rite, the consumerist culture has invaded even Catholic weddings, and a conscious effort needs to be made by those preparing couples for marriage that the heart of the wedding is the commitment, covenant, and sacrament.

A marital commitment is publicly manifested in one day, yet the possibility for making a true lifelong commitment arises previously, *once we are prepared*. After teaching on the nature, dignity, and purposes of marriage, Pius XI instructs unreservedly on the fundamental necessity of proper formation in the faith and marital preparation. "All these things, however, Venerable Brethren, depend in large measure on the due preparation remote and proximate, of the parties for marriage. For it cannot be denied that the basis of a happy wedlock, and the ruin of an unhappy one, is prepared and set in the souls of boys and girls during the period of childhood and adolescence."²²⁶ Before their commitment is made on their wedding day, couples should be "well disposed and well prepared, so that they will be able, as far as they can, to help each other in sustaining the vicissitudes of life, and yet more in attending to their eternal salvation and in forming the inner man unto the fullness of the age of Christ."²²⁷ Pius XI highlights one of the most important aspects of marriage preparation, one that has been sorely neglected and

225. Mead, *One Perfect Day: The Selling of the American Wedding*, 216-17.

226. Pius XI, *Encyclical of Pope Pius XI on Christian Marriage Casti Connubii*. December 31, 1930, http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html (accessed June 20, 2008).

227. Pius XI, *Casti Connubii*, no. 113.

left in ambiguity in theological instruction and pastoral practice. “To the proximate preparation of a good married life belongs very specially the care in choosing a partner; on that depends a great deal whether the forthcoming marriage will be happy or not, since one may be to the other either a great help in leading a Christian life, or, a great danger and hindrance.”²²⁸ The place of discernment of one’s vocation, and if it be marriage, one’s specific partner, cannot be overlooked.

In *Familiaris consortio*, John Paul II delineates the stages of marriage preparation: remote, proximate, and immediate.²²⁹ Beginning in early childhood, remote preparation involves the forming of character through the instillation of authentic human values in the family and through catechetical formation. Proximate preparation builds upon this earlier stage and “involves a more specific preparation for the sacraments, as it were, a rediscovery of them.”²³⁰ In *Familiaris consortio*, the role of discernment and the placement of engagement within the stages of marriage preparation are not clearly presented. Immediate preparation takes place within the weeks and months prior to the wedding celebration and includes the prenuptial canonical investigation of the freedom to marry, evangelization and catechesis in the knowledge of the love of Christ for His church, and preparation for active participation in the wedding liturgy.²³¹ In 1988, the NCCB (now named the USCCB) expanded greatly upon these stages in a workbook for

228. Pius XI, *Casti Connubii*, no. 115.

229. John Paul II, *Apostolic Exhortation of Pope John Paul II Familiaris Consortio*. November 22, 1981, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html (accessed July 24, 2005).

230. *Ibid.*, no. 66.

231. *Ibid.*

the pastoral help for marriage preparation, *Faithful to Each Other Forever*.²³² Within the stage of proximate preparation, adolescents and young adults should be formed in the Christian understanding of love, intimacy, and sexuality. The text specifically addresses the question of discernment in proximate preparation. “How does one find or pick a partner with whom we can enter into such a loving, intimate, and committed relationship?”²³³ Although most Americans have the freedom to marry whom they choose, the disturbing divorce rate reveals we may need help in choosing whom to marry and staying married to whom we chose. The NCCB concludes, “Consequently, the more we understand the essence of love; the conscious and unconscious factors operative in any developing relationship; the expectations that are fostered, even from early childhood; the nature of intimacy; and the true character of the other person, the better chance there is for a lasting love and successful match.”²³⁴ Proximate preparation is the opportunity to dispel the myth of “The One” soul mate theory of dating and to raise awareness regarding the transitory and illusory character of romantic love. During this time, young people learn that a developing relationship requires a balance of autonomy and relatedness and that there are characteristics of a healthy, intimate relationship that should be recognized, namely, authenticity, mutuality, growth, and inclusivity.²³⁵

Bypassing the question of how well these pastoral guidelines have been utilized programmatically, I call attention to the lacuna in the Church’s documents on the role of

232. National Conference of Catholic Bishops, *Faithful to Each Other Forever: A Catholic Handbook of Pastoral Help for Marriage Preparation* (Washington, D.C.: United States Catholic Conference, Inc., 1989).

233. *Ibid.*, 30.

234. *Ibid.*, 31.

235. *Ibid.*, 31-32.

discernment and dating in marriage preparation. In 1996 the Pontifical Council for the Family detailed the stages of marriage preparation, and stated specifically, “Proximate preparation takes place during the period of engagement.”²³⁶ Although the council states that these stages “are not rigidly defined,”²³⁷ the role of dating and discernment is too quickly passed over. The council asserts, “The young people should have already been helped to discern their vocation through their own personal efforts and with the aid of the community, and above all pastors. This discernment must take place before any commitment is made to get engaged.”²³⁸ The *when* of marital commitment needs to be more specifically fleshed out. To do so would require a theology of dating and vocational discernment. The recent pastoral letter of the USCCB on marriage assumes, “By the time of immediate preparation, the couple has developed a conviction that God is calling them to marriage with a particular person.”²³⁹ The letter continues,

Prayer, especially for the guidance of the Holy Spirit, and the help of wise mentors are crucial in this discernment process. Discernment also involves an honest assessment of qualities that are foundational for the marriage. These include an ability to make and keep a commitment, the desire for a lifelong, faithful relationship, and openness to children. The couple will also want to reflect on the values they share, their ability to communicate, and agreement on significant issues.²⁴⁰

Although the stages of marriage preparation may not be rigidly defined in timing or duration, there needs to be greater clarity on *when* and *how* a commitment forms in a

236. Pontifical Council for the Family, *Preparation for the Sacrament of Marriage*. May 13, 1996, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_13051996_preparation-for-marriage_en.html (accessed March 25, 2003).

237. *Ibid.*, no. 21.

238. *Ibid.*, no. 33.

239. United States Conference of Catholic Bishops, *Marriage: Love and Life in the Divine Plan* (Washington, D.C.: United States Conference of Catholic Bishops, 2009), 44, <http://www.usccb.org/laity/loveandlife/MarriageFINAL.pdf> (accessed June 26, 2010).

240. *Ibid.*, 44-45.

dating relationship. When the pressures of the wedding industry weigh down on an engaged couple, it is too late to begin questions of discernment. In her longitudinal research with children of divorce, Judith Wallerstein makes a similar conclusion:

Most programs that give marital advice are aimed at engaged couples who belong to churches and synagogues. These are very good beginnings that should be expanded. But many offer too little and arrive too late to bring about changes in any individual's values or knowledge. Nor is the excitement that precedes a wedding the best time for reflection on how to choose a lifetime partner or what makes a marriage work.²⁴¹

Wallerstein opines that the best time for discussion of mate selection, sex, love, intimacy, and morality is mid-adolescence.²⁴² This coincides with the NCCB's discussion on proximate preparation.

This stage of proximate preparation requires the most theological and practical work in order to support and strengthen marital commitment. The Pontifical Council for the Family brings to light the phenomenon of prolonged or extended adolescence. "The pastoral care of youth should also keep in mind that, because of various kinds of difficulties—such as a 'prolonged adolescence' and remaining longer in one's family (a relatively new and troubling phenomenon), young people today tend to put off the commitment to get married for too long."²⁴³ Adolescence, in itself, is an ambiguous state somewhere between childhood and adulthood; adolescents exist on a continuum of physical, sexual, intellectual, moral, and spiritual development that cannot be defined simply by age. This ambiguity is further exaggerated by the phenomenon of extended adolescence, which could range anywhere from age 10 to 29 or beyond. Bonnie Miller-

241. Judith S. Wallerstein, Julia M. Lewis, and Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York: Hyperion, 2000), 304.

242. *Ibid.*

243. Pontifical Council for the Family, *Preparation for the Sacrament of Marriage*, no.33.

McLemore states, “Contemporary childhood has doubled or even tripled, from seven to fourteen to twenty-one years. At the same time, the age of puberty has dropped, creating an odd period of physical maturity in the midst of emotional and social dependence.”²⁴⁴ Marital commitment used to serve as a demarcation of growing up, a rite of passage. The rise in the age of first marriage and the dramatic growth in cohabitation have contributed to a wide range in the ambiguous adolescent period. In order to prepare young people for marital commitment, greater attention and precision need to be given to the stage of proximate marriage preparation.

Finally, the *when* of marital commitment occurs every day after the wedding celebration.²⁴⁵ As Farley notes, “As my committed relationship moves into the future, I must choose again and again to ratify it or not.”²⁴⁶ Marital commitment is the choice to keep on choosing one’s spouse day after day. Because change is an inevitable part of marriage and life, couples need to renew promises within a continually shifting context.

Herbert Anderson argues for the necessity of promising again within marriage:

In order to accommodate the inevitable and sometimes necessary changes that occur in marriage, couples need to practice making promises that are time-limited, situational, circumstantial, and frequently renegotiated. Obviously, these promises build on the primary promises of love, respect, and mutual recognition that are foundational for marriage. . . . Promising again and again is an intentional, relational act that defines the self and honors the other. It is an act of mutuality that rests on the willingness of two people to recognize each other as people of worth, each with particular gifts and a unique story.²⁴⁷

244. Bonnie J. Miller-McLemore, *Let the Children Come: Reimagining Childhood from a Christian Perspective*, The Families and Faith Series, ed. Diana R. Garland and J. Bradley Wigger (San Francisco, CA: Jossey-Bass, 2003), 7.

245. In terms of marriage preparation, this fourth stage of pastoral care after marriage is essential. The cycle of marriage preparation continues as newly married couples often become parents and begin remote preparation of marriage for their children.

246. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 44.

247. Herbert Anderson et al., eds., *Mutuality Matters: Family, Faith, and Just Love* (Lanham,

The basic interpersonal commitment to love another for life is then particularized within the flow of everyday life. Anniversaries can be a fertile opportunity to deepen the marital commitment within a ritual particular to the couple, family, or church. With each change and movement, the hope is that the commitment will grow and strengthen so that at the end of one's life, the commitment will be tested, true, and tough, a testimony to the unfailing love of God.

4.3 Sustaining a Marital Commitment

Within the present context of individualism and a cultural lack of commitment, marital commitment is made even more difficult to sustain. Throughout childhood and particularly adolescence, persons are either well or ill prepared to make such a commitment as adults.²⁴⁸ Consequently, the possibility of making such a profound commitment may be enhanced or limited by the experiences of these early years. However, commitment manifested on the wedding day is an act of freedom, even though it is subject to the conditions of effective freedom. The significance of choice and self-determination has already been demonstrated. Although marital commitment may be prepared for liturgically, emotionally, intellectually, and spiritually, only consent *de praesenti* creates marriage. Marital commitment expressed at the wedding changes the reality of the couple. Every day following the wedding, this commitment needs to be

MD: Sheed & Ward, 2004), 76.

248. This statement is not meant to be deterministic, because persons are free to overcome those obstacles from childhood through the grace of God. This is simply recognition of the limits of effective freedom.

sustained. Browning's five dimensions of moral reasoning can reveal the multi-faceted structure of marital commitment sustained over a lifetime.

4.3.1 Visional Dimension of Practical Moral Reasoning

The visional dimension of practical moral reasoning uncovers the role of community, narrative, tradition, and identity. Spouses make a marital commitment within a complex of communities with narratives and traditions that have shaped their current worldview, or prejudices as explained in the first chapter. Marital commitment is an act of freedom within a context. Although belonging to many communities, persons may primarily identify with one so that the history and beliefs of that community become one's own. Bellah and his colleagues name such a community a "community of memory."²⁴⁹ These communities of memory retell their stories, stories of hope and suffering, so that the traditions of the past become the constitutive narratives of the present. The church is a community of memory offering stories of men and women who have lived in covenant relationship with God and one another. As retold in the previous chapter, marriage is integrally woven throughout the history of the church providing a living tradition for the community to interpret.

One of the ways in which the rich theological tradition of the church makes the sacramental commitment of marriage sustainable is through the vision of marriage as eschatological sign. Theologically, marriage has penultimate value, because the church, as well as marriage, is to serve as a sign of the eschatological hope of the heavenly wedding feast at the end of time.²⁵⁰ Because marriage alone is not meant to satisfy the

249. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 153.

250. Kasper, *Theology of Christian Marriage*, 42.

deepest needs and desires of the human person, marital commitment is more easily sustained as a symbolic instrument pointing toward the hope of ultimate fulfillment in God:

By being classified as a penultimate rather than as an ultimate value, marriage is demythologized, demystified and desacralized, and in this way its immanent beauty and inner wealth are more perfectly expressed. If, on the other hand, exaggerated expectations are projected onto marriage and the partners in marriage, the inevitable result is almost always disappointment. No partner can give the other heaven on earth. A person's urge to make such penultimate values absolute and his tendency to do violence to them in this way can only cease when he recognizes God as the ultimate reality. A person can only be fully human when he or she sees God fully as God. The eschatological glorification of God is the final humanization of humanity. The eschatological reservation regarding marriage is therefore the source of freedom in marriage. It binds both partners to God and prevents them from becoming enslaved to each other.²⁵¹

In this way, the church's theological vision of marriage supports the continuance of the commitment. Spouses who believe that they should be completely fulfilled by the other will surely be disappointed and tempted to break their commitment. Stanley addresses how expectations affect the marital relationship. He purports, "The losses you feel in your marriage will be made up of the difference between what you expected and what you have."²⁵² He urges couples to have reasonable expectations within marriage and an accurate assessment of what most marriages are like.²⁵³ The theological vision of marriage as a human reality pointing to and participating in a greater divine love allows for reasonable expectations within marriage.

The church as community is able to protect and sustain marital commitments through its prayers, presence, and structures. Faith is necessary for the sacrament of

251. Kasper, *Theology of Christian Marriage*, 43.

252. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 74.

253. *Ibid.*, 75.

marriage, and it is precisely in times of discouragement and doubt that spouses believe in the power and grace of God to support their commitment, however weak it may feel. As a public ritual and symbol, marriage is nurtured through the prayers of the wider church community. Members of the faith community are to act, not only spiritually through prayer, but also socially through real physical presence. In difficult times, spouses need to talk and listen to others who share in the same constitutive stories of the Christian faith. Finally, canon law, that is the structures, rules, and procedures of the church, prevents spouses from easily breaking their commitment. Canon law protects and supports the values of the church regarding marriage, specifically the importance of fidelity, unity, life, and love.

4.3.2 Obligational Dimension of Practical Moral Reasoning

By looking at the obligational dimension of moral thinking, we can see the role of principles and virtues in sustaining a marital commitment.²⁵⁴ The thought of moral principles and duty may not seem to fit with the contemporary view of romantic marriage, but nonetheless it has a significant role in marital commitment. Basic moral principles such as the obligation to keep one's commitments and the duty to be faithful to one's spouse serve as anchors in the changing course of marriage over a lifetime. At times, the pure conviction that spouses *should* be true to their vows, that they have an obligation to keep their commitment, can keep the marriage intact. The "should" of moral principles can maintain the marital commitment. Farley expounds, "Duty can hold us in relation when all else fails. When our hearts are dry and our vision clouded, when

254. Browning holds that all five dimensions of practical moral reasoning can be viewed from deontic (referring to moral principle and action) and aretaic judgments (referring to moral character and virtue). See Browning, *A Fundamental Practical Theology*, 237. Here, I have chosen to look at the role of principles and virtues in marital commitment under the obligational and tendency-need dimensions.

our memory is confused and our hope is eclipsed in the day, then duty—our sense of obligation in relation to the word we have given—holds us to the deeds of love and to attentiveness to new springs of old love within us.”²⁵⁵ Basic moral principles guide and direct spouses to choose again to commit and remain faithful to that commitment. Nevertheless, duty alone cannot sustain a marriage, certainly not a happy one. Farley describes the role of duty in marriage in this way:

No, the overarching role of duty in our commitments to love is more likely to be the indirect and paradoxical one whereby we are obligated to find ways to continue loving, but ways that are not themselves dependent only on the obligation we have undertaken. There is a wisdom for faithful loving, a wisdom to which duty calls us but which duty itself does not provide.²⁵⁶

The moral obligation to keep one’s commitment to love another for life becomes the decision to find creative ways to continue loving for life.

4.3.3 Tendency-Need Dimension of Practical Moral Reasoning

Because discussions of virtue address human nature and human goods, virtue can be classified under both the tendency-need as well as the obligational dimensions of practical moral reasoning. Virtue theory certainly touches upon psychology and anthropology while moving beyond it. In agreement with Yves Simon, I would argue that “psycho-technology” is not a substitute for virtue.²⁵⁷ For human tendencies deemed undesirable, we primarily look to psychological and/or medical techniques to solve the problem. Certainly, psycho-technology aids in understanding and transforming destructive tendencies, passions, behaviors, and relationships, but chemical and

255. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 38-39.

256. *Ibid.*, 39.

257. Yves R. Simon, *The Definition of Moral Virtue*, ed. Vukan Kuic (New York, NY: Fordham University Press, 1986), 12.

psychological techniques cannot substitute for moral virtue. Simon supposes, “Few people stop to think that beyond the problem of diseased emotions, twisted passions, destructive compulsions, and so on, there awaits the real problem of the use and abuse of healthy tendencies and sound emotions, which is a problem for everyone, those in need of psychological help not excluded.”²⁵⁸ Simply put, psychological theories and the application of their results are not a replacement for moral and religious theories of the flourishing of human personhood and relationships.

The adherence to moral principles and the acquiring of moral virtues are both essential to sustaining marital commitment. Indeed, there are connections between commitment and virtue that can be elucidated. Both the acquisition of virtues and the making of commitments are ways of assuring human dependability. As explained previously, we make commitments to assure others of our intentions to act in certain ways in the future. Commitments created and kept foster a sense of trust and dependability. Virtues do the same in that virtuous persons act consistently and reliably. Simon contends that “the only way to assure human dependability is by acquisition of virtues.”²⁵⁹ Virtues enable spouses to remain faithful, forgiving, and loving throughout the changing circumstances of life. Exactly how the virtues are operative in marital commitment can be seen by looking more closely at what virtue is.

A virtue is a *habitus*, or “state of character.” *Habitus* has been incorrectly translated as habit, which would imply that acts proceeding from virtues are done without

258. Simon, *The Definition of Moral Virtue*, 15.

259. *Ibid.*, 16.

freedom.²⁶⁰ Simon explains, “For while, as we have seen, even as they serve specific ends, habits operate automatically or mechanically, the operation of habitus is characterized by unmistakable vitality. Habit relieves us of the need to think; but habitus makes us think creatively. . . . Compared to habit, habitus represents thought that is truly alive.”²⁶¹ Through the repetition of right actions, certain virtues develop allowing the person to be ready and willing to do the right thing at the right time regardless of the circumstance. According to Romanus Cessario, “the acquired virtue enables the one who develops it to act after the fashion of a *habitus*-formed act, that is, promptly, easily, and with a measure of satisfaction and joy.”²⁶² He continues,

Virtue establishes in us a kind of second nature, since it provides a steady inclination for freely performing good actions in the same way nature itself operates with respect to necessary actions, such as sight and digestion. But even acquired virtue, since it observes the general rules of *habitus* development and operation, respects the person’s freedom in determining the conditions for performing or refraining from a particular action.²⁶³

Actions proceeding from virtue are fully human acts engaging one’s freedom and responsibility. They simply arise more easily like traveling a well worn path. Virtue is essential to marriage due to the magnitude of the moral demands pressed upon spouses together with the vast change and unpredictability of married life. Virtues acquired through chosen repeated actions and infused through the grace of Christ at baptism enable spouses to be ready to love rightly.

260. Simon, *The Definition of Moral Virtue*, 57.

261. *Ibid.*, 60.

262. Romanus Cessario, *The Moral Virtues and Theological Ethics* (Notre Dame, IN: University of Notre Dame Press, 1991), 100.

263. *Ibid.*, 101.

Using a Kantian account of virtue, Hayden Ramsey articulates explicitly the connection between commitment and virtue. Although he conceives of habit and disposition differently than previously described, his theory of virtue can disclose the importance of virtue and commitment for the moral life, specifically marriage. Whereas Simon describes virtue as the “deliberate disposition of the dynamic parts of the psyche that would make us existentially ready to do the right thing at the right time,”²⁶⁴ Ramsay holds that “dispositions are a matter of (largely unchosen) personal endowment, situation and temperament, or if they are pervasive or enduring, personality.”²⁶⁵ For Ramsay, “habits are a matter of character, and imply presence of commitments, life plans and identificatory beliefs which identify certain values with agents.”²⁶⁶ This view of habits seems more in line with *habitus* as previously described. Nevertheless, Ramsay states, “Virtue on my account is distinct both from dispositions and from virtuous habits. . . . The experience that is Virtue creates forms of harmony or achievement through commitments to fundamental aspects of our own well being.”²⁶⁷ Ramsay views the commitment to basic human goods as virtue. The virtuous person experiences oneself as committed and liberated at the same time. For Ramsay, virtue is not something that happens through repeated action but something one chooses:

To be committed is to have a certain sort of experience: constraint of will but experienced as the will’s freedom to determine itself. To be virtuous is not just being disposed to *behave* in certain ways—as any animal or machine could be—but having a certain sort of experience: virtuous persons constrain themselves in

264. Simon, *The Definition of Moral Virtue*, 91.

265. Hayden Ramsay, *Beyond Virtue: Integrity and Morality* (New York, NY: St. Martin's Press, Inc., 1997), 61.

266. *Ibid.*

267. *Ibid.*, 62.

accord with fundamental features of the human good, and they experience this as self-determination. Virtue, therefore, does not consist in experiencing morality as difficult and effortsome, but precisely the opposite: virtue is experiencing morality as freedom, as not being imposed upon by external or internal (emotional or imposed rational) factors.²⁶⁸

This alternate account of virtue highlights the importance of commitment in the whole of the moral life.²⁶⁹ Commitment and virtue assure others of human dependability, and both commitment and virtue constrain the will in a way that actually leads to greater freedom, satisfaction, and ease in living. Ramsay's account of integrity,²⁷⁰ or commitment to all human goods, is reminiscent of Stanley's concept of metacommitment. Persons of integrity are committed to being committed.

Central to virtue theory is the concept of life-planning. In agreement with Aquinas²⁷¹ in the *Summa Theologiae*, Jean Porter describes how a fully human life is structured and properly ordered around the true end of human life. "Aquinas . . . insists that in order for human life to be truly successful, it is not enough that it be structured around some goal. The goal must be the correct goal. Most properly speaking, this goal

268. Ramsay, *Beyond Virtue: Integrity and Morality*, 55.

269. Ramsay's account of virtue is dependent upon his understanding of *human* personhood, which is defined as the possession of the ability to pursue one's own good through choosing participation in every basic good (a commitment to practical reasonableness). Thus, the ability to reflect, understand, judge, decide, and commit is essential to *human* personhood. Therefore, he classifies legal entities, embryos, and those nonself-determining individuals due to age, trauma, genetics, or disease as persons but not *human* persons. See Ramsay, *Beyond Virtue*, 90. Obviously, such a position has consequences for moral reasoning beyond the scope of this dissertation. Some relevant question would be: Are children capable of virtue, and how does such an account determine the moral formation of children, specifically in terms of remote marriage preparation? What effect does such a view of human personhood have on the meaning of commitment for those who experience traumatic brain injury or disease after marital consent?

270. Ramsay, *Beyond Virtue: Integrity and Morality*, 86.

271. Thomas Aquinas, *Disputed Questions on Virtue: Quaestio Disputata de Virtutibus In Communi and Quaestio Disputata de Virtutibus Cardinalibus*, trans. Ralph McInerney (South Bend, IN: St. Augustine's Press, 1999).

can only be the direct vision of God (I-II.3.8).”²⁷² In order to attain this supernatural end of human life, one needs the theological virtues, the infused moral virtues, and the gifts of the Holy Spirit.²⁷³ Additionally, human persons have a natural end, which incorporates an aggregate of goods into an ordered unity. In ST I-II.94.2, Aquinas lists the human inclinations of self-preservation, reproduction through procreation, living in society, and knowing the truth about God.²⁷⁴ Porter explains,

What Aquinas offers in I-II.94.2 is an outline of what a human life should properly look like, what goods it will incorporate, and what relation those goods should have to one another. That is, he offers an inclusive life-plan, which . . . can serve as the aim by which an individual can bring the diverse activities of his life into a unified whole.

A normative human life, as Aquinas’ account of the inclinations indicates, is one in which the goods of all the inclinations (except, in some cases, procreation) are pursued in an orderly way, with the pursuit of the lower inclinations being subordinated to the pursuit of the higher inclinations. Clearly, the natural end of human life, so understood, allows for considerable variety in the way in which these pursuits are combined into a complete life.²⁷⁵

Freedom is found in embracing an inclusive life-plan that is ordered yet flexible in the specific details of one’s life. One’s life-plan is inclusive in the sense that serious moral commitments are made to human goods without those goods becoming idols. Something similar happens in marital commitment. Although the details of life can never be known or decided beforehand, marital commitment focuses and orders one’s future actions, so that the marriage is always a penultimate value. Through the grace of God, the moral and theological virtues enable and empower spouses to be faithful to their commitment. The

272. Jean Porter, *The Recovery of Virtue: The Relevance of Aquinas for Christian Ethics* (Louisville, KY: Westminster/John Knox Press, 1990), 83.

273. The relation of these virtues and gifts to one another and how they function in the moral and spiritual life is beyond the scope of this dissertation.

274. Porter, *The Recovery of Virtue: The Relevance of Aquinas for Christian Ethics*, 89.

275. *Ibid.*, 90.

acquired moral virtues aid in achieving natural human happiness, whereas, the infused moral virtues and theological virtues empower spouses to experience union with God through their sacramental union.

The cardinal virtues are “hinge” virtues, because they “are those on which human life is founded, by which the gate may be entered.”²⁷⁶ Following the suggestion of Simon, I will refrain from using “the impossible names of irascible and concupiscible appetites”²⁷⁷ when referring to the virtues that govern the emotional life. The virtue of fortitude or courage disposes the person to face and fear the right things, from the right motive, in the right way, in the right circumstances.²⁷⁸ Although Aquinas refers to the virtue of courage in reference to remaining firm in the presence of mortal danger, courage is relevant and necessary in making and maintaining a marital commitment.²⁷⁹ Great risk is involved in promising to remain faithful and to love another for the whole of one’s unknown future. Courage empowers one to face that risk and make the commitment. In addition, when spouses cause each other pain in the midst of their emotionally vulnerable, intimate relationship, the urge to flee and seek refuge may be overwhelming.²⁸⁰ Again, the virtue of courage holds them firm in the commitment already made. The virtue of temperance is the “rational disposition of the drive toward

276. DQV 2.1.co.

277. Simon, *The Definition of Moral Virtue*, 102.

278. *Ibid.*, 103.

279. DQV 2.1.co.

280. Here I am referring to reasonable or normal amounts of pain and frustration that spouses cause one another and not abusive relationships. Of course, “reasonable” and “normal” are relative terms; this fact leads to the ambiguity in defining abusive relationships, a point that will be addressed at the end of this chapter.

the pleasurable and away from the unpleasant.”²⁸¹ The virtue of temperance in marriage orders the sexual drive and the basic need for touch within the marital commitment toward one’s spouse. Temperate spouses embrace a healthy and satisfying sexual life with one another and refuse the temptations of sexual pleasures outside of marriage. Courage and temperance, the affective virtues, are particularly important for the contemporary view of marriage as interpersonal, emotional relationship. In today’s understanding of marriage as a SuperRelationship, rational control and ordering of emotional responses are paramount:

In particular, the affective virtues of fortitude and temperance are both possible and necessary because of the special character of the passions that they rectify (namely, fear, desire, and anger [I-II.59.2, 4, 5; I-II.60.1]) What characterizes these passions is that they are not rational in the full sense, and yet they have a cognitive component that is amenable to rational direction. . . . The formation of the affective virtues consists precisely in the reeducation of one’s emotional responses in this way. Hence, to the extent that this process has been successfully carried out, the individual’s immediate emotional responses, his likes and dislikes, will accord with what his more considered rational judgments on the matter would be. And that is precisely why the truly virtuous person does not require constant conscious deliberation on his final end in order to act in accordance with it. His immediate responses will reliably direct him to act appropriately, at least in normal circumstances.²⁸²

The minefield of emotions involved in an intimate relationship like marriage requires the affective virtues, which are acquired through right action and infused through the grace of God.

The virtue of justice is the cardinal virtue of the rational appetite, or the will. Justice is concerned with right relations among persons or between a person and the community. The will naturally seeks the good of the person as understood; however, the will needs to be disposed and ordered to seek the good of the other through the cardinal

281. Simon, *The Definition of Moral Virtue*, 103.

282. Porter, *The Recovery of Virtue: The Relevance of Aquinas for Christian Ethics*, 103.

virtue of justice and to the ultimate norm of charity. As virtues of the will, both justice and charity direct the relation of spouses one to another. The theological virtue of charity is “the mother of all virtues,”²⁸³ the root and principle of all the virtues directing one to her ultimate end of union with God. The relation between justice and love has been discussed previously as minimal and maximal terms. Here, love or charity is the foundation, end, and principle of the moral life. The moral virtue of justice disposes one to give the other her due. In many ways, canon law regarding marriage seeks to protect the rights of spouses and ensure each is given his or her due. The next chapter will explore the complexity of identifying and legislating justice in relationships when rights and promises are exchanged rather than goods and services.

The final cardinal virtue, prudence, is the form of the other moral virtues and a virtue of the practical intellect. Right thinking in relation to what is to be done or avoided is the work of prudence. The virtue of prudence is the judgment of conscience working well in concrete situations. Regarding prudence, Aquinas avers, “From this the rectitude and completion of goodness in all other virtues comes.”²⁸⁴ The relation of prudence to the other moral virtues is relevant to my impending discussion on the incapacity of consent and the simulation of consent; therefore, prudence deserves ample consideration. Prudence and the moral virtues operate in a circle of interdependence. As Aquinas argues, “[No] moral virtue can be had without prudence nor can prudence be had if one is

283. DQV 2.1.ad.8.

284. DQV 1.6.co.

lacking moral virtue.”²⁸⁵ How does one break into this “vicious circle”?²⁸⁶ The answer is simply: Reality breaks in. Cessario explains,

But practical wisdom itself discovers its rule and measure in conformity with reality. Of course, by this we understand reality in all of its dimensions. All in all, only a realist moral theology can express such confidence about the relationship of morality to the created order. In effect, abusive use of human capacities bumps up against reality, even if reality does not always respond immediately. It takes time, for example, before a society which does not respect the value of the human word sees what ill effects the consequent breakdown in human communication causes.²⁸⁷

Josef Pieper concurs, “The content of prudent decision is, rather, determined by the *ipsa res*, by reality, which is the ‘measure’ of all cognition and decision.”²⁸⁸ To live prudently means to love the good and approach it through the concrete and particular circumstances of one’s life. The beginning of living prudently is to desire the good. “Only one who previously and simultaneously *loves* and *wants* the good can be prudent; but only one who is previously prudent can *do* good.”²⁸⁹ In other words, the prerequisite for responding appropriately emotionally, knowing the right moral action, and actually doing it is to desire and love what is good. The health of our human affective responses and our capacity for practical moral reasoning are dependent upon our wanting what is good and right and true. In marriage, the capacity to make a marital commitment (a serious moral obligation and decision) along with the ability to live up to the obligations of marriage once created will be greatly dependent upon the desire and intention toward the goods or values of marriage. The infused moral and theological virtues affirm that God graces

285. DQV 2.2.co.

286. Cessario, *The Moral Virtues and Theological Ethics*, 136.

287. *Ibid.*, 137.

288. Josef Pieper, *The Four Cardinal Virtues* (Notre Dame, IN: Notre Dame Press, 1980), 35.

289. *Ibid.*, 34.

spouses with the capacity to know and love God and one's spouse through the sacrament, and the acquired moral virtues equip spouses with the facility to live the marital vocation. However, spouses must first and continually want the good for the marriage. The virtues that are given and cultivated are what make a person capable and consistent. In understanding the capacity for marital commitment and the ability to sustain one's commitment, it is not enough to look at purely psychological theories, for desire for the good and cultivation of virtue actually shape one's psychological capacities.

4.3.4 Environmental-Social Dimension of Practical Moral Reasoning

The environmental-social dimension of practical moral reasoning reveals the constraints that help sustain marital commitment. Constraints placed on spouses help to organize conflicting wants and needs revealing what is possible within the limits of the situation. Finitude dictates that human persons cannot have every need and desire met at all times. Constraints uncover which needs and wants can be actualized within this context. Certainly, there are a number of material constraints that aid in sustaining marital commitment. Marriage carries with it certain financial benefits, such as the power of specialization for goods produced and consumed in the home and the benefit of economies of scale. Married men tend to earn more than single men and experience faster wage growth during marriage.²⁹⁰ Husbands tend to specialize in making money which they then share with their families. Married men, through the support of their wives, tend to lead more settled lives which increases career success and financial growth.²⁹¹ Married women receive a financial advantage over single women as well;

290. Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (New York: Broadway Books, 2000), 99-101.

291. *Ibid.*, 102-5.

however, it is not nearly as significant as that for men.²⁹² In addition, married men and women can share household duties and divide them according to time and talent. The fact that these benefits would be lost in the case of divorce serves as a constraint keeping some marriages intact. Moreover, married persons benefit from economies of scale, meaning spouses share resources by living in one household.²⁹³ For women, “the motherhood penalty” can also add to constraint commitment.²⁹⁴ The costs for married mothers who have forsaken or limited career possibilities to devote time to their children are very great. These costs may be deemed too immense to warrant breaking one’s marital commitment. The financial costs of legal termination proceedings and custody arrangements are also factors associated with constraint commitment.

The public nature of marriage witnesses to the role of community in constraint commitment. The communities to which spouses belong can aid in sustaining marital commitment through social pressure, that is, through concern over the disapproval of the community should divorce occur and the effects of the divorce on children and the wider community. Tying in with the visional dimension of practical moral reasoning is the way in which communities link spouses to their original commitment, thus keeping the commitment alive. Farley describes the role of community in holding persons to their commitments:

. . . [W]e are upheld in our otherwise fragile commitments by the very fact that others (whether a family or a network of friends or a church or a voluntary association) know about these commitments and share them with us. We are

292. Waite and Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially*, 105.

293. *Ibid.*, 115.

294. *Ibid.*, 107.

importantly carried by the momentum of the activity of others. We are confirmed in our intentions by the ability of others to ease our doubts. Our memories make more sense as they are rooted in the story of a people or group. Our hopes seem more real when we see them shining from the hearts of others whom we love and respect. Our seriousness is tempered by a community's recurring humor and play; our foolishness is balanced by a communal sense of purpose. We can afford the risks of both greater joy and suffering when they are never ours alone.²⁹⁵

Although the role of community is presented as a factor in constraint commitment, in essence, communities lessen the burden of commitment by sharing it, supporting it, respecting it, and celebrating it.

4.3.5 Rule-Role Dimension of Practical Moral Reasoning

Finally, by considering the rule-role dimension of practical moral reasoning, we see how concrete and specific rules and practices can sustain marital commitment. This is the level of canon law where church structures, rules, and procedures exist in order to support, protect, and promote theological values.²⁹⁶ Canon law of marriage and the family, specifically consent in canon law, is the focus of the next chapter and will be addressed there. Here, some concrete rules and practices that can effectively strengthen and sustain a marital commitment will be identified briefly. These concrete rules, practices, and patterns of commitment can be classified under three fundamental aspects of commitment: choices, permanence, and unity.

The first aspect of commitment, *choices*, has already been discussed at length in this chapter. "Commitment involves making choices, protecting choices from other options, and arriving at ongoing decisions that reflect the priorities of your

295. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 63-64.

296. Whether or not they effectively do so is an evaluative task, which will be addressed in the final chapter.

commitments.”²⁹⁷ Because life is filled with competing demands for our time and attention, spouses need to decide that their marriage is a priority and then dedicate, or set apart, time to focus on this relationship.²⁹⁸ The threat of attractive alternatives and the danger of the practice of alternative monitoring have already been addressed. Some practical strategies to overcome this threat include: setting and adhering to specific boundaries in relationships with the opposite sex, identifying positive qualities in your own spouse, recognizing negative qualities in alternatives and those harmful consequences, and actively grieving over losses from expectations that may not be met.²⁹⁹

Concrete strategies and practices regarding the *permanence* of marriage can promote stability in marital commitment. To be committed to marriage as a permanent relationship requires a long-term view. Stanley holds that “a fundamental erosion of a sense of eternity has occurred among people living today.”³⁰⁰ This is another way of describing the general bias explained previously which leaves us excessively focused on the immediate. Because marriage is a relationship that lasts a lifetime, spouses need to practice lengthening and broadening their perspective to include not only the course of one’s own life but also the whole of another’s life. This is certainly not an easy task, and the practice of doing so could be described as an ascetic discipline of the imagination calling for effort and prayer.³⁰¹ Particularly when faced with the threat of attractive

297. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 23.

298. *Ibid.*, 36.

299. *Ibid.*, 58-76.

300. *Ibid.*, 110.

301. Certainly wisdom, the gift of the Holy Spirit that empowers one to see the world from God’s viewpoint, is essential to maintaining the long-term view of marriage.

alternatives to the permanence of marriage, couples must train their minds to think in ways that foster fidelity. Farley explains, “It [decision] is the recognition that there are certain ways I cannot allow myself to *think*. The key is more in my imagination than in my will.”³⁰² Finally, commitment to the permanence of marriage necessitates a positive vision of marriage. A vision “provides meaning, motivation, and inspiration for the tasks ahead.”³⁰³ Stanley continues, “A vision is more than seeing a certain kind of future; it is seeing the future so clearly that you act on it.”³⁰⁴ Having a positive, yet realistic, view of marriage ties into the concept of life-planning already discussed. This vision can be nurtured through prayer, setting common goals, sharing hopes and dreams, celebrating ordinary family rituals, and playing together.³⁰⁵

Finally, there are practices that can foster the *unity* of marital commitment. To become truly united with another in marriage requires a resilient yet sure sense of personal identity. Identity and its relation to vocation and fidelity were addressed in the previous chapter. Identity here at the rule-role dimension of practical moral reasoning is intimately connected to the visional dimension where persons come to identify with the stories and traditions of their communities. Here, the role of remote and proximate marriage preparation is paramount where intentional practices and instruction help to form personal identity and to discover vocational direction. To be able to remain unified in marriage, spouses should have established a keen sense of self in the formative years,

302. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 48.

303. Stanley, *The Heart of Commitment: Compelling Research That Reveals the Secrets of a Lifelong, Intimate Marriage*, 140.

304. *Ibid.*

305. *Ibid.*, 145-55.

so that as persons of integrity, they can remain faithful to their commitments. Fidelity means continuing commitment to love another through change. Whitehead and Whitehead expound,

Because we are neither totally changeable nor totally finished, we must learn the difficult virtue of fidelity to growing and changing persons—ourselves and others. In marriage I am called to be faithful not only to the person I married but to the person I am now married to. As I change and grow, my partner can be expected to do the same. Fidelity is not a virtue which allows me to hold doggedly to a remembered commitment; it is a virtue which provides resilience in responding to continuing commitment.³⁰⁶

In the critical area of fidelity, many of the dimensions coalesce. Fidelity is a vision, an obligation, a virtue, a constraint, and a rule. It moves along with the changing course of a lifetime of married love. It is connected to the past, active in the present, and moving toward the future.

As human reality and sacrament of divine love, the marital commitment cannot be sustained without forgiveness. Footnoted in the previous chapter is the story of Hosea. The prophetic book of Hosea began the tradition of expressing God's covenant with His people through the human reality of marriage. Through the infidelity of Gomer and Hosea's steadfast love and forgiveness, the enduring love and forgiveness of God is revealed.³⁰⁷ It is striking that the first prophetic use of marriage as symbolic of the relation between God and His people is one of infidelity and forgiveness. What this means for human marriage and commitment is that forgiveness is indispensable. It is the

306. Evelyn Eaton Whitehead and James D. Whitehead, *Marrying Well: Stages on the Journey of Christian Marriage* (Garden City, New York: Image Books, 1981), 215.

307. Kochuthara points out how the uniqueness of this story dramatically and prophetically reveals Yahweh's unfathomable love as no Israelite law had provisions for taking back an adulterous wife; on the contrary, the adulterous wife was severely punished. This story reveals the kind of fidelity Yahweh has toward His people. See Kochuthara, *The Concept of Sexual Pleasure in the Catholic Moral Tradition*, 56-7.

concrete practice of forgiveness and acceptance of forgiveness from both spouses that sustains a marriage. Farley articulates this point:

Without its offer [forgiveness] in some form at critical junctures in the process of living out a commitment, probably no commitment-obligation remains possible of fulfillment in the long run. The trouble with recommending forgiveness is, however, that its own possibility depends (like the possibility of fidelity generally) on the capacities of the persons involved and on the corrigibility or ultimate bearableness of the problems in the relationship. . . . At its best it is active, not passive, and it serves to mobilize the human spirit. It is the opposite both of hardening one's heart and of allowing oneself to be victimized. Though it requires an inner surrender, it is ultimately an expression of inner power.³⁰⁸

Asking for forgiveness means admitting of fault, making reparation in whatever ways are possible and relevant, deciding to change one's ways, and doing so, so that one is proven trustworthy again. The process of forgiveness is a cycle in which one asks for forgiveness and the other does so. Forgiveness is neither denial of wrongdoing nor magical disappearance of hurt. It is a very real human process intrinsic to any relationship involving finite, sinful human persons. God's example and actions throughout salvation history provide the means for spouses to do the same through the grace of God.

In addition to practices of fidelity and forgiveness, certain patterns of communication can work to sustain the unity of marital commitment. Through clinical observation, John Gottman and Nan Silver have identified specific patterns of communication during an argument that serve as indicators of the future breakup of couples. These indicators include: harsh startup to an argument, criticism, contempt, defensiveness, stonewalling (disengaging), flooding (feeling overwhelmed by spouse's negativity), physiological signals of stress, failed repair attempts (actions that prevent

308. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 92.

negativity from intensifying), and bad memories overshadowing the good.³⁰⁹ Gottman and Silver identify these patterns of communication in arguments, not as *causes* of divorce, but rather as *signs* that the end is likely to come. “After intensely studying happily married couples for as long as sixteen years, I now know that the key to reviving or divorce-proofing a relationship is not in how you handle disagreements but in how you are with each other when you’re not fighting.”³¹⁰ Although healthy and effective patterns for conflict resolution can prove helpful in strengthening marital commitment, the key practices and strategies revolve around building up the friendship that is the heart of marriage. These friendship-enhancing strategies and guides include: heightening emotional attunement, nurturing fondness and admiration, offering attention and affection, being disposed to be influenced by the other, recognizing unsolvable problems, solving solvable problems, recognizing the hopes and dreams of the other, and creating shared meaning through rituals, roles, and symbols and communicating personal goals.³¹¹ Just as all of the dimensions of practical moral reasoning interconnect in living the moral life so also do they connect and reveal the varied dimensions involved in sustaining a marital commitment, not an easy task.

4.4 Release from an Interpersonal Commitment to Love for Life

Current canon law upholds the belief that valid, sacramental and consummated marriages are intrinsically and extrinsically indissoluble. The only way that release from

309. John Gottman and Nan Silver, *The Seven Principles for Making Marriage Work* (London: Orion Books Ltd., 2000), 25-44.

310. *Ibid.*, 46.

311. *Ibid.*, 47-258.

the obligations of marriage may occur is if some basic flaw can be identified and proven in the original commitment. This flaw could be a lack of freedom (impediment), a lack of canonical form, or a defect of consent. As Farley notes, "Strictly speaking, however, this kind of release from obligation is not a 'release' but a recognition that no marriage ever existed. The obligation was never truly undertaken; the marriage was in an important sense invalid from the start and therefore nonbinding all along."³¹² Before addressing questions of defect of consent in the next chapter, I will consider Farley's challenge to current canonical teaching and procedure. She proposes that there are three conditions under which the obligation to sustain a valid, sacramental and consummated marriage cease to bind. She makes this claim by proposing that "a marriage commitment is subject to release on the same ultimate grounds that any extremely serious, nearly unconditional, permanent commitment may cease to bind."³¹³ Since she does not believe that an ontological change occurs in marital commitment, Farley holds that every marital commitment is subject to the norms of justice and should it fail to be a just love, then spouses may be released from the moral obligations of marriage and may be free to remarry.³¹⁴ For Farley, just love is an emotion that is true to the concrete reality of each participant in the relationship and the nature of the relationship itself:

[T]he emotion of love is not the same as "feelings" that come and go, whether we like it or not, in the mode of physiological disturbances and sensations, and that may importantly accompany emotions but are not required for them. Love is spontaneously receptive but not a passive reaction; it is active in response, constituted in union, shaped by perceptions and understandings, and engaging of myself in affirmation of what I love. It is true and just when and insofar as it

312. Farley, "The Concept of Commitment as Applied to Questions of Marriage and Divorce," 91.

313. *Ibid.*, 92.

314. Farley, *Just Love: A Framework for Christian Sexual Ethics*, 308-11.

accords with the concrete reality of what is loved, the one loving, and the nature of the relationship between them.³¹⁵

She identifies three situations in which things have changed within a committed relationship in such a way that the obligations arising from the commitment no longer hold. Farley admits that these situations or conditions are not necessarily mutually exclusive and may be different ways of describing the same situation.³¹⁶ Farley's three criteria for release from the obligations of marital commitment will be explained, and subsequently four cases³¹⁷ that pose serious questions to the traditional doctrine of indissolubility will be addressed in relation to Farley's criteria. These four cases include: adultery, abuse, addiction, and abandonment.³¹⁸

4.4.1 Impossibility

First, "when it truly becomes impossible to sustain a commitment-relationship, it may belong to a just love to change or break the commitment."³¹⁹ In a marital commitment, the impossibility referred to is primarily psychological or moral, such as when the relationship has broken down irretrievably and reconciliation is deemed impossible. Farley admits that "impossibility, when it is not 'physical,' is less like an objective, incontrovertible 'fact' and more like a judgment that we make or even a decision."³²⁰ The difficulty and ambiguity involved in judging when the criterion of

315. Farley, *Just Love: A Framework for Christian Sexual Ethics*, 203.

316. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 84.

317. These are not specific juridical cases but rather classes of cases for the purpose of analysis.

318. It should be understood that this will be a preliminary analysis. By incorporating biblical exegesis and a history of the church's teaching on divorce and remarriage in these areas, an analysis of these four A's could be the sole subject of further study.

319. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 85.

320. *Ibid.*

impossibility applies is severe. Farley concedes that “there are obvious critical questions to be asked about the accuracy of the analysis of any given situation and about the integrity in the personal motivation of those who are discerning and deciding.”³²¹ There are many factors that contribute to determining if a marital commitment is truly impossible to sustain including physical, psychological, moral, cultural, and economic limitations or incapacities. Some of these incapacities are simply given while others are the consequences of past choices. Unlike current canon law, Farley does not specify that these incapacities need to be present at the moment of consent in order for one to be released from the commitment. The impossibility may have arisen during the course of the marriage. Moreover, determination of the possibility or impossibility of a marital situation is not simply dependent on one’s own capacities or lack thereof. “In relationships that are meant to be mutual, that essentially involve interaction between myself and another person, what the other does or can do and what happens between us may make all the difference.”³²² In this way, each spouse’s limitations and incapacities have the potential to create an impossible situation for the other. However, the interesting question is what is it about some marriages that keep them from the threshold of impossibility despite arduous challenges while others seem to quickly cross it and crumble? Although seemingly tautological, one of the key factors is the nature, quality, and strength of the commitment itself and those that create it. Through openness to the possibility of forgiveness, change, and fidelity, those committed couples may prevent an impossible situation from developing.

321. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 87.

322. *Ibid.*, 88.

4.4.2 Loss of Meaning

Second, “when a specific commitment no longer fulfills the purposes of the larger and more basic commitment that it was meant to serve, it may be a part of a just love to change it or break it.”³²³ In this situation, the commitment has lost its intrinsic meaning, not just the *experience* or *feeling* of its purposes. Farley admits that marriage has multiple meanings making the occurrence of any given marriage losing all its meaning extremely rare.³²⁴ Again, the ultimate criterion Farley uses to judge whether a particular framework for love is morally binding is its relation to just love. She states, “If this framework (this marriage) turns out to block the love, because it places it in a shared life for which they are tragically unsuited, etc., then the obligation to the particular form of committed love may no longer hold.”³²⁵ According to Farley, the framework (marriage) is always in service to the unconditional commitment to a just love. When the particular framework fails to support the original commitment to a just love, then “the special right of the other at least obligates us, to the extent we are able, to change the commitment with care, without violence on our part, with some form of fidelity to the love we originally promised.”³²⁶ As in the first criterion of impossibility, the ambiguity involved in applying this criterion cannot be underestimated. “A just love, committed unconditionally, may require that its framework be lived to the end; but it may also require that its framework be changed.”³²⁷ Farley does not give a clear picture of when

323. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 92.

324. Farley, "The Concept of Commitment as Applied to Questions of Marriage and Divorce," 93.

325. *Ibid.*

326. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 99.

327. *Ibid.*

just love requires that the framework be abandoned and when it requires that it be maintained, because her analysis is so couple specific.

4.4.3 Alternate Superseding Obligation

Finally, “when another obligation comes into conflict with and supersedes the obligation to keep a commitment, a just love may require that the commitment be broken or changed.”³²⁸ Farley contends that when the demands of another essential love conflict with the obligations of a marriage, the marital commitment can be broken or changed in service to just love. “Still, there are times when other fundamental obligations can take priority—obligations to God, to children, to society, even to one’s spouse (when, for example, ironically commitment to the well-being of the spouse conflicts with continued commitment to the relationship within the framework of marriage).”³²⁹ In addition, obligations to oneself can take priority over the marital commitment. It is not that self-love and love of another are incompatible; on the contrary, it is through self-sacrificial love that one comes to self-possession and self-determination. However, there are “limits to the sacrifice that is required or even morally allowed.”³³⁰ These limits are based upon the norm of just love. Farley clarifies that “while we may sacrifice everything we have, we may not sacrifice everything we are. We may not sacrifice in a final sense our autonomy. We may not sacrifice our capability for union and communion with God and human persons.”³³¹ In addition, she argues, “No person’s good is achieved by the

328. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 100.

329. Farley, "The Concept of Commitment as Applied to Questions of Marriage and Divorce," 94.

330. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 105.

331. *Ibid.*, 106.

destruction of another person *as a person*.³³² Although recognizing that self-sacrifice is necessary in every marital relationship, Farley addresses questions of the limits of self-sacrifice in terms of power and inequality:

When a disproportionate burden of sacrifice is laid on one person in a commitment-relationship, and when the person who bears it is the one with the least power, the duty of self-sacrifice is morally suspect. This suggests that where there is an imbalance of power, the expectation ought to be that the one with the greater power will be obligated to the greater self-sacrifice.³³³

In real marital relationships, identifying who possesses greater power can be difficult and problematic, and judging when self-sacrifice is actually destructive of personhood is a delicate moral analysis. Some may argue that the unconditional commitment to marriage is the decision to give *all* to one's spouse. Ultimately, this reverts back to the question of the meaning of conjugal love. Indefinable, love resurfaces throughout this study making a clear-cut moral analysis of marital relationships nearly impossible.

4.4.4 Questions of Adultery, Abuse, Addiction, and Abandonment

In the case of adultery, the matter of what actions qualify as adultery is the first question. If what is exchanged in marital consent is the *ius in corpus*, then sexual intercourse outside of marriage constitutes adultery, for it is a violation of a right. However, if marital consent is understood as the giving and receiving of persons through an irrevocable covenant, it is not so clear what constitutes adultery. Is it possible that an intensely emotional interpersonal relationship with someone of the opposite sex (without sexual contact) could constitute adultery? Is it possible to give oneself totally to another outside of marriage without sex in a way that violates the marital commitment? Those questions aside, does adultery fulfill one or more of Farley's conditions for release from

332. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 107.

333. *Ibid.*

the obligations of commitment? There are far too many variables to answer unilaterally. If the adultery is pervasive, continual, and recurrent, it may be impossible to sustain the commitment-relationship, because the relationship is truly intolerable and unjust. In such a situation, the commitment has lost all intrinsic meaning. A marital commitment lacking even the most basic form of fidelity over an extended period of time seems nonsensical and utterly meaningless. Is a commitment that is broken egregiously truly a commitment undertaken? I would argue it is not. More likely, it seems to be a flaw in the original commitment or the capacity of the one attempting to make a commitment and not a release from the obligations of a valid commitment. The case of adultery may also fulfill the condition of superseding obligation to another. Remaining in a relationship of repeated and flagrant infidelity could be viewed as a failure to love and respect oneself enough to refuse to be disregarded in that way. The framework of marriage could be an obstacle to being loved justly. Again, I would argue that the superseding obligation to love oneself does not release one from the obligations of marriage but points to an unjust situation stemming from the incapacity or unwillingness of one or both of the spouses. Here I am referring to rare cases of clear and continual infidelity, and still there is no unmistakable application of Farley's conditions. Even greater ambiguity is introduced when considering the repentant adulterer and emotional affairs. In the case of adultery, Farley's conditions for release from the obligations of a commitment are not useful.

In the case of abuse, the question of what qualifies as abuse is forefront. Marital relationships that involve the infliction of bodily harm or sexual assault³³⁴ clearly qualify

334. The identification of behaviors as sexually abusive may be problematic. Lack of consent and the presence of physical coercion are not the only criteria to indicate sexual abuse. A spouse may consent to sex due to antecedent threats or the belief that one does not really have a choice but to consent, thus making consensual, nonviolent sex, at the same time, abusive.

as abusive; however, marital relationships in which the actions of one or both spouses result in mental anguish are less clear. Terms such as emotional abuse or psychological violence encompass a wide variety of specific behaviors. Are behaviors like name-calling, belittling, threatening, yelling, intimidating, and manipulating always abusive? Is there a threshold that must be crossed? Can the withholding of attention or affection be considered abusive? There is no clear answer or consensus among legal or clinical professionals. That being said, in situations of sustained and pervasive physical, emotional, or sexual abuse, it may be impossible to sustain the marital commitment due to the superseding obligation of self-protection and self-love. In addition, a truly abusive marital relationship is essentially contradictory and meaningless. Marriage is a relationship of love and life, whereas abuse is the complete opposite. Thus, abuse seems to meet the criteria of all of Farley's conditions for the release from the obligations of marital commitment. However, similar to the first case of adultery, here it seems more fitting to speak of lack of true commitment undertaken rather than release from the commitment. The abuser is either incapable of committing to a lifelong relationship of love and fidelity or unwilling to do so. Because marriage is a *mutual* commitment, the abused spouse cannot be released from a commitment that has not really been made. The difficulty with Farley's position is that some abused spouses may observe the necessity of upholding the obligations of their "commitment" in spite of the abuse due to their own integrity while thinking that their sacramental marriages continue to witness to Christ's love and fidelity. Remaining faithful to one's obligations in a commitment regardless of the failure of the other to live up to his or her side of the commitment is a necessary part of a healthy relationship. However, in the case of abuse, it can be detrimental to human

personhood and the basic human need for safety. Arguing against the position of Himes and Coriden that an abused spouse may be free to divorce to experience peace and freedom, Ryan and Grisez make just such an absurd argument. In a footnote, they state, “HC [Himes and Coriden] are mistaken in claiming that some marriages regarded by the Church as indissoluble simply ‘cannot witness to the fruits of life in Christ.’ Even if one spouse is abusive and unfaithful, the other’s lifelong fidelity can bear witness to Christ’s unconditional fidelity to his sinful people.”³³⁵ How does the fidelity of an abused spouse make present God’s love? What kind of a god would want a person to remain faithful and present in an abusive situation?³³⁶ God remains faithful to His unfaithful people, because He is the only one who can offer salvation. God is not abused by our un-love. Unlike human marriage, the God-human relationship is not equal, nor is it intended to be so. It is beyond unhealthy and unwise to ask a spouse to “save” another. It is simply impossible. Moreover, it is highly unlikely that the continual presence and fidelity of an abused spouse in a marriage will witness to the love of Christ. If anything, it may signify to the world the presence of an archaic institution out of touch with reality. Therefore, it is better to judge the commitment as not truly made rather than risk an abused spouse remain in an unsafe situation. Commitment is not control or coercion, because marital commitment is inherently mutual.

335. Peter F. Ryan and Germain Grisez, "Indissoluble Marriage: A Reply to Kenneth Himes and James Coriden," *Theological Studies* 72 (2011): 386n88.

336. Perhaps in the situation of a repentant and reformed abusive spouse, the fidelity of the abused spouse could witness to Christ’s love and fidelity; however, I would not argue that an abused spouse should ever stay in such a situation in the hope that the abuse will stop. To argue that the abused spouse has a free choice whether or not to stay in the marriage does not take seriously the nature of abuse and the effect it has upon one’s effective freedom. In addition, the abuse is an affront to the sacrament; those outside of the tradition could interpret the continuation of the marriage as an example of the burdensome and restrictive institution of marriage and/or religion.

In the case of addiction, the object of addiction could vary from alcohol and other substances to sex or gambling. The criteria of what constitutes an addictive disorder continue to evolve as evidenced by the multiple editions of the *Diagnostic and Statistical Manual of Mental Disorders* produced by the American Psychiatric Association.³³⁷ Suffice it to say, there is ambiguity surrounding the diagnosis of an addictive disorder and the severity of said disorder. Assuming there is agreement regarding the presence of addictive disorder in one or both of the spouses, does the case of addiction satisfy any of Farley's conditions for release from the obligations of marital commitment? Regarding the conditions of impossibility and loss of meaning, addictive disorder can damage the affective functioning and the maturation process of the person so that an intimate, loving interpersonal relationship becomes effectively impossible and counter to an essential purpose of marriage, that is, growth in holiness. In reference to alcoholism and marital commitment, Patrick Morris describes the impact of alcoholism on the affective functioning of the alcoholic. The alcoholic may abuse alcohol to escape reality and responsibilities by numbing oneself from feelings of pain, frustration, or inadequacy. "If an individual is chronically anaesthetized with alcohol, the experiences of reality that normally allow for personality maturation, the development of self-knowledge and knowledge of the other are not processed."³³⁸ Morris articulates how the alcoholic's affective capacity then impinges upon the marital relationship:

When individuals agree to, consent to, commit themselves to marriage, they must be capable of and are committing themselves to the development of a unique

337. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Arlington, VA: American Psychiatric Publishing, 2013). It is beyond the scope of this dissertation to delve into the exact criteria for diagnosis of addictive disorder for various substances or behaviors. It is enough to note that critics of the manual question its objectivity, reliability, validity, and possible biases.

338. Patrick S. Morris, "Alcoholism and Marital Consent," *Studia Canonica* 34 (2000): 163.

interpersonal relationship. If this relationship does not emerge, the marriage may become intolerable. Through the process of living through both the constricting and liberating experiences inherent in a marital relationship, there can be an arousal and development of consciousness so that the partners become increasingly aware of the purpose of their marriage. A long-term and exclusive association with another human being involves a confrontation with the great awakener, reality. When the original "in-loveness" wears off in daily marital existence, what comes next depends entirely on the quality of the original commitment as well as perseverance in commitment. If the capacity to make the original commitment was present and if the desire and capacity to persevere in commitment exist, love will change and become a true devotion to the partner as well as an inner personal, purposeful and liberating experience. . . . If alcohol is used to escape from the experience of reality, it could indicate an incapacity to experience marital reality and hence an incapacity to commit the self to marriage. An equitable and just answer to the question of capacity/incapacity for commitment demands an assessment of the individual's level of emotional maturation, affective, cognitive and motivational functioning in light of the requirements for commitment and perseverance in commitment. Commitment to marriage is not only a commitment to one's partner but also a commitment to movement through a unique type of interpersonal relationship.³³⁹

What is said of alcoholism could apply to other addictions as well. Addictive behavior is a means of escaping or avoiding reality to alleviate pain and produce pleasure. The addict then becomes relatively powerless to control the behavior in spite of negative consequences. It is apparent how addictive disorder could make the marital commitment impossible to sustain. In addition, the addictive behavior thwarts one of the essential purposes of marriage, which is the sanctification of the spouses as described in *Casti connubii*. However, rather than applying Farley's conditions for the release from a marital commitment, Morris places the problem of addiction within the category of incapacity. Although Morris' analysis is psychological and juridical rather than moral, I would agree that once again Farley's conditions are not functional. The more appropriate place for the consideration of addiction is within discussions of incapacity. Is the addict capable of forming a lifelong commitment to grow in love with another? To better

339. Morris, "Alcoholism and Marital Consent," 164-65.

answer that question, one needs to consider the “antecedence, severity, perpetuity, and relativity” of the addiction.³⁴⁰ When questions of capacity or incapacity are most relevant, then Farley’s conditions become unnecessary.

Finally, of the four cases, abandonment seems most fitting to Farley’s conditions for release from the obligations of marital commitment. When one spouse truly abandons another, that is, leaves the marriage without the consent of the other spouse, it is impossible to sustain the marriage relationship. In addition, a marriage in which one spouse is abandoned by the other has lost its intrinsic meaning. Moreover, the obligation of self-love and self-respect may take priority over the obligations of the marital commitment. Although these conditions certainly seem applicable, the investigation into a particular case of abandonment may reveal that the spouse that left was incapable of making a true marital commitment or only appeared to commit. The subsequent unwillingness to work on the marriage may reveal that one or both of the spouses never really committed in the first place. In the four cases of adultery, abuse, addiction, and abandonment, it is more fitting to examine the original commitment and the subsequent lack of perseverance in the commitment rather than release from the obligations of marital commitment.

4.5 Synthesis of Marital Commitment in Theology

The contemporary American culture of individualism that has developed over many years creates a situation in which making and keeping a marital commitment is particularly challenging. This culture of individualism is a result of the individual, group,

340. Morris, "Alcoholism and Marital Consent," 194.

and general biases as described by Lonergan. This cultural environment characterized by division and an inordinate focus on the immediate, the short-term, and one's own individual needs has had tremendous effects on marriage and family. The very notion of freedom has been skewed. In American culture in general, freedom is often viewed as freedom *from* instead of freedom *for*, that is, freedom from obligations, freedom from institutions, and freedom from commitments. In contrast, freedom *for* means freedom for making decisions for oneself on the fourth level of conscious and intentional operations. Freedom is the gift of self-determination in relationship with God and others. In spite of the presence of sin in culture, the human person is not denied the grace of essential freedom. In fact, many people use what Lonergan has deemed the three escapes from living morally and exercising true freedom. These are self-conscious-less, rationalization, and moral renunciation. When human persons experience discomfort and anxiety because there is lack of consistency between their knowing and doing, they resort to one or more of these three escapes. Culture may make commitment difficult, but not impossible. The redemptive community of the church and other civic associations provide their own cultural structures and symbols to help the human person to develop in communion.

To be a person means to be capable of self-awareness, self-determination, and self-transcendence in mutually loving and life-giving relationships made possible by commitment. The significance of commitment for permanent relationships is evidenced by the fact that God's relationship with humanity is in the form of a covenant. A marital commitment is made in and from the heart of the person, the center of who a person is. A commitment is a mutual giving and receiving of one's word, a promise to be held by the

other. To make a marital commitment means creating a new relationship in the present to direct one's freedom in the future. It is the choice to give up other choices, to intentionally limit one's freedom in a relationship that is characterized by love and justice. Dedication commitment refers to the wanting to and devotional aspects of commitment, whereas constraint commitment refers to the factors and forces that would be costs if the commitment were abandoned.

Marital commitments are made to strengthen one's unreliable will, to reassure others of one's intention, and to express and make present the fullness of love as it grows and develops over time. Commitment is an internal, psychological, and spiritual act on the level of responsible personhood. At the same time, because marital commitment is mutual, it must be expressed externally and socially. It can happen incrementally in ritual, such as "committed dating" and engagement, but it is fully manifested at the wedding celebration in community. Marital commitment should happen once the couple has been prepared, a task that begins in early childhood with greater attention to the role of discernment in dating. This commitment is made once, yet it continues to be nurtured and chosen every day thereafter. It is imperative that the church be pastorally present to support married persons throughout the lifecycle. The ways in which marital commitments can be sustained correspond to the five dimensions of practical moral reasoning. The visional dimension emphasizes the importance of community, narrative, tradition, and identity in nurturing a marital commitment. The obligational dimension refers to the role of principle and duty, and the tendency-need dimension refers to the role of psychology and virtue. Most efforts at sustaining marital commitment have focused on psychological techniques while overlooking the significance of virtue, both acquired

and infused, as a means of assuring human dependability. The environmental-social dimension includes the role of constraints, both natural and social, and community. Finally, the rule-role dimension emphasizes the importance of certain practices and patterns of communication that sustain marital commitment. Of particular importance for this study is the role of canon law in establishing structures and norms that maintain Christian freedom and good order and justice, which is the minimum demand of love.

Finally, Margaret Farley has proposed three conditions under which the obligation to sustain a marital commitment ceases to bind. In short, these conditions are impossibility, loss of meaning, and alternate superseding obligation. These conditions were applied to four general cases to see if any of the cases fulfill Farley's conditions so that one may be released morally from a marital commitment. In the cases of adultery, abuse, and addiction, Farley's categories were too ambiguous to apply and considered impractical, because in such cases it is more likely that a true commitment was never made than that the obligation no longer binds. Such cases would be more appropriately dealt with canonically in annulment hearings. Abandonment may be the only case of the four in which all three conditions may apply. However, even abandonment should be handled on a case by case manner, which is the procedure of canon law.

CHAPTER FIVE

MARITAL CONSENT IN CANON LAW

5.1 Marriage in the 1983 Code of Canon Law

5.1.1 The Values of Sacramental Marriage

As explained in Chapter Two, canon law is the church's system of structures, norms, and procedures that enable persons to reach out for and appropriate the goods or values identified by theology in order that the church may grow in faith, hope, and love for the salvation of souls. The salvation of souls fundamentally implies communion, sharing in the trinitarian divine life through Christ and with one another in faith and baptism. *Communio* is substantively related to salvation. Of course, this *communio* has not been perfectly expressed or realized due to the pervasive character of sin. The pilgrim church is the instrument and sacrament of Christ in the world to continue the redemptive work of Christ. In the trinitarian divine life, there is perfect freedom, reciprocity, order, and love. The church, as human and divine redemptive community, cannot claim the same. The ministry of canon law exists to protect and maintain a harmonious balance between individual and communal goods. Polarization of the individual from the community that manifests itself historically and repeatedly creates a false and unnecessary antagonism. The fullness of human flourishing can only occur within interdependent relationships. The refusal to look beyond one's own self, group, or immediate situation in order to live attentively, intelligently, reasonably, and responsibly was previously described as individual, group, and general bias. Bias continues to be a force in the world, and even in the church. Therefore, canon law aims to promote and

protect the freedom and good of the individual within an ordered whole. As an instrument for the promotion of a just community, canon law ideally works to promote the salvation of souls, a task which is ultimately the work of the Holy Spirit.

While canon law in general seeks to promote and protect the values of freedom and good order, there are values (or goods) specific to marriage that need to be appropriated, because they contribute to human flourishing and connect us to the divine life. John McAreevey maintains, “The most significant values are the stability of marriage, its protection against human weakness and sinfulness, respect for the seriousness of human commitment in marriage, the freedom of the parties in entering marriage, respect for the intimacy of human sexuality and the sacramentality of the marriage bond.”¹ Marriage is perhaps the most intimate and vulnerable relationship, loaded with the potential to devastate or fortify persons. It can contribute to great holiness and great sin. The intimacy and vulnerability involved in a sexual relationship necessitate the stability and constancy of the marital commitment in order to safeguard the union and strengthen it. At the same time, because marriage is a relationship between human persons created with dignity and the capacity for self-determination, the freedom of persons needs to be protected. Therefore, the canonical framework for marriage should promote and protect these values of marriage. While there are numerous goods of marriage, I will concentrate on the three traditional goods of marriage first identified by Augustine.

1. John McAreevey, *The Canon Law of Marriage and the Family* (Portland, OR: Four Courts Press, 1997), 16.

5.1.2 The Three Augustinian Goods of Marriage

The traditional *bona* of marriage have been utilized significantly in canon law in designating what is essential to marriage. In the original use of the *bona*, Augustine defended the goodness of marriage against the Manichees by identifying those goods or blessings of marriage, subsequently to be known as the three traditional *bona* of marriage. Eventually, these *bona* came to specify that which is constitutive of marriage, the inclusion of which is absolutely necessary for a valid marriage. For Augustine, sex was suspect but could be excused if engaged in for the purpose of producing and raising children. Therefore, *proles* is the first good of marriage. The *bonum proles* designates the procreativity of the couple that welcomes persons into the family, the church² and the world. In a worldview where all that exists is created by God and enveloped in grace, the welcoming and raising of children is an obvious good. The existence of a new human person is simply good. Moreover, the *bonum proles* is good for the married couple.³ While there is a certain degree of maturity that couples should possess before becoming parents, the daily acts of parenting well contribute to a couple's maturing. In other words, children are a gift and a good in themselves and a blessing and a good to the

2. The *bonum proles* is a good for all married couples, but for sacramental marriages this good means that invaluable persons are added to the faithful as well. See Leo XIII, *Arcanum*, no. 10 and Pius XI, *Casti Connubii*, no. 12, 13.

3. Joseph Selling objects to the contention that canon 1055 §1 designates and legislates procreation as a value for everyone at all times. Procreation may be deemed valuable for the community and the church, but it may not be so for the couple “who carry a serious genetic defect, who already have a large family, who have a shortage of resources to provide a responsible upbringing for (more) children, or who live in an overpopulated situation.” He continues, “Procreation is a ‘good’, but it is not an appropriate good for all persons in every circumstance; i.e., it is not always valued; nor can it be said to be *valuable* for persons with no interest in or need for it. Law, then, cannot and should not attempt to determine or even advise what is ‘of value’ to the community or its individual members. Law can only address what the community finds to be ‘good’.” Joseph Selling, “Values, Goods and Priorities: Can Law Determine the Pattern?” *Louvain Studies* 20 (1995): 61.

couple as they contribute to their own parents' growth and maturation.⁴ Still, even if procreation is not physically possible, *fides* makes marriage good. The sexual fidelity of the couple brings about and makes possible the *communio personarum*. The good of fidelity, or the sexual exclusiveness of the marital relationship, is a blessing of marriage, because it affirms the unique status that spouses have in relation to one another.

Augustine Mendonça states, "Therefore, for St. Augustine, *bonum fidei* denoted *total mutual dedication*, the sustaining element of conjugal union and the means by which marriage comes to completion."⁵ The *bonum fidei* assures spouses that each is loved, respected, and cherished in a relationship that is exclusive, distinctive, and irreplaceable. Msgr. Cormac Burke articulates precisely this point.⁶ "The good or value of fidelity is expressed in the affirmation, 'You are unique to me, and I to you,' which is the first truly personalized affirmation of conjugal love. No lover is content to be just one among the loved one's lovers."⁷ In a marital relationship where spouses are faithful to the commitment they have made to one another, the *communio personarum* can come to be in an atmosphere of trust and love. Equally inherent in conjugal love is the desire for permanency. As indicated in Chapter Three, Augustine's use of *sacramentum* as a good of marriage is ambiguous yet decidedly connected to commitment, perseverance, and indissolubility. Burke continues by expressing the commonly shared experience of

4. The rising median age for first marriage is linked to an increase in cohabitation prior to marriage, but it could also indicate for some the erroneous belief that couples must be unrealistically "mature," emotionally satisfied, and financially secure before getting married and becoming parents. The maturation of persons through marriage will be developed later in this chapter in conjunction with discussions of the *bonum coniugum*.

5. Augustine Mendonça, "The Theological and Juridical Aspects of Marriage," *Studia Canonica* 22 (1988): 292.

6. Judge-Auditor of the Roman Rota, 1986-1999.

7. Cormac Burke, "Personalism and the *bona* of Marriage," *Studia Canonica* 27 (1993): 404.

human love. “Lovers wish to belong truly to each other, with a ‘belongingness’ that is for always.”⁸ The experience of love evokes promises of forever and the desire for permanence.

Because the *bona* are blessings of conjugal love, all of the matrimonial *bona* are related to one another. Thomas Doyle claims, “For Augustine these three converge to realize the total good of marriage. They cannot be rightly studied except as they relate to each other and to marriage as a whole.”⁹ William Woestman summarizes how these goods of marriage are integral to the whole of marriage and related to conjugal love:

The three *bona* are not something extrinsic or external to marriage, but are by their nature essential to the *totius vitae consortium*, to the *communio vitae*, to true, real, marital love between husband and wife. True and real conjugal love by its very nature is permanent—not temporary, e.g., not “for as long as we live in peace,” not “for as long as I do not find someone else more attractive.” Thus, we have *bonum sacramenti*, a permanent union. True and real conjugal love by its very nature excludes infidelity, e.g., marital love and affection and acts with a third party; it also excludes considering one’s spouse as a mere object of lust and sexual pleasure through acts that are demeaning of one’s spouse because they are contrary to sexual morality insofar as they are not performed in a human fashion and apt in themselves for the procreation of offspring. Thus, we have *bonum fidei*. Finally, true and real marital love does not exclude the natural fruit of marriage, the procreation and education of offspring. Thus, we have the *bonum prolis*.¹⁰

These Augustinian *bona* have influenced theological thinking and canonical praxis for over 1,500 years.¹¹ Canon law should continue to protect and promote these goods or values for the development of human persons and communities. Throughout years of jurisprudence, the Augustinian *bona* have been used to identify the juridical essence of marriage. While the Code does not explicitly define the essence of marriage or provide a

8. Burke, "Personalism and the *bona* of Marriage," 405.

9. Thomas Doyle, "A New Look at the 'Bonum Fidei'," *Studia Canonica* 12 (1978): 8.

10. William H. Woestman, "Simulation Revisited," *CLSA Proceedings* 65 (2003): 247.

11. Burke, "Personalism and the *bona* of Marriage," 403.

definition, the essential ends, properties, elements, and rights/obligations can be extrapolated from several canons.

5.1.3 The Ends of Marriage

The goods of marriage, that is, the inherent features that demonstrate marriage's goodness, are not necessarily the same as the ends of marriage. As previously discussed, the goods of marriage identify the blessings of marriage or that which make marriage good, or more accurately, that which reveal marriage's essential goodness. Marriage is good, because it is characterized by procreativity, fidelity, and permanence. The ends of marriage denote its intrinsic finality. They are the good purposes of marriage, plainly, the goals toward which marriage is directed. The ends are embedded in the structure of marriage (*finis operis*) independently of the goals or intentions of the spouses (*finis operantis*). In a teleological understanding of marriage, the ends denote that toward which marriage naturally and intrinsically moves if not thwarted by the will of the spouses or another cause. The ends of marriage are identified in canon 1055, which provides a description or "working definition" of marriage garnered from *Gaudium et spes* 48.¹² This canon is a theological statement in juridical language, the content of which specifies *what marriage is essentially*¹³ regardless of the particular mind or will of the spouses. **Canon 1055 §1** reads,

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of

12. John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000), 1240.

13. The question of whether or not it is appropriate or even possible to specify the essence of marriage in a postmodern context is a valid one. However, that question will be addressed in the final chapter.

offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.

“Which is ordered by its nature” clearly expresses finality. “The term ‘end,’ *finis*, is not used, but the verb ‘ordered,’ *ordinatus*, expresses the same thought: there is a built-in finality in the institution of marriage.”¹⁴ In contrast to the 1917 Code, the ends are not ranked hierarchically here. Canon 1013 of the 1917 Code delineates the primary end of marriage as the procreation and nurture of children and mutual help and remedying of concupiscence as the secondary ends.¹⁵ Mackin notes, “Strange as it may seem it is nevertheless certain that Canon 1013.1 is the first document of the Church that lists these ends and arranges them hierarchically. . . . This canon is also the first document of the Church to use the terminology ‘primary’ and ‘secondary.’”¹⁶ Whether or not this is the first use of the hierarchical ordering of the ends in *official* church teaching need not be argued here.¹⁷ Clearly, the procreative purpose of marriage has been emphasized for centuries until the explicit ordering of the ends in the 1917 Code cemented this ranking. Although Pius XI reiterated the teaching of Leo XIII that the principal ends of marriage

14. Ladislav Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions* (Wilmington, DE: Michael Glazier, 1986), 52.

15. Theodore Mackin, *What is Marriage? Marriage in the Catholic Church* (New York: Paulist Press, 1982), 209.

16. *Ibid.*, 213.

17. Michael Lawler and William Roberts state explicitly that the 1917 Code did not “invent this hierarchy of ends” but “merely repeated it from a long history.” See Michael Lawler and William Roberts, *Christian Marriage and Family: Contemporary Theological and Pastoral Perspectives* (Collegeville, MN: The Liturgical Press, 1996), 32. In addition, Michael Prieur questions this claim due to the use of “*primo*” and “*secundo loco*” regarding the ends of marriage in the encyclical *Arcanum* of Pope Leo XIII. See Michael Prieur, “The Articulation of the Ends of Marriage in Roman Catholic Teaching: A Brief Commentary,” *Studia Canonica* 33 (1999): 528.

were set in God's command to "increase and multiply," he furthered the nascent theology of the *bonum coniugum* as an equal end of marriage:¹⁸

This mutual molding of husband and wife, this determined effort to perfect each other, can in a very real sense, as the Roman Catechism teaches, be said to be the chief reason and purpose of matrimony, provided matrimony be looked at not in the restricted sense as instituted for the proper conception and education of the child, but more widely as the blending of life as a whole and the mutual interchange and sharing thereof.¹⁹

The meaning and significance of the *bonum coniugum* must be given due consideration bearing in mind the relative newness of the term. Cormac Burke calls it "a totally innovative importation, practically never to be found in canonical or ecclesial writing prior to its appearance in the new Code."²⁰

In agreement with Burke, Klaus Lüdicke rejects the theory that the *bonum coniugum* is a fourth *bonum* alongside the three Augustinian *bona*:

The *bona* of Augustine are in their origin distinguishing characteristics of marriage, those that make marriage morally and socially valuable. It was only in the history of law that they took on the role of criteria for the nullity of marriage, and then as properties (*bonum fidei*—unity, *bonum sacramenti*—indissolubility; see c. 1056) or as an end (*bonum proles*—end of marriage; see CIC17, c. 1013 §1). The welfare of the spouses is not a characteristic of the quality of marriage; and the correspondence between "good" (*valor*) and "welfare" (*bene esse*) in the same Latin term *bonum* leads here to a false use.²¹

Lawrence Wrenn argues that the famous Jemolo case²² necessitates a fourth *bonum*

18. Pius XI, *Casti Connubii*, no. 8.

19. *Ibid.*, no. 24.

20. Cormac Burke, "Challenges to Matrimonial Jurisprudence Posed by the 1983 Code," *Studia Canonica* 41 (2007): 447.

21. Klaus Lüdicke, "A Theory of *Bonum Coniugum*," *The Jurist* 69 (2009): 713.

22. In 1941, the Italian jurist A.C. Jemolo presented the fictitious case of a man who marries a woman to carry out a vendetta. If the man intends to have children with his wife (*bonum proles*), to remain sexually faithful to her (*bonum fidei*), and to live with her until death (*bonum sacramenti*), yet be cruel and unloving to her, is such a marriage valid? All of the Augustinian *bona* have been intended and included in marital consent, yet the thought that such a marriage could be considered valid flies in the face of common

equally essential to marriage to be included in marital consent.²³ For Wrenn, the exclusion of this fourth *bonum* from consent, the *bonum coniugum*, makes the marriage invalid. He develops his argument by identifying the content of the essence of the *bonum coniugum* as the *ius ad amorem*, the right to love.²⁴ Wrenn defines love as “an affective tendency toward another person which is dialogical in nature and which involves union with the other.”²⁵ Such a definition emphasizes passion, heart, emotion, and mutuality clearly associated with marriage. However, the assertion that one has a *right* to love seems antithetical to love understood as a *gift*. One must ask if love is essentially a gift or a right. Similarly, in reference to the other end of marriage, to claim that one has a *right* to children betrays the reality of the *gift* of children to parents. In addition, Burke takes issue with Wrenn’s explication of the *bonum coniugum*:

Reference could be made here to the thesis that sees a *ius ad amorem* at the heart of the *bonum coniugum*. This, it seems to me, tends to invert the matter: the point is not that the *bonum coniugum* gives a right to love, but rather that the duty to love tends to the *bonum coniugum*. The *bonum coniugum* does not consist in love, but (if my tentative line of reasoning is correct) in that maturing of the persons and characters of the spouses which comes from fidelity to the married commitment, from living marriage in accordance with its essential properties.²⁶

According to Burke, the Augustinian *bona* are properties of marriage inherent in its structure which demonstrate its goodness. On the other hand, the *bonum coniugum* “relates to the spouses, and expresses (just as does procreation) a purpose or an effect that

sense.

23. Lawrence G. Wrenn, "Refining the Essence of Marriage," *The Jurist* 46 (1986): 535.

24. *Ibid.*, 545.

25. *Ibid.*, 543.

26. Cormac Burke, "The *Bonum Coniugum* and the *Bonum Proles*: Ends or Properties of Marriage?" *The Jurist* 49 (1989): 708.

should (but may not) result from marriage; the good effect intended here is that of making the spouses into better persons.”²⁷ He continues, “It is by responding to the demands inherent in the fundamental properties of marriage (which they accepted in proffering matrimonial consent) that the spouses will achieve the goodness that God wishes for them and assigns as one of the ends of their married commitment.”²⁸ The juridical relevance of this distinction is that whereas the non-achievement of the actual ends of marriage does not affect validity, the intentional exclusion of any or all of the properties invalidates marriage. However, there is no need to designate the *bonum coniugum* as a fourth *bonum* in order to demonstrate why the Jemolo case could not possibly constitute a valid marriage. It is enough to term the *ordinatio ad bonum coniugum* as an essential element of marriage, along with the *ordinatio ad prolem*, neither of which can be excluded from consent without invalidating.²⁹

Geoffrey Robinson describes the interrelatedness of the two ends of marriage as “complementary parts of one and the same good.”³⁰ He emphasizes that marriage is necessary for the education and nurture of children and not simply their generation. Faithful and life-long marriage nurtures children, while at the same time maturing parents. Robinson clarifies how the two ends form a unity:

If the good of the spouses is destroyed, then the good of the children will be harmed, for then the children will often not be properly educated. On the other hand, in most circumstances, if children are excluded from a relationship which of its very nature tends towards children, then the good of the spouses will be

27. Burke, "Challenges to Matrimonial Jurisprudence Posed by the 1983 Code," 447.

28. Ibid.

29. Lüdicke, "A Theory of *Bonum Coniugum*," 714.

30. Geoffrey Robinson, "Unresolved Questions in the Theology of Marriage," *The Jurist* 43, no. 1 (1983): 85.

affected. The purpose of marriage is therefore one. It is the *bonum totius familiae*—the good of all members of the family. The good of each is dependent on the good of others. They cannot be separated and none of them can be made subordinate to the others. It was God himself who created this interdependent unity of the family.³¹

This is a prime example of how the ministry of canon law exists to protect and promote the harmonious balance between individual and communal goods. Marriage is governed by canon law, because in family relationships both kinds of goods are at stake.

5.1.4 Covenant and *Consortium totius vitae*

According to canon law, marriage has intrinsic ends, essential properties, and essential elements. The essential elements of marriage derive from the ends and sacramentality and cannot be excluded from consent without invalidating the marriage.

Canon 1101 reads,

§1. The internal consent of the mind is presumed to conform to the words and signs used in celebrating marriage.

§2. If, however, either or both of the parties by a positive act of the will exclude marriage itself, some essential element of marriage, or some essential property of marriage, the party contracts invalidly.

Simulation, addressed in c. 1101, as a *caput nullitatis* will be explained in depth later in this chapter. Presently, I call attention to the fact that the essential elements are nowhere explicitly listed in the Code but can only be extrapolated from various canons and ongoing jurisprudence.

In addition to outlining the ends of marriage, the juridical description of marriage in canon 1055 §1 provides a foundational standard by which to judge and compare particular, real marriages. This canon establishes *matrimonium in fieri* as a covenant which brings about *matrimonium in facto esse*, described juridically as partnership of the whole of life, *consortium totius vitae*. The theological implications of covenant and its

31. Robinson, "Unresolved Questions in the Theology of Marriage," 85-86.

relationship to contract have already been brought to light in Chapter Three. Beal comments that “covenant” and “contract” were intended by the drafters of the Code to be used interchangeably.³² The higher or more inclusive viewpoint of covenant is juridically significant as Örsy explains:

Covenant, however, was not used by the Council to exclude altogether contractual elements in the marital promises (the more can contain the less), but the Council wanted the strictly legal elements to be incorporated into a sacred context. Accordingly, contractual elements can be still recognized in the exchange of the promises, but that exchange can no longer, not even in canon law, be adequately defined as a contract.³³

The use of covenant expresses the deep connection between theology and canon law and how theological articulations of marriage should drive canonical thinking. Mendonça reiterates, “The term expresses the theological and juridical content of marriage in biblical language and provides a universal basis for doctrine and jurisprudence to focus their research and study on the personalistic, religious, and sociocultural aspects of marriage.”³⁴

Contained in c. 1055 §1 is another term central to understanding the essence of marriage, that is, *consortium totius vitae*. Mendonça explains that during deliberations on the *1980 Schema* of the Code, the *coetus* working on marriage legislation replaced the conciliar term, *communio*, with *consortium*. “Therefore, the Pontifical Commission for the Revision of the Code of Canon Law introduced it in the *1981 Relatio* in order to remove the ambiguity surrounding the expression *communio* and also to express the

32. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1241.

33. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 50.

34. Mendonça, “The Theological and Juridical Aspects of Marriage,” 284.

notion of marriage in a juridically more precise term because of its traditional roots.”³⁵

Örsy expounds upon the meaning of the term:

Consortium is virtually impossible to translate correctly; it has no equivalent in English. Literally, it means a close association of persons sharing the same fortune, fate, and destiny. It is less than *communio*, which is the closest of intimate relationships. Yet it is more than *societas*, which can be a loose partnership for business purposes. In choosing the word *consortium*, canon law tries to strike a middle course between the ideal of a perfect union of minds and hearts, and the unsatisfactory state of merely external association, so that the legitimate marital customs and traditions of various peoples could be accommodated.³⁶

Michael Lawler claims that the use of *consortium* applies better to the diverse cultural situations in which people marry throughout the world. “It is at this point that we might attain the virtual impossibility of translation claimed by Örsy, a virtual impossibility of finding, not a verbal translation, but a universal cultural one.”³⁷ As a legal term, *consortium* is not and should not be steadfastly defined. As Örsy notes, “Life can be taken out of a foundational concept by a precise definition. The ancient Romans were aware of this; they never defined the meaning of equity, natural justice, or of good faith—concepts which were both legal and inspirational. Thus they succeeded in keeping their laws flexible and human.”³⁸ Such a practice respects and honors the humanity of the ministry of canon law as it exists in a variety of cultural situations. Canon 27 states, “Custom is the best interpreter of laws.” This principle is rooted deep in canonical history and “is a particularly useful principle for interpreting a universal law in the diverse

35. Mendonça, "The Theological and Juridical Aspects of Marriage," 272.

36. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 51.

37. Michael G. Lawler, "Blessed Are Spouses Who Love, for Their Marriages Will Be Permanent: A Theology of the Bonds in Marriage," *The Jurist* 55 (1995): 223.

38. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 52.

particular churches.”³⁹ Accordingly, Lawler holds, “The precise meaning of consortium has always been and should continue to be interpreted not by the law, but by the customs of a particular culture.”⁴⁰ Mendonça arrives at a similar conclusion regarding the flexibility of the term. “Therefore, we must say that the concept of *consortium* remains open-ended so that doctrine and jurisprudence will have ample scope to gradually identify its constitutive elements.”⁴¹ Mendonça concludes that *consortium totius vitae* “is the juridical equivalent of marriage itself” and “represents the totality of rights and obligations of marriage.”⁴² The naming of these rights and obligations is not explicit in the Code, but like the essential elements, must be deduced from relevant canons and jurisprudence.

5.1.5 The Inseparability of the Contract and the Sacrament

Canon 1055 §2 pronounces, “**For this reason, a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament.**”

Although the canon seems straightforward in legislating the inseparability of the contract and sacrament, variation in jurisprudence and theological conclusions indicates that the matter is far from closed.⁴³ As the canon now stands, the contract cannot be separated from the sacrament between baptized persons. The theological reasoning often purported

39. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 92.

40. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (Collegeville, Minnesota: The Liturgical Press, 2002), 70.

41. Mendonça, "The Theological and Juridical Aspects of Marriage," 274.

42. *Ibid.*, 276.

43. Augustine Mendonça, "Exclusion of the Sacramentality of Marriage: Recent Trends in Rotal Jurisprudence," *Studia Canonica* 31 (1997): 5-48. For a brief history of sacramentality in both codes and related jurisprudence see Lawrence G. Wrenn, "Sacramentality and the Invalidity of Marriage," *The Jurist* 60 (2000): 205-32.

is that the baptized have entered a new ontological reality so that it is impossible for them to enter a valid marriage without the sacrament. Örsy identifies an example for which the inseparability doctrine does not apply. “The canon speaks of baptized persons; if, however, a baptized person marries legitimately another who is not baptized, the official position of the church is that the baptized one is bound by the contract but does not receive the sacrament. This is an officially acknowledged case of the separation of the contract and of the sacrament.”⁴⁴ In such a case, the baptized person is ontologically “in Christ,” yet able to marry validly outside of sacramental reality. Even if one were to bypass the theological inconsistency of such an example and hold firmly to the inseparability doctrine, dispute remains over whether sacramentality is an essential element of marriage, an essential property of marriage, or marriage itself.⁴⁵ For instance, Burke argues,

Sacramentality is not a sort of supernatural superstructure added to the natural reality of marriage. It is a mistake to regard it as an essential “property” or a constitutive “element” of Christian marriage. A property, such as indissolubility or unity, describes one *aspect* of the essence, whereas sacramentality transforms the *whole* essence of marriage. Sacramentality is not a matrimonial property or element, but coincides with marriage itself: *matrimonium ipsum*, as it exists for those whose souls bear the character of Baptism. It is simply marriage considered from the supernatural point of view.⁴⁶

For Burke, the sacrament is marriage itself for the baptized. However, he does not explain how a baptized person who is ontologically inserted into a new reality, that is,

44. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 57-58.

45. Mendonça, "Exclusion of the Sacramentality of Marriage: Recent Trends in Rotal Jurisprudence," 12-15.

46. Cormac Burke, "The Distinction Between 2° and 3° of Canon 1095," *The Jurist* 54 (1994): 4-5.

“definitively placed within the new and eternal covenant”⁴⁷ who marries an unbaptized person does not receive the sacrament. In addition, it is difficult to reconcile theologically the assertion that two baptized nonbelievers (those who are completely indifferent to faith or the sacrament) receive the sacrament, yet a baptized person fervent in faith who marries an unbaptized person is not able to receive the sacrament. From this example, c. 1055 §2 seems to imply an “automatic sacramentality” for the baptized irrespective of active faith. To counter this mechanistic view of sacramentality, recourse can be made to the distinction between valid reception and fruitful reception of the sacraments and the significance of intention. For validity one must intend what the church intends by that action. Susan Wood articulates,

Thus the religious marriage is valid when the prevailing will is to marry, and this will includes those characteristics of marriage intended by the Church: indissolubility, exclusivity, and openness to procreation. When a couple intend such a marriage, they intend to receive what the Church intends as the sacrament. Because the will of the couple is actively involved in this intention, the sacrament is not in any way “ceremonial” or “automatic.”⁴⁸

This intention contains an “inchoate and implicit faith.”⁴⁹ According to the scholastic distinction mentioned above between valid and fruitful reception, the valid reception of the sacrament depends upon intention. Wood expounds,

The reception of the sacramental character, the *res et sacramentum*, does not depend on the faith of the recipient. The *res et sacramentum* is the sign of the real existence of the sacrament, which has an objective reality and whose existence depends on an act of the Church and its ministers, not on the act of the one who receives it. Only a direct intention against the reception of a sacrament negates its

47. Burke, "The Distinction Between 2° and 3° of Canon 1095," 2.

48. Susan Wood, "The Marriage of Baptized Nonbelievers: Faith, Contract, and Sacrament," *Theological Studies* 48 (1987): 292.

49. *Ibid.*, 295.

reception. The absence of faith does not have a similar effect on the reception of a sacrament.⁵⁰

Wood explains that faith is not simply “an explicit and conscious act of faith,” but rather encompasses “the habit of faith” acquired “through the moral order and, most especially, through baptism.”⁵¹ The indelible character of baptism consists of “an ordination of the baptized to worship, the expression and public witness of faith.”⁵² One could argue that language involving sacraments being “received” assumes a dispensational account of the sacraments that is no longer suitable in a postmodern context.⁵³ This critique is primarily theological and will be explored further in the final chapter. The practical problem of sacramental marriage and baptized nonbelievers stems from theological ambiguity that needs further resolution. Simply proffering a juridical response to a theological problem is insufficient. Burke asserts, “Canonical ‘solutions’ that give rise to significant doctrinal difficulties are to be treated with great reserve and examined most thoroughly and prudently.”⁵⁴ According to Wood, the concern over automatic sacramentality could indicate deeper questions in sacramental theology:

These deeper roots may lie in the larger theological question of whether sacraments are fundamentally viewed as Christ’s free act on us and thus as primarily a theocentric activity even though they are only efficacious to the extent that they encounter the *opus operantis* of the believer, or whether the emphasis on subjective disposition reflects the anthropocentric turn in theology.⁵⁵

50. Wood, "The Marriage of Baptized Nonbelievers: Faith, Contract, and Sacrament," 294.

51. Ibid.

52. Ibid.

53. Lambert J. Leijssen, *With the Silent Glimmer of God's Spirit: A Postmodern Look at the Sacraments*, trans. Marie Baird (Mahwah, NJ: Paulist Press, 2006).

54. Burke, "The Distinction Between 2° and 3° of Canon 1095," 8.

55. Wood, "The Marriage of Baptized Nonbelievers: Faith, Contract, and Sacrament," 286.

Because theology informs and judges canon law, these theological questions need some resolution before canon law can effectively and accurately be applied to real marriages.

5.1.6 The Essential Properties of Marriage

According to **c. 1056**, “**The essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a special firmness by reason of the sacrament.**” This canon is effectively borrowed from the 1917 Code. As essential properties, unity and indissolubility are descriptive, necessary qualities of the essence of marriage. “*Essential properties* are qualities that flow from the very nature of marriage in itself, so that without them there can never be a real marriage. There is question here then, not of an ideal to be aimed at, nor even of a moral imperative, but of ontological fact.”⁵⁶ These properties are necessary for the intrinsic finality of marriage.⁵⁷ “The integrity of the ontological ends (procreation/education, and the good of the spouses) requires that marriage be one and indissoluble.”⁵⁸ Simply, a union of one man and one woman that lasts a lifetime is good for the growth and development of the spouses and the children that may come from their union. Although both codes listed only these

56. The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, "Title VII: Marriage," in *The Canon Law Letter & Spirit: A Practical Guide to the Code of Canon Law*, ed. Gerard Sheehy et al. (Collegeville, Minnesota: The Liturgical Press, 1995), 574.

57. In GS 50, the conciliar bishops clearly state, “Marriage and married love are by nature ordered to the procreation and education of children. Indeed children are the supreme gift of marriage and greatly contribute to the good of the parents themselves.” Clearly, the procreation and education of children is depicted here as an end of marriage and a gift, not a right. In addition, marriage and married love are not a means to an end, that is to say, they are not “instrumental realities,” but rather “developmental realities” that “move from an inchoate state, grow, flower in a completion internal to themselves.” Mackin, *What is Marriage? Marriage in the Catholic Church* (New York: Paulist Press, 1982), 269. Marriage is not a mere means to children, but rather a permanent, developmental relationship between a man and a woman that opens up the possibility for children and holiness.

58. Ignatius Gramunt, "The Essence of Marriage and the *Code of Canon Law*," *Studia Canonica* 25 (1991): 379.

properties as essential, Burke argues that the three Augustinian *bona* are all essential properties of marriage:

With regard to canon 1056, it should be observed that there is nothing in the Latin text to indicate that the enumeration of essential properties is meant to be exhaustive. Vernacular translations, however, do tend to give this impression. It might eventually prove opportune to rephrase the Latin so as to avoid any impression that the third Augustinian *bonum* is not to be ranked among the essential properties of matrimony. Thus legislation would be brought more in line with theological thinking. For its part, jurisprudence, which is already at home with the scheme of the triple *bona*, may well wish to tighten its understanding of the *bonum prolis*.⁵⁹

He clarifies that the confusion that occurs surrounding the term, *bonum prolis*, “is the fact that offspring can be considered not just as a matrimonial good or value, but also as an *end* of marriage.”⁶⁰ He continues, “Precision of terminology, in other words, asks that we distinguish ‘proles’ as finality from ‘proles’ as property; or, better still, that we distinguish procreation (end) from procreativity (property).”⁶¹ Although this distinction does clarify such an ambiguity in theology and canon law, one could ask why in neither code procreativity is specifically listed as one of the essential properties. In my estimation, it adds greater confusion to assert, as Burke does, that procreativity is an essential property of marriage and that the exclusion of offspring invalidates on the double ground of exclusion of an essential property and exclusion of an end.⁶² Perhaps procreativity is not specifically listed as one of the essential properties of marriage, because c. 1084 §3 states that “sterility neither prohibits nor nullifies marriage.” In a case where sterility is at least morally certain, if not medically certain, the marriage

59. Burke, “The *Bonum Coniugum* and the *Bonum Prolis*: Ends or Properties of Marriage?” 713.

60. *Ibid.*, 711.

61. *Ibid.*, 711-12.

62. *Ibid.*, 713.

continues to be possible and valid. In such a case, does it make sense to say the marriage is characterized essentially by procreativity? For procreativity to be an essential property means that without it there is no marriage.⁶³

The essential property of unity “means one partner and no more, either simultaneously or successively; hence polygamy, polyandry, remarriage after divorce while the first party is still alive, are all excluded.”⁶⁴ Unity does not exclude remarriage when the previous bond of marriage has been declared invalid or has been dissolved by legitimate means. Because marriage is a *consortium totius vitae* ordered to the *bonum coniugum* and *bonum prolis*, husband and wife must be one. “Without unity the total self-giving essential to marriage is impossible: a person with several spouses cannot give totally to any of them.”⁶⁵ This unity implies a fundamental equality necessary for the fulfillment of both ends.⁶⁶ As expressed in c. 1135, “Each spouse has an equal duty and right to those things which belong to the partnership of conjugal life.” Klaus Lüdicke explains, “A respect for this equality of spouses (in rights and obligations) is the necessary and sufficient condition for marriage to serve the good of the spouses.”⁶⁷ Ignatius Gramunt explains how polygamy and polyandry do not embody the essential property of unity, because in the former, equal partnership is denied the woman in raising

63. The argument that procreativity is intentionally absent from the list of essential properties opens up the question of homosexual marriage. While interesting and relevant, this question is beyond the scope of this study.

64. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 58.

65. The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, "Title VII: Marriage," 574.

66. *Gaudium et Spes*, no. 49.

67. Lüdicke, "A Theory of *Bonum Coniugum*," 724.

her children and in the latter the lawful paternity is denied the man.⁶⁸ In plural marriage, the equality implied in the concept of *consortium* is lacking, because there is not an equal sharing of lives and destinies among spouses.

As previously explained, indissolubility is an essential property of all marriages. Once entered validly, the marital relationship is perpetual, “which not only should not be terminated but cannot be terminated, even if the couple’s existential relationship is irretrievably broken.”⁶⁹ This means that regardless of the current relationship of the spouses (separated, divorced, and/or civilly remarried), the rights and obligations incumbent upon them remain. Therefore, consent makes marriage for the whole of life. That is why the juridical essence of marriage is the *consortium totius vitae*. Vincent Pereira explains how this *consortium*, characterized by unity and permanence, leads to the *bonum coniugum*, which is tied to commitment:

This *consortium* empowers the contractants to share their physical and spiritual entities while committing themselves to each other for the whole of life, seeking their own good and the good of the other spouse. The partnership fosters their process of maturation whereby the partners learn to negotiate and compromise as they carry out the essential marital obligations. As the partners negotiate and compromise, this relationship solidifies their conscious commitment.⁷⁰

It is this commitment that sustains the marriage and leads to the *bonum coniugum*. Thus, the marital commitment is necessary in fulfilling marriage’s salvific purpose, and, according to c. 1752, the salvation of souls is the supreme law of the church. Burke opines,

68. Gramunt, "The Essence of Marriage and the *Code of Canon Law*," 379.

69. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1249.

70. Vincent Pereira, "Christian Anthropology and the Adjudication of Marriage Nullity Cases in the Light of Canon 1095," *The Jurist* 66 (2006): 408-9.

As in all of God's doings, his purpose is to prepare (i.e., to *mature*) us for eternal life. What matures the spouses most in marriage is precisely their faithful mutual commitment, their loving each other in good times and in bad, their persevering dedication to their children; very often, it is the "bad" or harder times (serious illness, financial hardship, the drawn-out experience of mutual defects, the cares of family life, etc.) which *most* mature a person because they can indeed lead a person out of themselves and teach them to love. That, after all, is the ultimate purpose of everything God has created in regards to human beings: to lead us to heaven and prepare us for it. What is truly good here on earth is to learn to love. There are few better schools of love than marriage. Marriage is a particular call for two people to learn to love each other (with their defects), and to love the fruit of their mutual love and union, their children (also with their defects), and so to grow towards the infinitely perfect love of God.⁷¹

The mutual commitment of one man and one woman (unity) lived in faithful love for life (indissolubility) molds and perfects them for eternal life with God. According to c. 1056, the essential properties of unity and indissolubility "obtain a special firmness by reason of the sacrament." As Örsy notes, this qualification is difficult to explain "because neither unity nor indissolubility admits degrees."⁷² Presumably, this distinction is in place to account for the dissolution of marriages where neither or only one party is baptized.⁷³

5.2 Marital Consent in the Code

5.2.1 Consent Makes Marriage

Canon 1057 §1—The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent.

This canon is the juridical expression of the resolution of the medieval debate surrounding the efficient cause of marriage. The decretals of the twelfth century,

71. Burke, "Challenges to Matrimonial Jurisprudence Posed by the 1983 Code," 449.

72. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 59.

73. See cc. 1142-1150.

beginning with that of Pope Alexander III, affirmed that consent *de praesenti* creates marriage. Although marriage usually involves parents, family, church, and state, the consent of the parties alone makes marriage. Accordingly, should there be some defect of consent, the marriage would be invalid. In addition, this consent must be “legitimately manifested.” Marriage is a social institution with many stakeholders; therefore, the manifestation of consent must be public. Should there be some defect of canonical form, the marriage would be invalid for Catholics.⁷⁴ Finally, the persons must be “qualified by law,” that is, legally capable of marriage. Canons 1073, 1083-1094 identify the impediments to marriage “which disqualify persons either from any marriage (e.g., the impediment arising from sacred orders) or from particular marriages (e.g., the impediment of consanguinity).”⁷⁵ Should there be a diriment impediment that applies to either party, the marriage would be invalid. From c. 1057 §1 the three ways in which a marriage may be declared invalid can be deduced: defect of consent, lack of canonical form, and existence of a diriment impediment.⁷⁶

Canon 1057 §2—Matrimonial consent is an act of the will by which a man and a woman mutually give and accept each other through an irrevocable covenant in order to establish marriage.

In this canon, consent is identified as an act of the will. Although here the legislator purports to make a universal statement about what makes marriage, such a

74. Eastern Catholics and Eastern non-Catholics are bound to observe their church’s sacred rite, and Protestants and unbaptized persons are bound to follow the civilly prescribed form. Although these forms differ, they are public ceremonies because consent must be manifested externally. See John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000), 1250.

75. *Ibid.*

76. The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, “Title VII: Marriage,” 575.

statement presupposes a philosophical system that is specific to a certain period of time. The view that consent makes marriage derives from ancient Roman law; however, the statement that consent is an “act of the will” would be foreign to the Roman understanding of marriage where the existence of a marriage was identified by visible displays of the spouses’ desire to be married (*maritalis affectio*) not an abstract juridical or metaphysical formulation. This phrase, an “act of the will,” is evidence of “the code’s reliance on the rational psychology originated by Aristotle, Christianized by the Scholastic theologians, especially Thomas Aquinas, in the Middle Ages, and enshrined as the privileged vehicle for communicating Catholic doctrine as least since the neo-Scholastic revival of the nineteenth century.”⁷⁷ The designation of consent as an act of the will can lead to the misunderstanding that mind, will, and emotion are separable (versus simply distinct) and that they operate independently of one another.

In his 1999 Address to the Roman Rota, John Paul II explicitly links consent and commitment, and when this text is read in light of Lonergan’s intentionality analysis previously discussed, we can come to understand the relation of consent to commitment and the inadequacy of the Code’s “definition” of consent. John Paul II’s text is a linchpin in this study as it unambiguously links consent, commitment, and conjugal love:

Here we sometimes encounter the misunderstanding in which marriage is identified or at least confused with the formal, outward rite that accompanies it. Certainly, the juridical form of marriage represents a civilized advance, since it confers both importance and efficacy on marriage in the eyes of society, which consequently undertakes to safeguard it. But you jurists cannot overlook the principle that marriage consists essentially, necessarily and solely in the mutual consent expressed by those to be married. This consent is nothing other than the conscious, responsible assumption of a commitment through a juridical act by which, in reciprocal self-giving, the spouses promise total and definitive love to each other. They are free to celebrate marriage, after having chosen each other

77. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1251.

with equal freedom, but as soon as they perform this act they establish a personal state in which love becomes something that is owed, entailing effects of a juridical nature as well.⁷⁸

Örsy describes consent as “a deep seated act in the spirit of a human person.”⁷⁹ A commitment is made and accepted through consent in the mysterious depth of the human spirit. Commitment is a fundamental choice effecting action on the fourth level of conscious and intentional operations. As a decision, commitment is an act of rational self-consciousness. “Man is not only a knower but also a doer; the same intelligent and rational consciousness grounds the doing as well as the knowing; and from that identity of consciousness there springs inevitably an exigence for self-consistency in knowing and doing.”⁸⁰ Lonergan describes decision as an act of willing,⁸¹ but his positive account of freedom emphasizes the intimate connection between knowing and willing. There is an interrelation between the cognitional and volitional operations of the human spirit but not a relation of necessity. In a marital commitment, something new is created out of the complex relationship between knowing and doing. Spouses consent to a present and future way of life, course of action, pattern of behavior, form of relating that could be otherwise. Consent is internal, rational, conscious, creative, and intentional. John Paul II’s reference to consent as “the conscious, responsible assumption of a commitment” demonstrates that consent is an act of rational self-consciousness effecting action on the

78. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. January 21, 1999, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/john_paul_ii/speeches/1999/documents/hf_jp-ii_spe_19990121_rota-romana_en.html (accessed November 12, 2008).

79. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 61.

80. Bernard Lonergan, *Insight: A Study of Human Understanding*, 5th ed., ed. Frederick E. Crowe and Robert M. Doran, vol. 3 of *Collected Works of Bernard Lonergan* (Toronto, Canada: University of Toronto Press, 1992), 622.

81. *Ibid.*, 636.

fourth level of conscious and intentional operations. Mendonça reiterates precisely this point. “Marital consent is truly human, when, by means of the conjugal pact, the life of those marrying is decided and profoundly changed. Such an act flows from the synergy of intellect and will, that is, through the psychological mechanisms involved in forming a truly human act.”⁸² Consent is a juridical act, but it cannot be reduced to its outward expression. The internal and intentional act with psychological, moral, social, and juridical effects is presumed to be in accord with the external act (c. 1101 §1). Jurists need to be cognizant of and considerate of the intricate nuances of this psychological process of consenting in order that just sentences are delivered.

Many, if not most, challenges encountered in marriage nullity cases based upon defects of consent can be traced to two primary sources of confusion. Both have been alluded to already. The first difficulty is the fact that a specific philosophical theory is implicit in the canons on matrimonial consent. Örsy asserts,

The fact stands that a philosophical theory has become the touchstone for the validity and invalidity of the sacrament, and it was used to determine the fortune or misfortune of many human persons. This is all the more surprising because the Church in its official acts always refused to “canonize” a philosophy, that is to raise it to the level where it became an integral part of Christian doctrine. Yet when the very existence of Christian marriages is judged by a philosophical theory, and the faithful are compelled to abide by such judgment, the theory is given in effect the importance of an article of faith.⁸³

In the translation of philosophical theory to canon law, a great deal of the nuance and intricacy of Aristotle and Aquinas have been lost, particularly in this canon which describes consent as an act of the will. Örsy describes this translation as a “crude

82. Augustine Mendonça, "Recent Developments in Rotal Jurisprudence on Exclusion of the *Bonum Coniugum*," *The Jurist* 62 (2002): 384.

83. Ladislav Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," *The Jurist* 43, no. 1 (1983): 37.

reconstruction of a subtle theory.”⁸⁴ He continues, “The fundamental problem with it is that it misrepresents the human spirit. Its natural unity becomes fragmented. The faculties, the mind and the will, are presented as more or less autonomous agents acting independently from each other.”⁸⁵ For Örsy, the definition of consent as an act of the will is insufficient. His understanding of consent, decision, and commitment is more in line with Lonergan, and he describes the mind/will dichotomy as an “intellectual straight-jacket.”⁸⁶ He notes that canons that are truly new to the 1983 Code, such as c. 1095 and c. 1098, bring mind and will closer together in canon law, yet the problem remains:

There is movement in the right direction, but it will have to go further. The real solution would be to free the law from an abstract metaphysical hypothesis and accept the common sense truth substantiated by voluminous research in psychology: a human person is a whole, his operations in understanding, judging, and deciding form an integral process where the parts have no autonomous life.⁸⁷

As the law stands, it is difficult for just sentences to be given in marriage nullity cases when a philosophical system is crudely simplified yet universally enshrined.

The second source of confusion stems from the complex relation between the world of spirit and the world of law. As discussed in Chapter Two, the two worlds are distinct yet integrated. Canon law is a necessary human instrument, a concrete system of structures and norms, which exists to secure freedom for the Spirit to operate in the church. It is this delicate and complex relationship between the two worlds in marital consent that is the focus of this study. Örsy clarifies this difficulty encountered by judges, advocates, defenders of the bond, and spouses:

84. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 37.

85. *Ibid.*

86. *Ibid.*

87. *Ibid.*, 38.

But it is not so easy for the law to handle consent. The world in which consent is given or withheld is distinct and separate from the world where laws are made about it. Consent operates or fails to operate in the internal world of the human spirit; legal norms regulate external social relationships in a visible community. The legislator can do no more than catch some glimpse of the mysterious world of the human spirit and set up some sensible norms which help to conjecture the presence or absence of consent. It follows that to handle the issue of consent intelligently, the understanding of two distinct worlds is required: that of the human spirit and that of the law.⁸⁸

Necessarily, the law is “an imperfect instrument” in dealing with consent, because the law can only be applied to the external evidence of consent or lack thereof.⁸⁹ Consent, which operates in the world of the spirit and the world of law, is “internal and ontological” as well as “external and legal.”⁹⁰ Örsy continues,

The legal system can handle only facts which are ascertainable in the empirical world. The only way the law can reach the world of the human spirit is through presumptions, using the external signs to come to conclusions about the internal reality. If we wanted to use really precise language, we should never say “there was consent” or “there was no consent”; only “there is evidence of consent” or “there is no evidence of consent.” Indeed, the time-honored language of tribunals is a similar one: they never say “there is a valid marriage” or “there is no valid marriage”; they state only that “there is evidence for nullity” or “there is no evidence for nullity”: *constat* or *non constat de nullitate*.⁹¹

Marriage nullity cases dealing with defect of consent have to contend with the challenge of trying to fit complex psychological processes into overly simplistic, narrow philosophical categories along with the challenge of defining what kind of external evidence to accept in proving the invalidity of marriage in a particular case.

88. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 62.

89. *Ibid.*

90. *Ibid.*, 63.

91. *Ibid.*, 66.

5.2.2 The Object of Consent

Canon 1057 §2 establishes that the essence of the covenant of marriage is the exchange of consent. The mutual consent of the man and the woman is the true efficient cause of marriage. Through consent, the man and woman give and accept each other to form a marriage. This canon identifies the object of consent as the mutual giving and accepting of persons. This is the *sese mutuo tradunt atque accipiunt*, borrowed from *Gaudium et spes* 48. Marriage is rooted in the conjugal covenant of mutual consent, “the human act by which partners mutually surrender themselves to each other.”⁹² Burke argues that Flannery’s translation of the conciliar text lessens the force of the original Latin in which “the perfection and totality of the conjugal commitment” is demonstrated through the notion of “the mutuality of acceptance.”⁹³ Translating the phrase as “mutually surrender themselves” omits the idea of *accepting* the other as juridically essential. As we have seen, commitment involves sending one’s word unto another and that person’s receiving of that promise. The human act of consenting is described as a covenant with all the biblical and theological connotations previously mentioned. In the 1917 Code, the *ius in corpus* was specified as the object of consent, whereas in the present Code the object of marital consent is not so clear. Although glaringly physicalist in reducing marriage to a sexual relationship for the primary purpose of procreation, the formulation of the object of consent in the old Code was juridically precise lending itself to clearly defined rights and duties. Because canon law must deal with the external and that which can be proven, the *ius in corpus* as the object of consent certainly had its

92. *Gaudium et Spes*, no. 48.

93. Cormac Burke, “The Object of the Marital Self-Gift as Presented in Canon 1057, §2,” *Studia Canonica* 31 (1997): 408.

advantages but at the expense of being reductionist and objectifying. The giving over of a right in the 1917 Code has been replaced with the giving over of persons in the current Code.

Analysis of the object of marital consent deserves further attention because it is critical in the relationship between a theological understanding of marital commitment and a juridical articulation of marital consent. Burke states precisely this point:

Canon 1057 §2, which expresses the object of marital consent, is the main reference point for the juridical analysis of what is essentially involved in marital commitment. It therefore calls for a thorough analysis; all the more so inasmuch as its formulation, strongly marked by conciliar personalism, seems to offer one of the most striking changes which the 1983 Code introduced within the whole field of matrimonial law.⁹⁴

Burke articulates this change in formulation. “The ‘*traditio iuris*,’ the granting of a right ‘over the body’ (the *ius in corpus*) of the 1917 Code has given way, so it seems, to a *traditio suiipsius*: the mutual ‘gift of self.’”⁹⁵ Although the present Code’s formulation of the object of consent corresponds better theologically with marriage as covenant, a great deal of ambiguity exists over its precise juridical meaning. Burke notes how in jurisprudence the change has been ignored by some and discarded as “juridically meaningless” by others.⁹⁶ Gramunt distinguishes between the material object (the giving and accepting of each other) and the formal object (in order to form marriage).⁹⁷ However, as Burke notes, locating the object of consent in the “*finality* of this self-

94. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 403.

95. *Ibid.*, 404.

96. *Ibid.*, 405-6.

97. Gramunt, "The Essence of Marriage and the *Code of Canon Law*," 372.

giving” is rather tautological and fails to advance juridical thinking.⁹⁸ Following the advances in theological thinking regarding the *bonum coniugum* and the emphasis on marriage as a covenant relationship, it must be admitted that something more is meant by the object of consent than simply the *ius in corpus* or the establishment of marriage itself. Nevertheless, the mutual giving and accepting of persons cannot imply the donation of self in a way that destroys the personality or robs spouses of human dignity and freedom. To identify the object of consent as the spouses themselves may be an accurate theological statement, but as Burke questions, “Is a total gift of self a workable legal notion?”⁹⁹

Because a literal gift of self is impossible and theologically contrary to personalism, Burke argues that the *traditio suiipsius* implies “an element of metaphor.”¹⁰⁰ Juridically, what is given and accepted in marital consent is a right. “A true gift, after all, implies the transfer from the giver to the receiver of *ownership*—the *dominium*—of what is given. But it is obvious that each spouse does not transfer ownership of his or her *person* to the other.”¹⁰¹ In marital consent, what is given and received is a right “over something so proper to the person, so ‘representative’ of him or her, that its *traditio/acceptatio* constitutes the *conjugal gift of self*, measurable in juridical parameters.”¹⁰² For Burke, this most unique and personal right that is exchanged in

98. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 407.

99. *Ibid.*, 409.

100. *Ibid.*, 410.

101. *Ibid.*, 411.

102. *Ibid.*

marital consent is the right over one's procreativity. What is shared permanently and exclusively is one's procreative power.¹⁰³ He summarizes his position as such:

We could synthesize these considerations by saying: the distinctive self-gift which is the object of matrimonial consent, consists in the gift of conjugal sexuality; and this gift; a) in order to be sexual—i.e., in order to actualize shared and complementary sexuality—must be open to life; and, b) in order to be conjugal, must be exclusive and permanent. So, the marital self-gift—the *traditio coniugalis*—is the donation of one's sexuality, in its concretely procreative aspect, made in a permanent and exclusive way.¹⁰⁴

He designates the object of consent as such, because a “gift implies a definitive and permanent donation of something, with a concession of proprietary rights.”¹⁰⁵ This gift is a conjugal gift, meaning it is sexual, exclusive, permanent, and open to procreation. In Burke's reasoning, the object of consent involves procreativity as a constitutive element, because in true conjugal intercourse something real has been shared with the other spouse, that is, the male and female “generative element.”¹⁰⁶ Thus, according to Burke, the object of marital consent is specified by the three Augustinian *bona*, which he considers essential properties of marriage. “Procreativity, exclusivity, permanence—the Augustinian *bona*—define the essence of the conjugal commitment.”¹⁰⁷ Consequently, the Augustinian *bona* constitute the essential aspects of the marital self-gift.

One of the central problems with Burke's position is that his explanation of the object of consent is simply the *ius in corpus* of the 1917 Code transformed into personalist terms without any expansion in meaning. Although he does not explicitly

103. Cormac Burke, "Procreativity and the Conjugal Self-Gift," *Studia Canonica* 24 (1990): 48.

104. Cormac Burke, "The Essential Obligations of Matrimony," *Studia Canonica* 26 (1992): 384.

105. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 411.

106. *Ibid.*, 414.

107. Burke, "The Essential Obligations of Matrimony," 385.

equate the objects of consent¹⁰⁸ in the two codes, he clearly demonstrates their continuity by translating the *ius in corpus* into personalist language:

So strikingly different are the 1917 and the 1983 formulations that it seems hard to discover any relationship, any logical connection, or any evident point of development between the two. Science however seldom proceeds by total ruptures with the past. True progress—in canonical science no less than in other fields—usually shows many points of continuity with what has gone before; a point that could helpfully be borne in mind as we pursue the scope of our study.¹⁰⁹

Burke endeavors to explain how a personalist understanding of marriage evident in the pre-conciliar and conciliar documents is in continuity with an institutional conception of marriage manifest in the previous Code. Some see the two views of marriage represented in the two ends of marriage:

For a large part of this century, theologians, canonists and anthropologists have been engaged in a vigorous debate about the ends of marriage, and at times about its very nature. On the one hand was the traditional (often termed the “procreative” or “institutional”) understanding, which presented the ends of matrimony in a clear hierarchical manner: a “primary” end (procreation) and two “secondary” ends (mutual help and the remedy for concupiscence). On the other hand, there had emerged a new view which, without necessarily denying the importance of procreation, wished at least equal standing to be given to other personalist values linking husband and wife: mutual love, the conjugal union in its spiritual and not just physical aspect, etc.¹¹⁰

In his reasoning, the two ends identified in c. 1055 §1, procreative and personalist, are both institutional ends. Burke sees in Genesis 1 the procreative end instituted. This text

108. Burke practically equates the two objects in one article. “In order to be marital, the relationship must be sexual: specifically, it must involve the exchange of rights regarding the use of the complementary sexual potential which characterizes masculinity and femininity. This is what was involved in the older formula of the *ius in corpus*, the ‘right over the body, for acts which are of themselves suitable for the generation of children,’ considered as the essential object of matrimonial consent.” See Cormac Burke, “Personalism and the *bona* of Marriage,” *Studia Canonica* 27 (1993): 407.

109. Burke, “The Object of the Marital Self-Gift as Presented in Canon 1057, §2,” 404.

110. Cormac Burke, “Marriage: A Personalist or an Institutional Understanding,” *Communio: International Catholic Review* 19 (1992): 278-304, <http://www.cormacburke.or.ke/node/352> (accessed April 21, 2014).

emphasizes “man’s relative perfection” in the complementarity of the sexes ordained “to carry on the work of creation by procreation.”¹¹¹ In Genesis 2, the personalist end is highlighted by demonstrating how both sexes need one another in order that their union lead to the *bonum coniugum*. Burke correctly acknowledges that these ends are interrelated and should not conflict. He states, “The gift of procreativity has, in particular, a unique capacity to express the gift of self and the desire for union with one’s spouse. Here we can see how a personalist and procreative view of marriage are not in opposition, but are rather inseparably linked within a truly human understanding of conjugality.”¹¹² The difficulty in Burke’s articulation of the object of consent comes to light in many of his studies. Although I strongly agree with many of his points (particularly those affirming the relationship between commitment and the conjugal good¹¹³), his studies often reduce to moral arguments against contraception.¹¹⁴

A delicate balance needs to exist between the moral order and the juridical order. Moral questions and juridical questions are related, but they are not identical. His juridical explanation of the object of consent turns into a moral prohibition of contraception. Juridical questions regarding consent concern *matrimonium in fieri*,

111. Burke, "Marriage: A Personalist or an Institutional Understanding," 5.

112. Burke, "Procreativity and the Conjugal Self-Gift," 48.

113. See Cormac Burke, "Married Personalism and the *Good of the Spouses*," *Angelicum* 75 (1998): 255-69, <http://www.cormacburke.or.ke/node/365> (accessed October 1, 2012).

114. See Cormac Burke, "The Content of the *Bonum Fidei*," *The Jurist* 51 (1991): 138-54. Burke, "Personalism and the *bona* of Marriage." Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2."

whereas moral questions regarding contraception concern *matrimonium in facto esse*.¹¹⁵

John Coughlin explains the difference between canon law and moral norms:

Whether the origin of the law is an Ecumenical Council, the pope, the diocesan bishop, or the chapter of a religious community, the law differs from other moral norms in the church on the ground that this particular norm has been officially promulgated as law. The subject of canon law is disposed to obey the law in no small part because the law originates in some person or persons who are vested with the sacred power of governance. . . .

. . . As with any dogma or moral norm of the church, the believer's adherence to canon law is in no small part attributable to the consequences for eternal salvation. However, canon law is distinguishable from other norms on the ground that it constitutes the rule of law. Canon law is not a mere copy of divine and natural law. Canon law has its own positive character that is designed to advance its natural and supernatural goals. In choosing to be obedient to the law, the subject of canon law may perceive the inner meaning of canon law's purpose in advancing some goal. Not only may the subject have insight about the purpose of an individual canon, but the subject may have insight about the function of canon law as the rule of law in the life of the church. The subject who obeys canon law appreciates that life in the church would suffer absent canon law's function as the rule of law. The subject understands that canon law is essential to the church's natural peace, justice, fairness, and order. The subject regards canon law as an indispensable aid to the facilitation of grace in the life of the church. The function of canon law as the rule of law means that canon law cannot be reduced merely to theology.¹¹⁶

The prohibition of contraception is a teaching of the church, whether reformable or irreformable is under theological debate; it has not been promulgated as canon law.

115. Of course, I am not referring to the intention to allow *only* contraceptive intercourse in a marriage. Such an intention is an exclusion of the *bonum prolis*, which concerns *matrimonium in fieri* in the giving and receiving of consent. Burke's analysis seems to focus narrowly on the *bonum prolis* as constitutive of the marital self-gift, although he states that all the Augustinian *bona* "make up the three traditional features that must be accepted by whoever wishes to marry, if his or her consent is to be adequate to constitute a true and valid matrimonial consent." However earlier in the same text, he states, "In more traditional terms, conjugal self-donation is essentially characterized by the property of the *bonum prolis*." See Cormac Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," *Studia Canonica* 31 (1997): 417. Burke's overemphasis on the *bonum prolis* as essential to the object of consent, leads him to hold a minority opinion regarding exclusion of the *bonum fidei*, an opinion that relies on too great a separation between the moral order and the juridical order. This debate will be addressed in greater detail later in this chapter.

116. John J. Coughlin, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law* (New York, NY: Oxford University Press, 2012), 247-48.

Burke takes a controverted theological issue and attempts to give it the force of law, thus leading to greater confusion.

The question of consummation is relevant here, because the specification of what consummates marriage is dependent upon a clear understanding of the object of consent. To what do spouses consent exactly? The answer to that question will specify what completes or concludes consent. Burke's position regarding the conjugal self-gift and contraception reveals unsettled theological questions which cause even greater confusion in the juridical order. Canon law requires a "hermeneutics for restriction" through which commentary on a particular legal text focuses on the intended action with "classical brevity and clarity."¹¹⁷ There is no brevity or clarity regarding consummation. Burke argues that contraceptive intercourse cannot realize the conjugal self-gift "since one or both spouses in fact rejects any true sharing of conjugal sexuality."¹¹⁸ Burke fails to explain how spouses who limit sexual intercourse to the infertile periods for the purpose of avoiding pregnancy are making a total conjugal self-gift, whereas those who use contraception to avoid pregnancy reject "the other precisely in his or her personal and conjugal sexuality."¹¹⁹ According to Burke, contraceptive intercourse cannot be truly conjugal, because "there is an aspect to the other's proper conjugal self-gift—his or her procreativity—which each does not want to accept."¹²⁰ Again, he does not explain how sexual intercourse engaged in *precisely when spouses know it cannot be procreative*

117. Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, Minnesota: The Liturgical Press, 1992), 167n.

118. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 416.

119. *Ibid.*

120. Burke, "Personalism and the *bona* of Marriage," 410.

signifies and effects conjugal union, whereas contraceptive intercourse (also purposefully non-procreative) “frustrates the marital union.”¹²¹ His argument seems based purely on the physical structure of the act. Clearly, these are unsettled questions for moral theology. The consequence of blurring juridical and moral questions is found in his conclusion that contraceptive intercourse cannot consummate a marriage. “It is precisely because it is not a conjugal act that a contraceptive copula is not capable of consummating matrimony.”¹²² Theologically and juridically, this position is not settled. Prior to the 1983 Code, the position traditionally held was that consummation did not occur through *coitus interruptus* or intercourse using a condom, due to failure to ejaculate semen into the vagina, yet other types of contraception which did not prevent ejaculation of semen into the vagina did consummate marriage. Beal argues that “the revised code has defined the conjugal act by which marriage is consummated as one ‘which is suitable in itself for the procreation of offspring.’”¹²³ Thus, c. 1061 seems to imply that a conjugal act performed using any kind of contraception does not consummate the marriage. Beal continues, “Thus, despite the protestation of the code commission to the contrary, the revised code seems to have introduced a radical revision of the traditional understanding of the consummation of marriage.”¹²⁴ He considers this revision “unintended” and “canon 1061 §1 should be emended so that the mind of the legislator is

121. Burke, "Personalism and the *bona* of Marriage," 410.

122. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 416.

123. Regarding c. 1061 see Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1258.

124. *Ibid.*

expressed clearly in language consonant with the canonical tradition.”¹²⁵ Additionally, the commentary from the Canon Law Society of Great Britain and Ireland expresses the lack of clarity regarding consummation and conjugality:

The Revision Commission expressed the view that if the contraceptive means employed affect the act of intercourse itself, e.g. “coitus interruptus,” the marriage would not be consummated, whereas it would be if the means did not affect the act. This leaves unresolved the question as to whether or not a marriage is consummated if e.g. a condom or a vaginal sheath is used: is this a “human manner” of the exercise of the procreative act ordained by God in the context of marriage?: it is the view of this commentary that it is not. This and allied matters are ones which have yet to be more extensively explored and clarified by jurisprudence and practice.¹²⁶

In the New Commentary on the Code of Canon Law by the CLSA, Lynda Robitaille, commenting on c. 1142 regarding the dissolution of ratified but non-consummated marriage, holds that sexual intercourse which prevents the ejaculation of semen into the vagina does not consummate marriage, including *coitus interruptus* and intercourse using a condom or vaginal sheath.¹²⁷ However, the 1977 decree of the Congregation for the Doctrine of the Faith does not require the ejaculation of semen for the completion of the conjugal act.¹²⁸ In such a case there is not a sharing of the procreative elements, yet the CDF has deemed such an act a true conjugal act in order that sterile persons are not considered impeded from marriage. The preceding analysis demonstrates that theological

125. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1258.

126. The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, "Title VII: Marriage," 577.

127. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1364.

128. Congregation for the Doctrine of the Faith, *Decree Regarding Cases in Which Impotence Renders Marriage Null*. May 13, 1977, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19770513_impotentia_en.html (accessed May 1, 2014).

questions regarding the object of consent and consummation need further study and investigation before juridical conclusions can be drawn.¹²⁹

Burke's near equation of the objects of consent from both codes fails to take account of the development that occurred in the twentieth century regarding the marital relationship. His position inflates the significance of procreative intercourse in the lives of married persons. He sermonizes, "A husband and wife never so fully become 'one flesh' as in the child born of their union; and if they are truly in love, they realize this."¹³⁰ Of course, such a statement may very well be experienced as true for spouses; nevertheless, this experience of conjugal sexuality is limited to a handful of sexual acts over a lifetime. What then is the theological and juridical significance of the vast majority of sexual acts spouses engage in knowing they will more than likely not be procreative? When the uniqueness of the marital relationship is reduced to sharing one's procreative power with one's spouse, then the "fullness" of the marital relationship is limited to the child-bearing years. Burke states, "The gift of procreativity has, in particular, a unique capacity to express the gift of self and the desire for union with one's spouse. It is in fact the first element that truly specifies and distinguishes the object of matrimonial consent."¹³¹ If the gift of procreativity is the distinguishing element of the object of consent, how does such a statement apply to sterile couples? He addresses this objection in another article by arguing, "Actual procreation, however, is not essential to marriage, and at times of course does not occur, as in the case of the marriage of sterile

129. Compounding the confusion is the question of a broader notion of consummation as discussed in Chapter Three. How does a finite dissection of marital sexual intercourse make sense in a personalist theology of marriage? It does not.

130. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 416-17.

131. Burke, "The Essential Obligations of Matrimony," 382.

persons. But even in these latter cases, marital intercourse still *signifies* the mutual self-giving of the spouses, for it ratifies their *intention* to bestow on each other the gift of conjugal procreativity.”¹³² Such a statement regarding signification is meaningless, because how can there be intention when there is impossibility? His redressing of the *ius in corpus* into the right to the other’s procreative power as a more personalist term is clear in this statement: “This brief examination of the *donative* sense of the conjugal act offers in effect a reinterpretation of the *bonum prolis*, in a personalist key. It shows how many insights, when adequately analyzed, do not break with tradition but rather link into it and enrich it.”¹³³ In seeking to find continuity (and, in my opinion, equivalence) between the objects of consent in both codes, he fails to explain how the change is “one of the most striking changes which the 1983 Code introduced within the whole field of matrimonial law.”¹³⁴

Clarification regarding the object of consent will bring with it clarification regarding the ensuing essential rights and obligations, because from a juridical point of view the explicit rights and duties deriving from consent will be dependent upon one’s understanding of the object. Although designating the object of consent as the spouses themselves is entirely accurate and theologically sound, such a statement is juridically insufficient and imprecise. Identifying the object of consent essentially defines and specifies the content of marriage. Gramunt declares, “To consent means to confirm a choice, and a choice is an elementary and most personal, nontransferable human act which, in the case of marriage, ‘no human power can replace’ except the spouses. What

132. Burke, "Procreativity and the Conjugal Self-Gift," 48.

133. Burke, "The Object of the Marital Self-Gift as Presented in Canon 1057, §2," 417.

134. *Ibid.*, 403.

defines a particular choice, however, and makes it different from any other choice is *the object* that is chosen.”¹³⁵ To designate the object of consent as the “right over one’s procreativity” as Burke does,¹³⁶ freezes the juridical articulation of marriage to the time of the 1917 Code, despite the development of the theological understanding of marriage over a century. The charge of physicalism is appropriate; the debate concerning the *bonum fidei* demonstrates the implications of such a theory.

Prior to a “watershed decision” of Msgr. Arturo De Jorio in 1963, the *bonum fidei* was identified juridically with the property of unity.¹³⁷ This meant that the exclusion of the *bonum fidei* could only occur by reserving to oneself the right to have more than one spouse (polygamy) or by reserving to oneself “the right to have more than one person with whom the *ius in corpus* for acts suitable for the generation of children was exchanged.”¹³⁸ In such a view, the intention to abuse the right to fidelity did not invalidate consent, only the intention to hand over to a third party *conjugal* rights to acts per se apt for the generation of children. Jenkins describes the consequences of this view in jurisprudence:

A corollary of this traditional doctrine was that a person who frequented prostitutes before marriage and swore he would do so afterwards did not place his consent in danger. Nor did a person who intended to engage in homosexual acts. Neither obviously intended to hand over the right to the body for acts *per se* apt for the generation of children. Indeed, the rare instances in which an exclusion of the *bonum fidei* applied almost always involved a man retaining a lover before

135. Gramunt, "The Essence of Marriage and the *Code of Canon Law*," 372.

136. Burke, "Procreativity and the Conjugal Self-Gift," 48.

137. Ronny E. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum Fidei*," *CLSA Proceedings* 61 (1999): 182. De Jorio was Judge-Auditor of the Roman Rota, 1959-1982 and Dean of the Roman Rota, 1982-1985.

138. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum Fidei*," 180.

marriage, and continuing to live with her after consent as if with another wife, in *more uxorio*, as the phrase went.¹³⁹

In a 1978 article, Thomas Doyle summarizes the kinds of examples in Rotal jurisprudence in which the evidence of the case did not indicate to the tribunal that the right had been vitiated, including the will to commit adultery and the intention to continue a homosexual relationship.¹⁴⁰ Writing before the completion and promulgation of the revised Code, Doyle states, “The object of consent is the right to procreative acts, not the fulfillment of this right.”¹⁴¹ He continues, “In giving consent then, a person promises fidelity to a right but not to the exercise of that right. Therefore, one can assume the obligations of marital fidelity and at the same time not intend to fulfill the obligation assumed. If the reader finds this distinction difficult to grasp, he should be consoled in the knowledge that he is one among many.”¹⁴² In 1963, De Jorio challenged this theory by arguing that the property of unity is not identical to the *bonum fidei*, because fidelity can exist even in polygamous unions. Secondly, rarely does a person committing adultery explicitly intend to hand over conjugal rights to a third party. More likely, the adulterer intends to be free of conjugal obligations rather than taking on more. Thirdly, he argued that unity is a property of marriage that encompasses more than the conjugal act. The *bonum fidei* implies that spouses exchange the right to exclusive sexual relations.¹⁴³ This position gained widespread acceptance in Rotal jurisprudence with

139. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum Fidei*," 181-82.

140. Doyle, "A New Look at the '*Bonum Fidei*'," 16-17.

141. *Ibid.*, 14.

142. *Ibid.*, 15.

143. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum Fidei*," 182-

Cormac Burke criticizing this view.¹⁴⁴ Burke argues that De Jorio's thesis rests upon the object of consent of the 1917 Code rather than the 1983 Code in that the exclusiveness demanded refers not to the *ius in corpus* of the old Code but to the marriage bond (c. 1134). Burke claims,

The result is that the whole canonical basis to the De Jorio thesis would seem to have been undermined. The exclusiveness of the conjugal relationship, in its juridical relevance, is now clearly referred to the bond, not to the copula (the right/obligation of an exclusive copula retains of course all of its moral importance). It is the intention not just of having illicit relations, but of creating a pseudo-marital bond, with another, that is incompatible with the constitutional exclusiveness of a real conjugal bond, and so vitiates the unity of marriage.¹⁴⁵

He continues,

The De Jorio thesis tends to reduce the *bonum fidei* to its physical dimension of the right to exclusive intercourse, with scarcely any further qualification. In other words, it focuses attention on the exclusiveness of the physical act, and tends to abstract it from an overall consideration of "conjugalit." In this it is notably out of harmony with the new code, where a clear change of emphasis is evident: away from a juridic notion of marriage centered on the "right to the body" (*ius in corpus*) considered in its mere physical entity; and toward a deeper and more human understanding of what is involved in a true conjugal relationship and bond.¹⁴⁶

In reference to the *bonum fidei*, Burke accuses the "new" position of conflicting with the revised Code by focusing on the physical act and reverting to the old Code's definition of the object of consent. Ironically, this is precisely what Burke does in regard to the *bonum proli*s as discussed previously. Burke opines, "The identification of the *bonum fidei* with the moral concept of fidelity rather than with the juridic concept of unity, can lead to

83.

144. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum Fidei*," 185.

145. Burke, "The Content of the *Bonum Fidei*," 142.

146. *Ibid.*, 142-43.

elitist theories of what is necessary for valid marriage.”¹⁴⁷ Easily, Burke’s understanding of the marital self-gift can lead to elitist theories, particularly for sterile couples or couples practicing artificial contraception. Whereas in regard to the *bonum prolis* Burke tends to blur moral and juridic distinctions, here he tends to separate the moral and juridic orders to the impoverishment of both. Explicitly he does so by concluding, “*Prescinding from the moral question*, I maintain that there is no juridical incompatibility between the intention to take a husband or a wife, and the intention to continue seeking other sexual outlets [emphasis mine].”¹⁴⁸ Although he argues that he includes the new Code’s concept of conjugality in his thought while his opponents have not, in my estimation he has done the opposite. His understanding of the object of consent as the right to one’s procreative power shared exclusively for life with one’s spouse leads him to the following statement: “The retention of a ‘right’ to have contraceptive (or other unnatural) intercourse with a third party would not constitute an exclusion of the *bonum fidei*.”¹⁴⁹ Jenkins states that Rotal jurisprudence continues to separate unity and fidelity, where the *bonum fidei* is considered an essential element of marriage that cannot be excluded without invalidating consent.¹⁵⁰ The difficulty inherent in this debate is maintaining the delicate balance between the moral and juridic orders and the difficulty in articulating the object of consent in a way that is juridically precise and yet faithful to the tradition, to developments in the theology of marriage, and to the experience of married love.

147. Burke, "The Content of the *Bonum Fidei*," 145.

148. *Ibid.*, 148.

149. *Ibid.*, 151. His evidence in support of his position is a case dating from 1929 thus demonstrating his reduction of the object of consent to that of the 1917 Code.

150. Jenkins, "Faithful in All Things Conjugal: Recent Developments in the *Bonum Fidei*," 186.

5.3 The Juridical Effects of Marriage

5.3.1 The Bond of Marriage

Canon 1134—From a valid marriage there arises between the spouses a bond which by its nature is perpetual and exclusive. Moreover, a special sacrament strengthens and, as it were, consecrates the spouses in a Christian marriage for the duties and dignity of their state.

Canon 1134 refers to *matrimonium in fieri*, that is, the irrevocable conjugal covenant whereby spouses mutually give and accept each other in order to form an intimate partnership of life and love which is permanent.¹⁵¹ This canon is foundational in establishing the canonical effects of marriage, because it establishes that the principal effect of the valid exchange of consent is the bond. As with many of the foundational canons (such as c. 1055), its literary form is a philosophical and theological statement with legal implications.¹⁵² Örsy explains,

Marriage here means the act of the initial commitment, the exchange of promises, the very act of creating a lifelong right-and-duty situation, natural or sacramental. In classical canon law this act was described as “marriage coming into existence,” *matrimonium in fieri*, distinct from “marriage in existence,” *matrimonium in esse*. The distinction should not be pushed too far; the moment of birth cannot be separated from the life that follows it.¹⁵³

As described previously in Chapter Three, *matrimonium in fieri* and *in facto esse* exist simultaneously in their possibility. The lived reality of marriage grows out of the initial making of the marriage in the conjugal commitment. The original covenant establishes a lifelong covenant. In continuity with c. 1056, this canon describes the bond as perpetual and exclusive. The bond of marriage has the essential properties of unity and

151. *Gaudium et Spes*, no. 48.

152. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 201.

153. *Ibid.*, 202.

indissolubility. The conjugal bond was explicated theologically in Chapter Three, and it is this theology that informs this canon. Through the marital covenant, spouses have chosen definitively to be bound to one another giving their life “a new orientation.”¹⁵⁴ Gramunt describes the bond as a “*relation of unity*, that is to say, a relation which unites the persons by the common end or purpose.”¹⁵⁵ He continues,

The marriage bond is a moral entity formed by a mutual and permanent *commitment* to seek the common good proper to marriage. Insofar as this commitment sets the will to seek the good of another person, it is a *habit of love*, and insofar as it sets the will to seek the same good as due by virtue of the same commitment, it is a *habit of justice*. The capacity to love, which is a capacity to give the goods of one’s life to another person, finds its roots in the human person’s spiritual likeness of the Creator which, embodied in masculine and feminine person, is expressed through the human person’s bodily constitution.¹⁵⁶

Spouses are bound together of their own volition through consent for the *bonum coniugum* and the *bonum prolis*, and according to *Gaudium et spes* 48 for the *bonum societatis*, thus revealing the theology of *communio*. For these goods to be realized, the bond needs to be perpetual. In Chapter Four, I outlined the reasons for making a marital commitment: to strengthen one’s own inconsistent will, to reassure others of one’s intentions, and to express and make present the fullness of love as it continues to grow throughout a lifetime. For these reasons, the bond is perpetual and exclusive as well.

According to c. 1134 for Christians, “a special sacrament strengthens and, as it were, consecrates the spouses.” This special consecration is “for the duties and dignity of their state.” Lawler’s description of the “triple bond of love, of law, and of sacrament” is

154. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 203.

155. Gramunt, "The Essence of Marriage and the *Code of Canon Law*," 374.

156. *Ibid.*, 374-75.

illuminating here.¹⁵⁷ Each succeeding bond “enhances and strengthens” the previous bond.¹⁵⁸ “From Christian marriage, then, arises an interpersonal, a civil, and a religious relationship, bond, or obligation. None of this happens in any autonomous physical reality. It happens, really and ontologically, only in human reality, only in the interpersonal sphere of the human spirit.”¹⁵⁹ In sacramental marriage, the Holy Spirit effects and consecrates their union empowering them to experience the grace offered to live the marital commitment. Kasper opines that the sacramental bond is “an ontological expression of the lasting aspect of promise and grace contained in sacramental marriage. It points to the constant claim that the partners can make on each other and their openness to each other.”¹⁶⁰ The bond is considered ontological, because it changes spouses in their being by uniting them permanently in such a way through their own promises along with God’s promises to be faithful. Through consent, spouses are bound to one another in a way that creates certain rights and obligations. The indissolubility of the bond means that those rights and obligations are permanent regardless of the existential state of the relationship of husband and wife.¹⁶¹

157. Lawler, "Blessed Are Spouses Who Love, for Their Marriages Will Be Permanent: A Theology of the Bonds in Marriage," 229. Eccl 4:12 could be relevant here. “Where a lone man may be overcome, two together can resist. A three-ply cord is not easily broken.” Although usually interpreted to refer to the strength of husband and wife bound together with God, the image of a rope of three cords could be developed to explain the multi-faceted conjugal bond, because in the sacramental bond the strength comes from God who becomes a partner in the marriage.

158. Lawler, "Blessed Are Spouses Who Love, for Their Marriages Will Be Permanent: A Theology of the Bonds in Marriage," 240.

159. *Ibid.*, 227.

160. Walter Kasper, *Theology of Christian Marriage* (New York, NY: Crossroad, 1983), 50.

161. Canons 1141-1150 address circumstances in which the obligations of marriage may be dispensed due to dissolution of the bond. In addition, a declaration of nullity affirms publicly that marital obligations do not bind, because there is proof of invalidity of the bond.

5.3.2 Equal Duties and Rights in Marriage

Canon 1135—Each spouse has an equal duty and right to those things which belong to the partnership of conjugal life.

From this bond, through which spouses are permanently bound to one another, there arise particular rights and obligations that pertain to married life. Despite cultural differences in the specific ways in which families live, c. 1135 affirms the basic and inherent equality of husband and wife. In *Familiaris consortio*, John Paul II avows, “Above all it is important to underline the equal dignity and responsibility of women with men.”¹⁶² Although men and women may have different roles that vary from culture to culture or even family to family, this canon establishes the basic equality of the spouses in the *consortium vitae*.

Knowledge of the essential rights and obligations of the *consortium vitae* presupposes an understanding of the object of marriage. The difficulty in clarifying the object of consent in a way that is canonically meaningful and functional has already been addressed. Mendonça explains, “In law the material objects of consent are the spouses themselves, who ‘mutually give and accept each other in order to establish marriage’ (c. 1057, §2). However, the formal object, that is, the juridic aspect under which the spouses mutually exchange each other, is the complex of essential rights and obligations of marriage.”¹⁶³ The essential rights and obligations of marriage derive from the essential elements (which are not explicitly listed in the Code), the essential properties of unity and indissolubility previously discussed, and sacramentality. Mendonça holds that the essential elements can be derived from c. 1055. Marriage is a *consortium*, an

162. John Paul II, *Familiaris Consortio*, no. 22.

163. Augustine Mendonça, “Consensual Incapacity for Marriage,” *The Jurist* 54 (1994): 507.

interpersonal relationship for the whole of life, ordered to the *bonum coniugum* and the *bonum prolis* and characterized by fidelity and indissolubility (and sacramentality for the baptized).¹⁶⁴ From these elements, jurists can infer essential rights and obligations.

Because the essential elements, and consequently essential rights and obligations, are nowhere specifically listed in the Code, Mendonça considers prior jurisprudence including that of Bishop Antoni Stankiewicz.¹⁶⁵ From Stankiewicz's description of the essential obligations of marriage, Mendonça concludes the following:

First, there is the "obligation" to conjugal love; second, the "obligation" to orient this "conjugal love" to the "procreation" and "education" of offspring; third, the "obligation" to share with the partner this "conjugal love" (a) "perpetually," (b) "exclusively," and (c) in a "human way"; fourth, the "obligation" to establish and preserve "conjugal communion," which "demands total fidelity and indissoluble unity."¹⁶⁶

Raymond Burke provides a similar explanation of the essential rights and obligations of marriage. He implies that the Augustinian *bona* are the focus of these rights and correlative obligations within a personalist perspective:

The essential rights and duties are described in canons 1055 §1; 1056; and 1057 §2, and can be summarized as the right to receive *and* the duty to give love which is exclusive or faithful, indissoluble or permanent, and procreative or life-giving. Any further specification must be related directly to the three essential rights and duties described above, for they identify the qualities proper to the love of marriage.¹⁶⁷

164. Mendonça, "Consensual Incapacity for Marriage," 511.

165. Judge-Auditor of the Roman Rota, 1978-2004 and Dean of the Roman Rota, 2004-2012.

166. Mendonça, "Consensual Incapacity for Marriage," 514.

167. Raymond L. Burke, "Canon 1095: Canonical Doctrine and Jurisprudence: Part I: Canon 1095, 1° and 2°," *CLSA Proceedings* 48 (1986): 100.

Ignatius Gramunt identifies the object of consent as “*the right over those acts that are necessary to attain the common good of marriage (ius in operations coniugales)*.”¹⁶⁸ In this way, the object of consent encompasses more than the *ius in corpus*; rather, it is a right to the acts that lead to both the *bonum coniugum* and the *bonum prolis*. From an analysis of Rotal jurisprudence regarding the *bonum coniugum*, William Varvaro concludes, “This jurisprudence shows that the partnership of the whole of life is ordained to the good of the spouses and so must be considered an *essential element* of marriage.”¹⁶⁹ In one of the few Rotal decisions directly related to the *bonum coniugum*, Msgr. Renzo Civili reasons that although the exact duties/rights related to the *bonum coniugum* have not been resolved, prior doctrine and jurisprudence indicate that the distinct, yet complementary personhood and the equal dignity of each spouse are inherent elements of the *bonum coniugum*.¹⁷⁰ This complementarity relates to “not only the generative fact but also the psychological difference in sex.”¹⁷¹ Yet, created in the image and likeness of God, man and woman are not the “completion of the other.”¹⁷² Consequently, there is no duty/right to complete the other or to rule over the other given that man and woman are equal in dignity and worth in their personhood. Civili’s judgment regarding a case of exclusion of the *bonum coniugum* demonstrates how care, respect, and equality are essential duties/rights of the *consortium vitae*:

168. Gramunt, "The Essence of Marriage and the *Code of Canon Law*," 382.

169. William A. Varvaro, "Some Recent Rotal Jurisprudence on *Bonum Coniugum*," *The Jurist* 67 (2007): 261.

170. Augustine Mendonça, trans., "Jurisprudence III: Exclusion of *Bonum Coniugum*: Decision *coram* Civili, 8 November 2000 (Slovakia)," *Studia Canonica* 39 (2005): 319. Civili was Judge-Auditor of the Roman Rota, 1988-2001.

171. *Ibid.*, 317.

172. *Ibid.*

A positive act of the will against the ordination of marriage toward the good of the spouses is verified when the will of those who marry is directed contrary to both the human and Christian commitment for continued growth in communion toward a more fruitful unity of bodies, hearts, minds and wills. This daily growth cannot occur unless one, by respecting the dignity of the other, gives him/herself to the other with total love that is unique and exclusive. Human dignity is based on fundamental rights. Therefore, one who intends by a positive act of the will not to recognize the fundamental rights of the other, excludes the good of the spouses.¹⁷³

The recognition in Rotal jurisprudence that the ordination of marriage to the conjugal good is an essential element with corresponding fundamental rights and obligations clarifies the possible ground of invalidity in the Jemolo case. In fact, this case *coram Civili* judged affirmatively on the ground of exclusion of the *bonum coniugum* was a case of domestic violence of the man (respondent) toward the woman (petitioner). Marriage is intrinsically directed toward a mutual, loving union so that the intention to grow and develop continually in fruitful communion must be included in consent.¹⁷⁴ To marry validly, spouses must order their wills to the ends of marriage and assume the obligations there implied. In agreement with the work of Archbishop Mario Francesco Pompedda, Lynda Robitaille identifies some of the specific rights and obligations directly related to the *bonum coniugum*.¹⁷⁵ “To summarize, some concrete aspects of the good of the spouses are: physical living together, the duty of assisting in the vital necessities of the other spouse, conjugal dignity of common life, participation of both in the matrimonial

173. Mendonça, "Jurisprudence III: Exclusion of *Bonum Coniugum*: Decision *coram Civili*, 8 November 2000 (Slovakia)," 319-20.

174. The question of whether love is relevant in the juridical realm will be explored in the final chapter.

175. Judge-Auditor of the Roman Rota, 1969-1993 and Dean of the Roman Rota, 1993-1999 (later Cardinal).

decision, it is *only* in marriage that this exists.”¹⁷⁶ Valid marital consent includes a commitment to the good of the other spouse, a commitment to the good of the couple, and a commitment to of the children that may come of the union.

5.3.3 Duties and Rights of Parents

Canon 1136—Parents have the most grave duty and the primary right to take care as best they can for the physical, social, cultural, moral, and religious education of their offspring.

This canon flows from c. 1055 §1 which states that marriage is ordered to the good of the spouses and the procreation *and education* of offspring. After reviewing the theological understanding of *educatio prolis* throughout the Christian tradition, Kenneth Schmidt summarizes this right and obligation that is an effect of marriage and a part of the *bonum prolis*:

Education strives for the full maturity of the offspring, including their physical growth, intellectual instruction, moral and religious formation, and social and civil development. The sacrament of marriage deepens and strengthens the parental obligation and reinforces the demand to provide—for the children’s spiritual and moral welfare—a specifically Christian upbringing.¹⁷⁷

The parental right and obligation to educate children is incorporated into the 1983 Code in c. 793 §1 and further specified in c. 795.¹⁷⁸ In c. 1136, these rights and obligations are considered some of the canonical effects of marriage. Because the ordination of marriage

176. Lynda A. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," *CLSA Proceedings* 68 (2006): 160.

177. Kenneth W. Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," *CLSA Proceedings* 59 (1997): 229.

178. "Parents and those who take their place are bound by the obligation and possess the right of educating their offspring. Catholic parents also have the duty and right of choosing those means and institutions through which they can provide more suitably for the Catholic education of their children, according to local circumstances." (c. 793 §1)

"Since true education must strive for complete formation of the human person that looks to his or her final end as well as to the common good of societies, children and youth are to be nurtured in such a way that they are able to develop their physical, moral, and intellectual talents harmoniously, acquire a more perfect sense of responsibility and right use of freedom, and are formed to participate actively in social life." (c. 795).

to the *bonum proles* (both procreative and educative aspects) is an essential element of marriage, certain rights and obligations are principally related to consent. Through an examination of Rotal jurisprudence, Schmidt admits there is considerable variation in the canonical understanding of the *educatio proles* and how exactly it relates to consent.¹⁷⁹ Schmidt contends that obligations related to the physical education of children have been upheld in Rotal jurisprudence as essential to marital consent such as the obligation to protect, feed, and care for children whether unborn or born.¹⁸⁰ In addition, he argues that the essence of a sacramental marriage must include assuming the obligation to provide a Christian education for children including baptism.¹⁸¹ Acknowledging that there are many issues related to the *educatio proles* that require greater study and elucidation, Schmidt lists several indicators of possible nullity relative to the *educatio proles* that should incite further investigation. Some of these that may be more common in contemporary American culture, yet difficult to pinpoint, include: “emotional distance, neglect, or abuse of a child”; “self-centeredness of a parent to the neglect or harm of a child”; “parents pass all responsibility for raising the child to others”; “parents leave all religious decisions for the child to make later”; and “neglect or refusal of parent to present a child for baptism, religious formation, or preparation for reception of sacraments.”¹⁸² By no means do these behaviors or attitudes automatically indicate proof of invalidity. Rather, their consideration here points to the fact that marriage is essentially *consortium totius vitae* for the good of the whole family.

179. Schmidt, "The 'Raising of Children' as an Essential Element of Marriage," 237.

180. *Ibid.*, 245-46.

181. *Ibid.*, 246.

182. *Ibid.*, 253-54.

5.4 Bilateral and Unilateral Dimensions of Consent as Complementary

5.4.1 What is the Bilateral Dimension of Consent?

As previously described, the Latin *consensus* implies with-ness, mutuality, and reciprocity. Garrett Roche traces the original meaning of the word in etymology and early Roman usage. He summarizes his position that the bilateral dimension of consent was dominant in common usage and Roman law:

While there is evidence that in early times “consent” was used to denote the agreement of different senses or faculties within the one person, there is no evidence that this usage was common or widespread. But there is ample evidence in early Roman usage, in Roman Law texts, and in the Vulgate translation, to show that “consent” originally primarily denoted harmonious agreement between two or more persons. It denoted a concurring of minds, a sympathetic feeling together with another person, agreement with the opinions or actions of another person, and at times denoted sinful collusion with another. If “consent” must be described in terms of the will, then, unilateral consent denoted at minimum “willing agreement with the acts or opinions of another,” and the full bilateral consent such as involved in contracts denoted a “union of wills.” Nuptial consent, being contractual by nature, is then properly described as being a union or a concurring of wills.¹⁸³

Roche distinguishes between consent and assent in classical Roman usage. “If the Romans wanted to speak of an individual *agreeing* to a venture or an obligation that concerned himself alone, then the proper word was *assensus* (also spelled *adsensus*), assent. One assented to an object, one consented with a person.”¹⁸⁴ He elucidates a similar distinction in early Roman Law between stipulation and consent. “Stipulation could take the form of being a binding verbal agreement, it could manifest consent, but it did not create consent. If there was no actual consent, no concurrence of minds, then the

183. Garrett J. Roche, “Consent is a Union of Wills: A Study of the Bilateral Dimension of Matrimonial Consent,” *Studia Canonica* 18, no. 2 (1984): 422.

184. *Ibid.*, 416.

stipulation on its own was null.”¹⁸⁵ In classical Roman marriage, “consent was *not* just a stipulatory will-act; rather it was the harmonious union of wills of the parties themselves and of their families.”¹⁸⁶ Consent was manifest not only at one moment but also throughout the process of creating and forming the *consensus*. This bilateral dimension of consent helps to make sense of the role of *maritalis affectio* in classical Roman marriage. Consent as a harmonious union of wills is another way of saying that the desire and will to be married is present throughout the process.

Roche describes how the bilateral dimension of consent continues to be present in canon law, although less so after the thirteenth century. In the medieval debate regarding what creates marriage, Gratian held that *consensus* was completed by *copula*. Roche argues that for Gratian it was not the intention to unite in a spiritual and carnal union that made a valid marriage but the actual union of wills and bodies in a spiritual and carnal joining together. He adds, “It is also noteworthy that Gratian does *not* speak of the ‘object’ of consent. This is a term that only becomes popular later in history when the emphasis had changed from the actuality of the union-of-wills to the intentionality of the will-act.”¹⁸⁷ This is in accord with the classical Roman use of *consensus*: one consented with a person, not an object. Although the twelfth century canonists continued to emphasize the bilateral dimension of consent, the need to ensure *verification* that consent had indeed been formed drove the shift toward emphasis on the unilateral dimension of

185. Roche, "Consent is a Union of Wills: A Study of the Bilateral Dimension of Matrimonial Consent," 418.

186. *Ibid.*, 419.

187. *Ibid.*, 425.

consent as a will-act.¹⁸⁸ By the thirteenth century, this shift was evident.¹⁸⁹ In response to the question of whether consent is of the appetitive or apprehensive power, Aquinas distinguishes between assent and consent. “‘Assentire’ [to assent] is, to speak, ‘ad aliud sentire’ [to feel towards something]; and thus it implies a certain distance from that to which assent is given. But ‘consentire’ [to consent] is ‘to feel with,’ and this implies a certain union to the object of consent.”¹⁹⁰ He adds that the will is said to consent, whereas the intellect is said to assent. For Aquinas, consenting implies a certain union with the object of consent. In response to whether consent is the efficient cause of marriage, Aquinas identifies the object of consent:

Just as marriage is one on the part of the object to which the union is directed, whereas it is more than one on the part of the persons united, so too the consent is one on the part of the thing consented to, namely the aforesaid union, whereas it is more than one on the part of the persons consenting. Nor is the direct object of consent a husband but union with a husband on the part of the wife, even as it is union with a wife on the part of the husband.¹⁹¹

Although the bilateral dimension of consent is implied in that both husband and wife consent to the union, the focus is clearly on the unilateral dimension of consent. Aquinas refers to each spouse’s consent and the object of consent for each. The object of consent is union with the other.

By the first codification of canon law in 1917, the unilateral dimension is forefront given that consent is described as an “act of the will” and the object of consent

188. Roche, "Consent is a Union of Wills: A Study of the Bilateral Dimension of Matrimonial Consent," 428.

189. *Ibid.*, 429.

190. Thomas Aquinas, *Summa Theologica*, I-II, Q. 15, Art. 1, ad. 3, Thomas Aquinas, *Summa Theologica*, Translated by Fathers of the English Dominican Province, Benzinger Bros. Edition. 1947, <http://www.basilica.org/pages/ebooks/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf> (accessed January 15, 2014).

191. Thomas Aquinas, *Summa Theologica*, Suppl., Q. 45, Art. 1, ad. 3.

is the *ius in corpus*.¹⁹² In the 1983 Code, the bilateral dimension of consent receives greater attention. Canon 1057 §2 continues to identify consent as an “act of the will,” but the addition of “by which a man and a woman mutually give and accept each other through an irrevocable covenant” suggests the bilateral dimension. Roche describes how the bilateral and unilateral dimensions are complementary and how awareness of this fact has both juridical and pastoral significance:

The canonical descriptions of matrimonial consent then do not exclude the bilateral dimension, though jurisprudence has tended to stress the unilateral dimension. There must indeed be a concurring of wills if there is to be a true valid consent. This concurring of wills is a fact of juridical importance no less than the individual contributions of each partner to that concurrence. Consent is not just a stipulatory will-act intending towards an object, it is the willful action of giving and accepting. However this union of wills cannot be a static or semi-conscious *consensus*, it must be a deliberate and conscious unanimity directed towards, and initiating, a lifelong exclusive partnership. The unilateral dimension brings a necessary emphasis on the fact that each partner is accountable for his or her contribution to the *consensus*, a contribution that must be deliberate and conscious. The unilateral and bilateral dimensions are then complementary, ensuring that there is a true concurring of personal will-acts, forming a valuable *consensus*.¹⁹³

Roche’s description of the complementary nature of the bilateral and unilateral dimensions of consent corresponds to the *when* of marital commitment. Just as commitment is expressed during the wedding and yet must continue every day after the wedding celebration, so also consent is expressed during the wedding liturgy yet each spouse must continue to will consciously and deliberately the union as *consortium totius vitae*.

Roche brings to light the pastoral and juridical significance of the bilateral dimension in other cultures, specifically African cultures, and within modern

192. Roche, "Consent is a Union of Wills: A Study of the Bilateral Dimension of Matrimonial Consent," 431.

193. *Ibid.*, 433.

psychology's stress on the interpersonal relationship where marriage is viewed as a dynamic process:

Emphasis on the fact that mutual consent should be a harmonious "union of wills" allows for a greater appreciation that consent itself is formed through a temporal process. The union of wills is formed over a period of time by the interaction of the betrothed parties, it becomes decisively permanent and exclusive at a certain stage in the temporal process and is then given juridical status by legitimate manifestation.¹⁹⁴

Greater attention to the bilateral dimension of consent pays heed to the diversity of marital customs throughout the world church and to the temporal character of the existential marital relationship from dating through a lifetime together. Consent as a union of wills points to the fact that internal consent occurs prior to its explicit manifestation at the wedding. Roche argues that "if the nature of the marriage covenant as being a 'partnership of the whole of life' is examined, it is clear that some form of concurrence is fundamentally required to initiate that covenantal partnership."¹⁹⁵ Such a consideration could shed light on the bond of marriage as well. The bond, *vinculum*, is not a juridical fiction external to the couple but a psychological, moral, and juridical reality. "Jurisprudence on 'incapacity' has already implied the inadequacy of separate consents that do not or cannot concur. It is also clear that the actuality of the concurrence of wills can form a psychological bond that intentionality without concurrence cannot form."¹⁹⁶ The bilateral dimension of consent highlights the actuality of the lived relationship. A man consents with a woman and a woman consents with a man. The union of their wills is what makes marriage. Mendonça articulates this point precisely

194. Roche, "Consent is a Union of Wills: A Study of the Bilateral Dimension of Matrimonial Consent," 435.

195. *Ibid.*, 436.

196. *Ibid.*

and references Roche's work. "This consent is primarily an act of the will of each spouse and only when there is legitimate expression of their 'wills-together' or 'union of wills' to enter into a life-long marital relationship, is there a valid marriage."¹⁹⁷ When discussing the possibility of relative incapacity as a ground of nullity, he adds, "Marriage as a union between two persons comes into being when their consents meet. Both in the aspect of 'union' and in the aspect of 'consent' marriage is an interpersonal reality."¹⁹⁸

5.4.2 Consent as Temporal Process Given Permanent Juridical Status

Renewed attention to the bilateral dimension of consent in canon law can help make sense of how a temporal process of marrying is given permanent juridical status. The bilateral dimension incorporates the theology of interpersonal commitment. It helps to bring consent in canon law closer to the lived reality of marital commitment. Without explicitly referring to the bilateral dimension of consent per se, Peter Huizing proposes a reevaluation of consent as it has been conceived canonically. "There are two subjects striving after nothing else than themselves, giving themselves and accepting each other in a perfectly immanent covenant. The community of common life and love is not the immediate content of the consent, but the commitment to it."¹⁹⁹ Since the arrival of scholastic philosophy, consent in canon law has been envisioned primarily in static terms; however, a return to acknowledgment of the bilateral dimension of consent moves the juridical articulation of consent closer to the dynamic, interpersonal process that it is existentially. Huizing continues,

197. Mendonça, "Consensual Incapacity for Marriage," 486-87.

198. *Ibid.*, 540.

199. Peter J. Huizing, "Canonical Implications of the Conception of Marriage in the Conciliar Constitution *Gaudium Et Spes*," in *Commitment to Partnership: Explorations of the Theology of Marriage*, ed. William P. Roberts (New York, NY: Paulist Press, 1987), 112-13.

The notion of consent as ‘act of the will’ should be developed to the existentially more correct and more appropriate notion of interpersonal conjugal engagement or commitment. There is no abstract act of the will referring to equally abstract qualities or properties like indissolubility, exclusivity or procreation, but an authentic attitude of persons giving themselves and accepting the other self into the most intimate community of life. That would be an indispensable attitude for a Christian marriage. The notions of aptitude-capacity-attitude, as well as the notions of immaturity-incapacity-exclusion of real marriage, would come nearer to each other.²⁰⁰

Canonical structures and norms need to be reflective of real life and address pastoral concerns in order for canon law to be recognized and utilized as a ministry. A canonical re-articulation of consent as a dynamic union of wills more accurately reflects the theology of commitment previously discussed. The continual, dynamic, lifelong, interpersonal process of consenting is manifested and given permanent juridical status at one moment in time. Certainly, the expression of consent at the wedding makes possible the verification of consent in the external forum, but the expression of consent is much more than a juridical formality. It is a public means of reassuring others of the commitment made in a relationship of faith and trust. The “moment of consent” presupposes a loving union already being made and the promise to continue in this loving union for life. The juridically necessary “moment of consent” seals and confirms love that exists in a temporal process. Farley’s theology of commitment coincides with this understanding of consent:

Commitment is our way of trying to give a future to a present love. It depends upon the power of the past (promise) to influence the present (fulfillment). It aims to strengthen us, so that our love will endure through time; to assure us, so that we may trust within time; to integrate love, so that one day’s fears do not threaten another day’s desires, or one year’s weakness overwhelm another year’s strength. Yet it is not immediately obvious whether commitment is, therefore, a

200. Huizing, “Canonical Implications of the Conception of Marriage in the Conciliar Constitution *Gaudium Et Spes*,” 113.

way of resisting time (of making love endure in spite of time, as if there were no time) or of embracing time (giving love a history by giving it a future).²⁰¹

Marital commitment publicly celebrated in the expression of consent seems to embrace time and the process of a loving relationship.

If the bilateral dimension of consent is to be taken seriously in canon law, so also must the canonical importance of marriage preparation. Evelyn Eaton Whitehead and James Whitehead develop a theology of the lifecycle of marriage that is true to life experience and the theology of commitment purported here. In their view, marriage is a sacramental passage composed of ritual celebration as well as an interpersonal process and transition:

Such a reflection begins with the now common insight that marriage is not a state that we suddenly enter on our wedding day. The sacrament of marriage cannot be understood in terms of a single ritual which magically transforms us from two into one forever. The sacramental celebration of marriage in the rites and ceremonies of the Christian Church must be the celebration of a process already well under way and of a process which has still some considerable way to go.²⁰²

In such a process, the ambiguity of the dating and engagement period requires particular pastoral care. This first stage in the passage into marriage is ambiguous, because “the couple are committed *to* marry, but are not yet committed *in* marriage.”²⁰³ While consent *de futuro* does not create marriage, as consent *de praesenti* does, still it is a stage in the process of marrying. The duty of the Christian faithful to prepare persons for marriage and care for married couples is of such importance that it is a canonical obligation.

Canon 1063—Pastors of souls are obliged to take care that their ecclesiastical community offers the Christian faithful the assistance by which the

201. Margaret A. Farley, *Personal Commitments: Beginning, Keeping, Changing* (New York, NY: HarperCollins Publishers, 1986), 40.

202. Evelyn Eaton Whitehead and James D. Whitehead, *Marrying Well: Stages on the Journey of Christian Marriage* (Garden City, New York: Image Books, 1981), 124.

203. *Ibid.*, 130.

matrimonial state is preserved in a Christian spirit and advances in perfection. This assistance must be offered especially by:

- 1° preaching, catechesis adapted to minors, youth, and adults, and even the use of instruments of social communication, by which the Christian faithful are instructed about the meaning of Christian marriage and about the function of Christian spouses and parents;**
- 2° personal preparation to enter marriage, which disposes the spouses to the holiness and duties of their new state;**
- 3° a fruitful liturgical celebration of marriage which is to show that the spouses signify and share in the mystery of the unity and fruitful love between Christ and the church;**
- 4° help offered to those who are married, so that faithfully preserving and protecting the conjugal covenant, they daily come to lead holier and fuller lives in their families.**

The canonical obligation to provide marriage preparation through all of its stages rests upon those who have the responsibility of caring for the Christian faithful. According to c. 1064 this responsibility falls ultimately upon the bishop, or local ordinary; however, the entire community shares in this task “*in solidum* with its pastors.”²⁰⁴ The ways in which various programs and means of preparation are structured are dependent upon the particular needs and resources of each local church. In addition, each local church should utilize the experience and expertise of married couples and those who work in fields related to marriage.²⁰⁵ Fintan Gavin explains that the use of the phrase *obligatione tenentur* indicates a most serious canonical obligation.²⁰⁶ Because marriage is both a private relationship affecting the most intimate and profound aspects of persons and also a public institution influencing entire communities, both ecclesial and secular, bishops must take leadership in making certain this preparation is ample and effective.

204. Fintan Gavin, "Canon 1063: Marriage Preparation as a Lifetime Journey," *Studia Canonica* 39 (2005): 186.

205. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1262.

206. Gavin, "Canon 1063: Marriage Preparation as a Lifetime Journey," 187.

The particular stages of marriage preparation outlined in the previous chapter are represented in c. 1063. Remote preparation (c. 1063, 1) occurs primarily in the family, school, and faith formation during infancy, childhood, and possibly adolescence. Lynda Robitaille argues, “Effective marriage preparation must begin in childhood. Children and young people who learn what the obligations of marriage are, and who learn to appreciate the importance of the sacrament, will be better able to apply those teachings to their own lives when they marry.”²⁰⁷ Unfortunately, as Gavin notes, “The difficulty with remote preparation is that it is so broad and vague that very often it doesn’t happen in any kind of a structured or systematic way.”²⁰⁸ The particular rights and obligations of marriage are not delineated in canon law and are still being fleshed out in jurisprudence. The fact that the contemporary experience and structure of families is so varied and fluctuating makes it particularly difficult for remote preparation to happen in any systematic manner.

The ambiguity of proximate preparation (c. 1063, 2) is not clarified in canon law. Gavin states that proximate preparation “takes place in the period of engagement.”²⁰⁹ Due to the fact that they rely on the document, *Preparation for the Sacrament of Marriage* from the Pontifical Council for the Family, Lynda Robitaille and John McAreavey hold that this stage concerns the engaged couple as well.²¹⁰ If proximate preparation is limited to pre-marital courses for the engaged, then the role of discernment and dating needs to be clearly addressed in the stage of remote preparation. Gavin points to this difficulty without explaining why this problem exists:

207. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1263.

208. Gavin, "Canon 1063: Marriage Preparation as a Lifetime Journey," 189.

209. Ibid.

210. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1263; McAreavey, *The Canon Law of Marriage and the Family*, 64.

One very practical difficulty with these courses is that couples tend to do them in the months or indeed the weeks leading up to their wedding when the decision has already been made and the preparations are already in place for the wedding. It means that these courses or programmes are too late to help people with the making of this critical decision to marry.²¹¹

This pastoral problem exists in part because a theology of dating and discernment has not been developed and then applied in canon law. The bilateral dimension of consent has been neglected with one of the outcomes being this lacuna in canon law and pastoral practice. The Pontifical Council for the Family alludes to consent as a union of wills that begins in the engagement period. “The proximate preparation of young people should make them understand that the commitment they take on through the exchange of their consent ‘before the Church’ makes it necessary for them to begin a path of reciprocal fidelity in the engagement period.”²¹² Throughout their preparation, a couple is on a path of committing, which is made public and explicit at the wedding. Once a theology of dating, discernment, and betrothal is developed, canonical structures can be created and utilized in practice.

Immediate preparation (c. 1063, 3) is the “culmination of a catechesis which helps engaged Christians to retrace their sacramental journey intelligently.”²¹³ If there has not been adequate preparation in the previous stages, immediate preparation is absolutely necessary to prepare couples to participate actively in the rite. Unfortunately, the common perception of marriage preparation is reduced to this stage alone, which occurs in the weeks and months prior to the wedding. Immediate preparation is meant to be a

211. Gavin, "Canon 1063: Marriage Preparation as a Lifetime Journey," 191.

212. Pontifical Council for the Family, *Preparation for the Sacrament of Marriage*. May 13, 1996, no. 39, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_13051996_preparation-for-marriage_en.html (accessed March 25, 2003).

213. *Ibid.*, no. 53.

review of the moral, doctrinal, and spiritual formation and a deepening in their relationship with Christ and with each other already begun. It is but one step in the process. During this stage, the local ordinary, usually the bishop, may prohibit a particular marriage for a grave cause as long as the cause endures (c. 1077 §1).

According to Beal,

This authority, which is an exercise of the executive power of governance in the form of a personal precept (c. 49), derives from the obligation of ecclesiastical authorities to promote the common good of the particular and the universal Church and to prevent abuses of ecclesiastical discipline, especially in the celebration of the sacraments (c. 392).²¹⁴

Although prohibitions affect only the lawfulness and not the validity of the marriage, this canon is a prime example of how canon law exists to promote order and the common good as well as protect individual freedom.²¹⁵ Marriage is a public institution with compounding effects. In the past, this canon has been employed to prevent marriages that in all probability would be declared null due to defective consent or an impediment in order to protect involved parties.²¹⁶ At the same time, since this canon affects the fundamental right to marry (c. 1058), it must be interpreted strictly (c. 18) with care that ecclesiastical authority is not abused. Pastoral ministers preparing couples for marriage have the very difficult task of investigating canonical freedom to marry (c. 1066). Should the possibility of defective consent be expected, a prohibition could prevent the eventual judicial procedure declaring nullity. In such a situation, the complementarity of the pastoral and canonical aspects of the church is evident. In his address to the Tribunal of

214. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1275.

215. “Only the supreme authority of the Church can add a nullifying clause to a prohibition” (c. 1077 §2).

216. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1276.

the Roman Rota on the inauguration of the judicial year 2011, Benedict XVI articulates the inseparability of the juridical and pastoral dimensions of canon law in marriage preparation:

Among the means for ascertaining whether the project of the engaged couple is truly conjugal the prematrimonial examination stands out. This examination has a mainly juridical purpose: to ascertain that nothing impedes the valid and licit celebration of the wedding. However juridical does not mean formal, as though it were a bureaucratic step, like filling up a form based on set questions. Instead it is a unique pastoral opportunity—one to be made the most of with the full seriousness and attention that it requires—in which, through a dialogue full of respect and cordiality, the pastor seeks to help the person to face seriously the truth about himself or herself and about his or her own human and Christian vocation for marriage.²¹⁷

He explicitly mentions how preemptive pastoral preparation can circumvent possible juridical investigations of nullity:

It is necessary to make every effort to interrupt, as far as possible, the vicious circle that often exists between a predictable admission to marriage, without an adequate preparation and a serious examination of the prerequisites for its celebration, and a legal declaration sometimes equally facile but of a contrary nature, in which the marriage itself is considered null solely on the basis of the observation of its failure.²¹⁸

That being said, the prohibition of the fundamental right to marry due to the possibility of defective consent in a first marriage requires such tremendous discretionary and predictive powers that it might be completely impractical.

The final stage of marriage preparation is continued pastoral care after marriage (c. 1063, 4^o). When the bilateral dimension of consent is appreciated, the aftercare of married couples as an essential stage in marriage preparation becomes even more

217. Benedict XVI, *Address of His Holiness Benedict XVI on the Occasion of the Inauguration of the Judicial Year of the Tribunal of the Roman Rota*. January 22, 2011, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/january/documents/hf_ben-xvi_spe_20110122_rota-romana_en.html (accessed February 4, 2014).

218. *Ibid.*, 3.

apparent. An invitation to a wedding is essentially an invitation to support the couple in prayer and counsel and any way possible, particularly in the early years of marriage. The church as *communio* is responsible for helping the couple to live out their fruitful, loving union for life. The specific means for doing so is left to the creativity and resources of the local church. Canon 1063 is included in the Code to ensure that structures and procedures are in place so that the values of marriage are appropriated in the church. While admitting the many challenges pastoral ministers encounter in marriage preparation, Gavin articulates the interconnection between the juridical and the pastoral aspects evident in this area of ecclesial life:

While acknowledging that there is always going to be a certain tension between the vision worked towards and the reality as it is practiced, the first thing required, if the Church's vision is to become more than just a theoretical vision, is a belief in that vision. There must be conviction about its value from the Bishop to the priest to the members of the church community. The Church must be prepared to set up structures and provide adequate trained personnel and resources. If more resources were invested in preparation for marriage then perhaps less expenditure would be necessary for or marriage tribunals.²¹⁹

Investment in marriage preparation is a most serious obligation; the church must spend adequate time, money, and resources in pastoral measures to build and fortify strong marriages or continue to use those resources in judicial measures to deal with failed marriages.

5.5 The Unilateral Dimension of Consent and Invalid Marriages

5.5.1 Personal and Responsible Contribution to the *Consensus*

My recommendation that the bilateral dimension of consent be explored in greater depth in both canon law and theology in no way diminishes the need for greater

219. Gavin, "Canon 1063: Marriage Preparation as a Lifetime Journey," 193.

understanding of the unilateral dimension of consent. The bilateral and unilateral dimensions are complementary. The unilateral dimension, or will-act of each person, corresponds to Lonergan's fourth level of conscious intentionality. The fourth level of conscious and intentional operations is where freedom operates, where human persons not only decide upon courses of action but also choose the kind of person one wants to be. The fourth level presumes the other three levels of experiencing, understanding, and judging. Marital consent is a conscious and intentional operation, an act of rational self-consciousness, in which spouses choose a course of action or way of life that could be otherwise. Essentially, that is what is meant by—consent makes marriage. The unilateral dimension of consent signifies that each person is accountable for and responsible for his or her contribution to the *consensus*. Historically, canon law has emphasized the unilateral dimension, particularly since the emergence of scholastic philosophy. As argued previously, consent as will-act is evident in the Code, and each person's capacity, knowledge, and responsibility regarding the marriage is considered juridically significant. Here, the canons particularly relevant to a theology of marital commitment and consent will be addressed.²²⁰

During the internal process of consenting, a serious deficiency or defect occurring at any or all of these steps has the possibility of vitiating consent. This process of consenting corresponds to Lonergan's levels of conscious and intentional operations and the elements of a positive account of freedom. Although listed sequentially and distinctly, these steps happen organically in relationships and real human experience.

The first step in consenting happens on the experiential level when a person gathers

220. Although there are thirteen canons directly related to consent, this study will focus on cc. 1095, 1096, 1097, 1099, 1101, and 1102 with varying degrees of analysis depending upon their relevance to a theology of commitment.

information about marriage in general and the person he or she is considering for marriage specifically.²²¹ It corresponds roughly to the element of freedom termed “the underlying sensitive flow.” The second step occurs as a person comes to understand “what marriage is, what values it represents, *and* what *this* marriage with *this* person is likely to be, what values *this* partner is likely to bring to the marriage.”²²² These intellectual acts of understanding and judging (when one’s understanding of marriage in general is applied to marriage with this particular person) correspond to the elements of “practical insight” and “practical reflection.” The third step occurs when a judgment regarding marriage to this particular person is accepted. Örsy describes it as an act of surrender. “After the absorption of information, after the understanding of its content, the person must surrender himself with all that such surrender entails to the reality of this marriage. ‘This marriage is for me!’”²²³ This step is the element of “decision.”²²⁴ It is an act of rational self-consciousness, an act of willing, an act of consenting. Örsy argues, “But it is not enough to know something or someone conceptually; there is an element of ‘surrender’ after the judgment, an element not mentioned in our new code! It is through this surrender that the whole human person (not just his cognitive faculties) gives himself to reality.”²²⁵ The fourth step occurs as the person takes the concrete steps to marry, that

221. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 63.

222. *Ibid.*, 64.

223. *Ibid.*

224. The separation of these steps is a heuristic device. As they are explicated, it becomes apparent that they overlap. The statement, “This marriage is for me!” is a practical judgment; however, the notion of surrender is much more than a practical judgment; it is a movement of the will in acceptance. This element of surrender is critical to a theology of marital commitment.

225. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 65.

is, to express consent in action.²²⁶ Because consent is an internal process, this consent needs to be expressed into the external world both at the wedding and in living out the marital covenant. Örsy's integral vision of the process of consenting is succinctly articulated as the following: a "four-fold process of moving from information, to understanding, to a value judgment, to surrender, and to action."²²⁷ The element of surrender in consent has not been adequately featured. Consent is an active choice and, at the same time, a surrender to what is and what will be. As commitment is the choice to give up other choices and love is simultaneously passion and action, so consent is letting go in acceptance of a radical new direction to one's life and set of obligations. Örsy mentions a danger at the third level of surrender I believe to be prevalent, almost rampant, in marriages in the United States:

Subtle deficiencies may arise at this stage. A person may remain in a dream world, contemplating the "idea" of marriage and the "idea" of the chosen partner somewhat *à la* Plato, but never committing himself to this marriage with this partner. Clearly such a defective stage is possible; it is usually betrayed by the person seeking his fulfillment, not the fulfillment of the other; asking studiously what he can get, not what he can give.²²⁸

Certainly, this is tied to the soul mate model of marriage, which perhaps could lead to defective consent as this element of surrender is absent or inadequate.²²⁹

As these canons are addressed, the difficulty mentioned earlier regarding the distinction between the world of spirit and the world of law becomes even more obvious. The complex and intricate psychological and spiritual process of consenting needs to find

226. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 65.

227. *Ibid.*

228. *Ibid.*, 64-65.

229. This idea of inadequate consent or lack of commitment in consent will be discussed in detail under c. 1101 on simulation.

expression in juridical language. The canonical meaning of consent must always be adjusted to better reflect the psychological and theological reality of consent:

Because of its incapacity to penetrate into the internal world of human persons, and its capacity to regulate and judge external actions, the law stands partly impotent, partly competent before the issue of consent. It stands impotent because it has no means of knowing how the human spirit works in general, or what it has done in a particular case; for such information the law must turn to other sciences. It stands competent because the manifestation of consent is an external act with far reaching social consequences. . . .

Thus, the canons on matrimonial consent reflect in manifold ways the impact of several diverse sciences on canon law. Rightly so since canon law must turn to other sciences to learn what consent is in its ontological reality. The “canonical” idea of consent, therefore, is a special construct, composed by informed lawyers. It may be close to its ontological counterpart but it cannot be fully identical with it. Precisely because of this difference, the canonical idea is subject to corrections as we advance in the knowledge of the operations of the human spirit. Some such corrections are found in the new Code.²³⁰

The difficulty of translating theological values and realities into canonical norms and structures is particularly concentrated in the issue of consent thus calling for periodic reconsideration. For example, canon 1095 is completely new to the 1983 Code as the legislator incorporates the insights of empirical psychology into the canonical meaning of consent. The relatively recent addition of this canon into a juridical structure of consent, which is about six hundred years old, lends itself to an awkward placement and ambiguous wording.²³¹

5.5.2 Consensual Incapacity

Canon 1095—The following are incapable of contracting marriage:

- 1° those who lack the sufficient use of reason;**
- 2° those who suffer from a grave defect of discretion of judgment concerning the essential matrimonial rights and duties mutually to be handed over and accepted;**
- 3° those who are not able to assume the essential obligations of**

230. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 126,129.

231. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 39.

marriage for causes of a psychic nature.

This “new” canon on defective consent demonstrates true development in canon law along with deviation. The addition of this canon to the Code reveals the movement of canon law toward a more nuanced theology of marriage fueled by the more recent insights of empirical psychology. However, with this movement come some dangers, particularly in the ways in which these new insights are applied in annulment cases. John Paul II’s annual allocutions to the Roman Rota for the years 1987 and 1988 specifically addressed these dangers. “From this perspective, I wish to devote particular attention today to psychic incapacities, which especially in some countries have become the ground for a high number of declarations of nullity of marriage.”²³² While appreciative of the advances in psychology, John Paul II cautions that contemporary discoveries in psychology “are not capable of resolving on their own the fundamental questions concerning the meaning of life and the human vocation.”²³³ Underlying these psychological theories are anthropological assumptions, some of which are irreconcilable with the canonical and theological understanding of marriage.²³⁴ Therefore, expert testimony must be used guardedly and weighed carefully according to cc. 1578-1579. The judge is the *peritus peritorum*, the expert of the experts, which means “it is for the judge and for him alone to consider the nullity of marriage.”²³⁵ The human sciences alone provide an incomplete picture of the human person, because they are limited to the

232. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. February 5, 1987, Libreria Editrice Vaticana, no. 1, http://www.vatican.va/holy_father/john_paul_ii/speeches/1987/documents/hf_jp-ii_spe_19870205_roman-rota_en.html (accessed July 14, 2008).

233. *Ibid.*, no. 2.

234. *Ibid.*, no. 4.

235. *Ibid.*, no. 8.

earthly and natural dimensions of human life, whereas an integrated Christian anthropology considers the human person in all aspects—“terrestrial and eternal, natural and transcendent,” “internally wounded by sin, and at the same time redeemed by the sacrifice of Christ.”²³⁶

In his 2009 Annual Address to the Roman Rota, Benedict XVI questions whether the interventions of John Paul II regarding the overuse, or possibly abuse, of psychic incapacity as a cause of marital nullity have been received.²³⁷ John Paul II declared the ecclesiastical tribunal to be “a ministry of charity towards the ecclesial community which is preserved from the scandal of seeing the value of Christian marriage being practically destroyed by the exaggerated and almost automatic multiplication of declarations of nullity of marriage in cases of the failure of marriage on the pretext of some immaturity or psychic weakness on the part of the contracting parties.”²³⁸ Over twenty years after these allocutions, Benedict XVI laments that this continues to be “a concrete and pressing problem.”²³⁹ To combat the problem, Benedict XVI asserts the need to recall some significant distinctions in order to respond to “the need for procedural precision.”²⁴⁰ The first distinction is between psychological maturity and canonical maturity. “With the use of expert evidence, psychic maturity which is seen as the goal of human development

236. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. January 25, 1988, Libreria Editrice Vaticana, 2, http://www.vatican.va/holy_father/john_paul_ii/speeches/1988/documents/hf_jp-ii_spe_19880125_roman-rota_en.html (accessed July 14, 2008).

237. Benedict XVI, *Address of His Holiness Benedict XVI to the Tribunal of the Roman Rota for the Inauguration of Judicial Year*. January 29, 2009, Libreria Editrice Vaticana, http://www.vatican.va/holy_father/benedict_xvi/speeches/2009/january/documents/hf_ben-xvi_spe_20090129_rota-romana_en.html (accessed February 4, 2014).

238. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1987*, no. 8.

239. Benedict XVI, *Address of His Holiness Benedict XVI to the Tribunal of the Roman Rota for the Inauguration of Judicial Year, 2009*, 1.

240. *Ibid.*

ends up being confused with canonical maturity which is rather the basic minimum required for establishing the validity of marriage.”²⁴¹ The second key distinction John Paul II sought to clarify in these addresses is the difference between the incapacity to give consent and the difficulty in giving consent:

For the canonist the principle must remain clear that only incapacity and not difficulty in giving consent and in realizing a true community of life and love invalidates a marriage. Moreover, the breakdown of a marriage union is never in itself proof of such incapacity on the part of the contracting parties. They may have neglected or used badly the means, both natural and supernatural, at their disposal; or they may have failed to accept the inevitable limitations and burdens of married life, either because of blocks of an unconscious nature or because of slight pathological disturbances which leave substantially intact human freedom, or finally because of failures of a moral order.²⁴²

The third distinction is between a canonical approach to normality and a clinical approach:

It follows, therefore, that while for the psychologist or psychiatrist every form of psychic illness can appear contrary to normality, for the canonist who is inspired by the aforementioned integrated vision of the person, the concept of normality, that is to say, of the normal condition in this world, also includes moderate forms of psychological difficulty. Consequently it includes the call to live in accordance with the Spirit even in the midst of tribulation and at the cost of renunciation and sacrifice. Where such an integral vision of the human being is lacking, normality on the theoretical level can easily become myth and on the practical level, one ends up denying to the majority of people the possibility of giving valid consent.²⁴³

The final distinction of John Paul II, which is recalled by Benedict XVI as necessary for resolution of the problem, is between “the minimum capacity sufficient for valid consent” and “the ideal of full maturity in relation to happy married life.”²⁴⁴

241. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*, 1987, no. 6.

242. *Ibid.*, no. 7.

243. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*, 1988, 3.

244. *Ibid.*, 4.

Canon 1095 reflects the threefold capacity that all persons must possess in order to elicit valid consent. Mendonça summarizes that the capacity to marry “concerns the very person of the spouses as subjects of consent, the object of consent (marriage), and its constitutive (essential) elements. This capacity is threefold: to understand the object sufficiently, to choose it freely, and to realize it in married life; it must be present in the parties at the moment of exchanging consent.”²⁴⁵ For this reason, there are three species of consensual incapacity as listed in c. 1095. The first species of consensual incapacity, lack of sufficient use of reason, has been recognized (although minimally utilized) in canon law before the promulgation of either code.²⁴⁶ Those incapable of placing a human act due to serious mental disorder, amentia, cannot possibly elicit valid consent to marriage. The severe mental impairment must be present at the time of consent, although it may be “habitual, such as schizophrenia, or temporary such as epileptic seizure, acute alcohol intoxication, etc.”²⁴⁷ The first species of consensual incapacity seems superfluous, because cases applicable to the first species would definitely apply to the second species. Mendonça concurs, “In my opinion, for all practical purposes, this norm is preempted by the norm of ‘lack of discretion of judgment,’ the second species of consensual incapacity.”²⁴⁸

The second species of consensual incapacity concerns the critical faculty, or the third level of conscious intentionality, the rational. Although identified as a defect of discretion of judgment, the defect can originate on the empirical level of experiencing

245. Mendonça, "Consensual Incapacity for Marriage," 489.

246. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1297.

247. Mendonça, "Consensual Incapacity for Marriage," 492.

248. *Ibid.*

and attending as well as the intellectual level of inquiring and understanding. Örsy opines, “Judgment is the final outcome of a long process towards reaching the truth, or towards appropriating a value.”²⁴⁹ Due discretion means the ability to make a decision that is “informed, prudent, and free.”²⁵⁰

This critical faculty, a function of the practical intellect, is the capacity to evaluate knowledge of one’s self, one’s prospective partner, and the complex rights and obligations constitutive of the partnership of the whole of life by comparing, integrating, and deducing new judgments. In short, the critical faculty is the capacity to make a prudent judgment about *this* marriage with *this* person at *this* time.²⁵¹

The fourth level of conscious intentionality is working as well, because it is the principle of self-control which is responsible for the proper functioning of the first three levels. In the previous chapter, the virtue of prudence was explored in relation to a theology of marital commitment. Prudence, a virtue of the practical intellect, is the judgment of conscience working well in a concrete situation. In order for prudence to develop in a person, that capacity must be present. Due discretion of judgment does not mean that the virtue has been perfectly cultivated, but rather that the capacity is present to make a mature decision. Ignatius Gramunt and Leroy Wauck explain, “*Discretio* means both the *power* to discern and its *exercise* by means of differentiation and distinction: in both senses it is often used as synonymous with prudence.”²⁵² In c. 1095, 2° the grave defect of discretion refers to “a grave defect of a person’s psychological power to make that

249. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 42.

250. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1299.

251. *Ibid.*, 1299-1300.

252. Ignatius Gramunt and Leroy A. Wauck, "Lack of Due Discretion': Incapacity or Error," *Ius Canonicum* 32, no. 64 (1992): 537.

particular judgment which forms the choice of the will.”²⁵³ Mendonça explains how due discretion of judgment has come to be identified canonically with maturity of will:

In total jurisprudence, the term “discretion” has finally come to mean “maturity” understood in the canonical and not psychological sense, and, therefore, when it is used with “judgment” as “discretion of judgment,” it basically signifies “maturity of judgment” or simply “mature decision” or “mature choice.” In relation to matrimonial consent, “discretion of judgment” means “maturity of decision” to enter into a permanent and exclusive interpersonal heterosexual relationship ordered by its very nature to the good of the spouses and of the offspring.²⁵⁴

Practical reasoning always involves concrete decisions; therefore, due discretion means the *ability or capacity* to make concrete decisions regarding one’s own life, marriage with a particular person and the rights and obligations inherent in a marital covenant with this person.

For defective consent to invalidate according to c. 1095, 2°, it must be grave. According to the instruction *Dignitas connubii* from the Pontifical Council for Legislative Texts, in causes of defect of discretion of judgment, the judge should ask the expert “whether one or both parties suffered from a particular habitual or transitory anomaly at the time of the wedding; what was its seriousness; and when, from what cause and in what circumstances it originated and manifested itself.”²⁵⁵ Since consent refers to *matrimonium in fieri*, the psychic anomaly may be habitual or transient as long as it is present at the time of consent. From an examination of Rotal jurisprudence, the allocutions of John Paul II and *Dignitas connubii*, Richard Reidy concludes that the psychic anomaly, either habitual or transient, must be serious; it must be the cause of the

253. Gramunt and Wauck, "Lack of Due Discretion!: Incapacity or Error," 537.

254. Mendonça, "Consensual Incapacity for Marriage," 494.

255. Pontifical Council for Legislative Texts, *Dignitas Connubii*. January 25, 2005, http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html (accessed April 10, 2014).

lack of discretion of judgment; it must be present at the moment of consent; and it must relate to the essential rights and obligations of marriage.²⁵⁶ Reidy adds a significant distinction:

It is critical to bear in mind that the presence of a psychic anomaly, even a serious one, in a party at the moment of consent does not necessarily translate to a defect of discretion of judgment or a lack of consensual incapacity. Rather, it is the *effect* of the psychic anomaly on one's discretion of judgment in relation to the essential rights and duties of marriage that determines the invalidity of marriage.²⁵⁷

The psychic anomaly itself is not the cause of nullity, but rather it causes the lack of due discretion which invalidates consent. Reidy lists some examples of psychic anomalies that have been cited in affirmative Rotal sentences as the cause of invalidating consensual incapacity according to c. 1095, 2. "These include: neuroses, psychic immaturity, drug dependence, alcoholism, schizophrenia, bipolar disturbance, affective immaturity, and various personality disorders, including obsessive-compulsive personality disorder, narcissistic personality disorder, anti-social personality disorder, and dependent personality disorder."²⁵⁸ The preceding causes are internal and psychological. However, underlying causes may be external to the person such as a crisis pregnancy, a difficult family background, or socio-cultural influences which are contrary to a theological understanding of marriage like the "hippy culture."²⁵⁹

The proof of these underlying causes does not mean an automatic declaration of nullity. Judges must decide with moral certainty if a person is truly incapable of giving

256. Richard F. Reidy, "The Grave Defect of Discretion of Judgment Necessary to Establish the Invalidity of Marriage Under Canon 1095, 2°," *The Jurist* 73 (2013): 352-59.

257. *Ibid.*, 356.

258. *Ibid.*, 355.

259. *Ibid.*

consent or made an imprudent decision in marriage and is now struggling in the difficulties of marriage. “Neither incomplete marriage preparation nor a failure to weigh all the consequences of the religious, social, ethical, public and private aspects of marriage constitute a defect of discretion of judgment.”²⁶⁰ Reidy delineates how the gravity of lack of due discretion is determined in Rotal jurisprudence:

Gravity is measured first by the subjective impact of the psychic anomaly upon the person’s ability to know, evaluate, and freely choose. Secondly, the objective impact of the defect is evaluated by examining the proportionality of those impacted faculties with minimum levels of discretion necessitated by the seriousness of the essential rights and duties of marriage to be mutually given and received by the parties.²⁶¹

The issue of proportionality is significant, as explained by McAreavey, “What the Church requires is that parties have reached a level of maturity proportionate to the seriousness of the commitment involved.”²⁶² This refers to a canonical level of maturity necessary for intending and realizing the marital commitment and not psychological maturity, which is the goal and term of human development. The complexity of this assessment demanded of judges cannot be underestimated. As previously indicated, the essential rights and duties of marriage are not specifically outlined, and the internal psychological processes do not lend themselves to clear juridical analyses. Burke argues that in no way does consensual incapacity offer easy grounds for a declaration of nullity. “Arriving at moral certainty about the nullity of marriage on the grounds of defective consent is never easy, for it means a present pronouncement on the validity of an internal act placed five, ten or twenty years ago. The judicial evaluation of external facts always offers difficulties; but

260. Reidy, "The Grave Defect of Discretion of Judgment Necessary to Establish the Invalidity of Marriage Under Canon 1095, 2°," 354.

261. *Ibid.*, 366.

262. McAreavey, *The Canon Law of Marriage and the Family*, 98.

if the fact to be established is internal, the difficulties are immensely increased.”²⁶³ In addition, lack of clarity and uniformity in jurisprudence, including Rotal jurisprudence, further compounds the challenges this ground of nullity poses to judges and canon law.

Reidy concludes,

The lack of canonical definitions in canon 1095, 2° presents challenges to interpretation. While a deliberate decision to avoid definitions in canon 1095 may have been made to await the further determination of Rotal jurisprudence, the lack of definitions and the inconsistent application of terms in jurisprudence and canonical commentary can give rise to a lack of uniformity in tribunal practice.²⁶⁴

These challenges are equally applicable to the third species of consensual incapacity, the incapacity to assume the essential obligations of marriage.

The third species applies to persons who are incapable of consenting to marriage, because due to causes of a psychic nature they are unable to assume the obligations of marriage. Örsy asserts that these essential obligations “certainly include whatever belongs to the substantial fulfillment of the *consortium* and of the procreation and education of children.”²⁶⁵ Gramunt and Wauck list the essential obligations that must be assumed in consent as the following: “a) the exclusive and indissoluble community of life and love; b) the help to be given to one’s spouse in the common purpose of raising a family; c) the conjugal acts directed to procreation.”²⁶⁶ Unfortunately, they do not specify how they arrived at this list or if any canons were given more consideration than others. Assuming these truly are the essential obligations of marriage, this list does not

263. Burke, "The Essential Obligations of Matrimony," 3.

264. Reidy, "The Grave Defect of Discretion of Judgment Necessary to Establish the Invalidity of Marriage Under Canon 1095, 2°," 367.

265. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 131.

266. Ignatius Gramunt and Leroy A. Wauck, "Capacity and Incapacity to Contract Marriage," *Studia Canonica* 22 (1988): 166.

give concrete and practical expression to what exactly spouses must be capable of doing. The ability to assume the essential obligations of marriage is a “psychological strength [which] must be there at the moment of the promises.”²⁶⁷ Örsy does admit that the wording of this canon is “very broad” and “defies any precise definition.”²⁶⁸ The basis of this species of consensual incapacity is the principle called upon in the law of contracts, namely, “‘ad impossibile nemo teneatur’ (no one can be bound to what is impossible).”²⁶⁹ This principle applies when it is truly impossible for a person to assume the essential obligations of marriage. The promises of marriage can only be binding creating a valid union if one is capable of honoring what is promised.²⁷⁰ Beal clarifies, “What is at issue is not the person’s capacity for critical deliberation, but his or her inability to put into effect one or more of the rights and obligations given and accepted in consent.”²⁷¹

In Chapter Four, making a commitment was described as creating a new relationship in the present in order to direct one’s freedom in the future. For consent to be valid, one must be capable of taking on presently those responsibilities intrinsic to married life that will be required in the future. Mendonça explains why the canon concerns the inability to *assume* versus the inability to *fulfill*. “The incapacity to assume is intrinsic to the person, whereas the incapacity to fulfill may be either intrinsic (psychic) or extrinsic. Here ‘intrinsic’ means it pertains to the content of the very act of consent as

267. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 131.

268. *Ibid.*

269. Burke, "The Distinction Between 2° and 3° of Canon 1095," 230.

270. Mendonça, "Consensual Incapacity for Marriage," 507.

271. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1302.

its object.”²⁷² All of the species of consensual incapacity concern a defect in the subject, although in different ways. Burke maintains that c. 1095, 2° concerns “defects of the mind; of the estimative-critical faculty, whereas c. 1095, 3° concerns “defects of the will; of the elective-executive faculty.”²⁷³ Such a definition seems to introduce too great a division in the subject through use of scholastic terms or faculty psychology. However, jurisprudence continues to employ such terms, and Lonergan continues to speak of the will, the nuances of which have been discussed previously. Burke articulates the distinction between 2° and 3° in another way, “Under 3° of the canon, then, a person understands the essential obligations sufficiently but, due to weakness of the will, is unable to carry them out; and therefore cannot validly assume them.”²⁷⁴ This weakness of the will must be due to causes of a psychic nature. In his 1987 allocution to the Roman Rota, John Paul II states that “real incapacity is to be considered only when an anomaly of a serious nature is present.”²⁷⁵ The following year he reiterates that “only the most severe forms of psychopathology impair substantially the freedom of the individual and that psychological concepts do not always correspond with canonical.”²⁷⁶ Mendonça interprets these documents to mean that the psychic cause is not synonymous with a diagnosed mental illness.²⁷⁷ James Provost maintains that psychic cause means that it is

272. Mendonça, "Consensual Incapacity for Marriage," 507.

273. Burke, "The Distinction Between 2° and 3° of Canon 1095," 233.

274. *Ibid.*, 232.

275. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1987*, no.7.

276. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1988*, 3.

277. Mendonça, "Consensual Incapacity for Marriage," 526-29.

“beyond the will or control of the affected party.”²⁷⁸ Gramunt and Wauck emphasize that this psychic cause creates an inability to assume the essential obligations. “Some psychopathologies can be great obstacles to the attainment of those conditions which contribute to a reasonably happy or successful marriage, as a human relationship, but happiness or success is often beyond the power of human beings and, consequently, cannot be the object of juridic rights and obligations.”²⁷⁹ Such a psychic cause must be present at the time of consent, but whether the incapacity must be perpetual in order to invalidate consent is a matter of debate.²⁸⁰ Beal offers a summary of the debate:

Since the ground of incapacity to assume essential marital obligations emerged by analogy to the impediment of impotence, some canonists have maintained that, in order to invalidate marriage, the incapacity must be perpetual or incurable by ordinary means, like the incapacity involved in impotence. This position has not, however, been embraced by the mainstream of Rotal jurisprudence, which has treated the incapacity to assume essential marital obligations as a ground of nullity distinct from impotence. Adherents of this position argue that, although the essential obligations of marriage bind perpetually, an incapacitating disorder need not be perpetual or incurable. It is enough that the person be incapable of assuming essential obligations of marriage at the time of consent.²⁸¹

The question of the perpetuity of incapacity is related to the ground of relative incapacity, which requires greater attention.

Burke refers to two senses in which relative incapacity may be understood. One sense in which “relative” applies to incapacity is in the sense of temporary or partial incapacity. This is the debate referred to above. Burke holds that the incapacity must be

278. James H. Provost, "Canon 1095: Past, Present, Future," *The Jurist* 54 (1994): 99.

279. Gramunt and Wauck, "Capacity and Incapacity to Contract Marriage," 168.

280. Provost, "Canon 1095: Past, Present, Future," 99-100; Mendonça, "Consensual Incapacity for Marriage," 531-35.

281. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1303.

perpetual or permanent, that there must be no hope of a cure by ordinary means.²⁸² He distinguishes c. 1095, 3^o from c. 1095, 2^o in this way: “Now the ‘incapacitas assumendi’ must similarly be present at the moment of consent; but *unlike* the grave lack of discretion, it is of its nature projected *towards the future*, being a present incapacity to fulfill future obligations. The proof of the ‘incapacitas assumendi,’ therefore, depends far more on ‘a posteriori’ deductions.”²⁸³ Although he admits that the causes of a psychic nature admit of degrees, he argues that “there is no such thing as a ‘relatively’ or ‘partially’ valid consent.”²⁸⁴ Burke maintains that incapacity is absolute or it is not a true incapacity. In a similar way, Burke argues against the second sense of relative incapacity, “the thesis according to which capacity for marriage must be judged not just in the abstract, in relation to marriage itself, but in the concrete, in relation to the union with the particular spouse chosen.”²⁸⁵ His conclusion is the following:

I find no solid basis in law, or in Christian theology or anthropology, to justify this theory. Consensual incapacity is incapacity relative to the objective rights/obligations of marriage in their juridic essence. It is incapacity regarding marriage considered essentially, in itself; not existentially, insofar as concern the concrete partner chosen. Consensual incapacity relates to marriage, not to spouse. The incapacity is person-to-institution, not person-to-person.²⁸⁶

Burke holds that relative incapacity as it has been used in jurisprudence really means incompatibility, which translates to “the ‘extreme difficulty’ which a person, given his or

282. Burke, "The Essential Obligations of Matrimony," 6.

283. Ibid.

284. Ibid.

285. Ibid., 5.

286. Ibid.

her character, experiences in doing or observing something.”²⁸⁷ As discussed previously, incapacity invalidates consent, not mere difficulty, however great.

On the other hand, positions in favor of relative incapacity take seriously the interpersonal nature of the marital relationship, that is to say, that the decision to commit to marriage is not an abstract choice to be married but a commitment to a particular person; therefore, each marriage is unique and dependent upon the individuality of each spouse. When explaining the conditions for release from an interpersonal commitment, Farley discusses the mutuality of relationship, in which each person’s limitations have the potential to create an impossible situation for the other.²⁸⁸ An example of incapacity relative to the particular spouses is the observation that two persons suffering from hypersexuality may have a satisfactory marriage, whereas one person with that condition may be incapable of assuming the obligation of fidelity with a person without that condition.²⁸⁹ Conversely, positions against relative incapacity take seriously that the commitment to marriage is a commitment to a person *within a particular framework*. Although each marriage is unique, marriage is a certain kind of relationship, and spouses must be capable of assuming the obligations involved in that kind of a relationship with the particular person chosen. Relative incapacity certainly poses the danger of abuse should the ground be applied to the difficult, but not impossible, situation of incompatible personalities or character flaws. Mendonça offers direction in resolution of the dispute:

Marriage as a union between two persons comes into being when their consents meet. Both in the aspect of “union” and in the aspect of “consent” marriage is an interpersonal reality. This union cannot arise in the presence of serious

287. Burke, "The Essential Obligations of Matrimony," 6.

288. Farley, *Personal Commitments: Beginning, Keeping, Changing*, 88.

289. Mendonça, "Consensual Incapacity for Marriage," 535.

psychopathology either in one or in both parties together. Incompatibility of personalities is a psychological fact. Persons are not alike, nor are all persons compatible. This is a normal phenomenon. We can live together in spite of differences in our personalities. Moreover, from a Christian anthropological point of view the strength of grace can enable persons to overcome the differences or to learn to live together productively despite the differences.

But serious incompatibility between two personalities is likely to amount to true incapacity for a lifelong (perpetual) marital union. Only when real psychopathology, and not merely character differences, underlies such an incompatibility in a concrete situation can we admit true “relative incapacity” for assuming the essential obligations of marriage.²⁹⁰

Mendonça mentions the bilateral dimension of consent, thus demonstrating the interpersonal and mutual character of the marital relationship; however, he is clear that normal incompatibility between personalities does not invalidate consent. There must be evidence of real psychopathology.

In cases utilizing c. 1095 as a ground of nullity, canon 1060 must be kept in mind. “Marriage possesses the favor of the law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven.” The basic presumption of law is that people are capable of marriage. Jerry Sherba observes, “So the wide use of canon 1095 in declaring marriage null is contrary to the overarching presumption that people are capable to enter into marriage. Canon 1095 is an exception and must be understood as such.”²⁹¹ The overwhelming use of this canon implies “that we have made the exception the rule.”²⁹² In his allocution of 2009, Benedict XVI asserts “the need for a new and positive appreciation of the capacity to marry belonging in principle to every

290. Mendonça, "Consensual Incapacity for Marriage," 540.

291. Jerry M. Sherba, "Canon 1096: Ignorance as a Ground for Nullity," *CLSA Proceedings* 59 (1997): 283.

292. *Ibid.*

human person by virtue of his or her very nature as a man or a woman.”²⁹³ He warns that we “risk falling into a kind of anthropological pessimism which, in the light of today’s cultural context, would consider marriage as practically impossible.”²⁹⁴ The same could be said of marital commitment insofar as the cultural context is not conducive to an appreciation of marital commitment and the real possibility of remaining in a faithful, loving, generative union for life. It must be emphasized that the incapacity to make a marital commitment is the exception, not the rule. Therefore, the high incidence of marital breakdown must be found in grounds other than incapacity or no grounds for nullity at all. According to Sherba, “The use of traditional grounds for nullity takes into consideration that people are basically capable of entering into marriage but for some reason *did not*.”²⁹⁵ The traditional grounds have been associated with the Augustinian *bona* of marriage and with a more static understanding of intentional psychology: “something intended or excluded here and now, entirely or in part, seriously or lightly, forever or for a time, conditionally or unconditionally, erroneously but not affecting the will or erroneously and affecting the will.”²⁹⁶ The insights of empirical and relational psychology can be applied to more than just c. 1095. Sherba adds, “We need to utilize what we have learned using canon 1095 and see how these insights and understandings

293. Benedict XVI, *Address of His Holiness Benedict XVI to the Tribunal of the Roman Rota for the Inauguration of Judicial Year, 2009*, 2.

294. *Ibid.*

295. Sherba, "Canon 1096: Ignorance as a Ground for Nullity," 283.

296. Martin E. Lavin, "Approaches to Traditional Grounds and the *Bonum Coniugum*: Something Old, Something New, Something Borrowed, Something Askew," *CLSA Proceedings* 55 (1993): 132.

can be applied to traditional grounds, opening up a rainbow of opportunities to use, and thus develop, jurisprudence based upon traditional grounds.”²⁹⁷

5.5.3 Ignorance

Canon 1096—§1. For matrimonial consent to exist, the contracting parties must be at least not ignorant that marriage is a permanent partnership between a man and a woman ordered to the procreation of offspring by means of some sexual cooperation.

§2. This ignorance is not presumed after puberty.

In this canon, ignorance is lack of speculative or abstract knowledge of marriage. Because marriage is “a true, bilateral, consensual contract,” the parties must know what they are giving and accepting in consent.²⁹⁸ The presumption of canon law is that after puberty persons are capable of knowing that marriage is a heterosexual, permanent partnership that is ordered to the *bonum proles* by means of some sexual cooperation. According to this canon, the knowledge required for a valid marriage is minimal. The age of puberty is not specified, although c. 1083 stipulates that a man cannot enter a valid marriage before completion of his sixteenth year and a woman cannot before she has completed her fourteenth year. Consent is invalid if either person is substantially ignorant regarding the personalist element or the procreational element. Regarding the procreational element, it is presumed that after puberty persons know that children are the result of sexual intercourse. Although the procreational element is rather vague, it is the personalist element related to this canon that deserves greater attention. The presumption in canon law is that the parties know that marriage is a permanent *consortium*. Örsy questions, “Permanency certainly means stability; but does it include lifelong

297. Sherba, "Canon 1096: Ignorance as a Ground for Nullity," 283.

298. *Ibid.*, 286.

commitment, that is, indissolubility?”²⁹⁹ He reasons that just as error (wrong knowledge) concerning the indissolubility does not invalidate unless it determines the will (c. 1099), so also ignorance (lack of knowledge) regarding indissolubility does not invalidate. One does not need to know the “doctrine of indissolubility” in order to validly consent to marriage.³⁰⁰ The technical distinction need not apply here.³⁰¹ According to Sherba, “This canon is more geared toward ordinary people’s understanding of marriage and we, as canonists, need to see it as that rather than place layers of canonical interpretations upon it, which we are quite prone to do.”³⁰² Nevertheless, he warns that the ease, availability, and culture of divorce could lead to ignorance that marriage is a permanent commitment and the *consortium* requires self-sacrifice.³⁰³ In reference to the presumption of law in c. 1096 Sherba concludes,

We cannot, as canonists, presume that couples marrying today understand, let alone know, what *consortium* is, given the high incidence of and our society’s acceptance—and at least placid encouragement—of divorce; the media’s fascination with lust and love outside the marital union; the high number of unchurched people and under-educated Catholics sitting in our pews. The utilization of ignorance as a ground for nullity is there; we need to open our canonical eyes, ask the right questions, and come to the realization that persons were capable of entering marriage, but their *consent* was defective, not the person.³⁰⁴

The relation of culture to presumption in the law can only be discussed after addressing error, simulation, and conditional consent.

299. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 133.

300. *Ibid.*

301. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1304.

302. Sherba, "Canon 1096: Ignorance as a Ground for Nullity," 292.

303. *Ibid.*, 292-96.

304. *Ibid.*, 298.

5.5.4 Error about the Person

Canon 1097—§1. Error concerning the person renders a marriage invalid.

§2. Error concerning a quality of the person does not render a marriage invalid even if it is the cause for the contract, unless this quality is directly and principally intended.

Like ignorance, error concerns knowledge; however, ignorance is lack of *due* knowledge, meaning this knowledge is presumed to exist in a person after puberty, whereas error is “false judgment of the mind.”³⁰⁵ Örsy distinguishes the two in the process of coming to know something. “In the case of error there is a judgment, in the case of ignorance there is not. In the case of an error the process of knowing started and went astray, in the case of ignorance it has not even started.”³⁰⁶ Error can occur at the empirical level through inattention to all the facts or at the intellectual level through misunderstanding or at the rational level culminating in a false judgment. Since the levels are sublated, a false judgment will occur if something has gone wrong at any of the levels. Canon 1097, §1 concerns simply the physical identity of the person. A person cannot marry another person who is not the one intended. In cultures where arranged marriages or marriage by proxy are normative, this canon is relevant. Conversely, in the United States where couples date and even cohabit for an extended period of time, the first paragraph of this canon scarcely applies.

Error that causes the contract, or motivating error, does not invalidate unless it is directly and principally intended. “A quality is an enduring characteristic of person that

305. James H. Provost, “Error as a Ground in Marriage Nullity Cases,” *CLSA Proceedings* 57 (1995): 308.

306. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 134.

significantly defines who that person is.”³⁰⁷ Some examples of qualities that have entered into Rotal jurisprudence include: marital status, social status, political affiliation, age, physical health, mental health, virginity, procreative capacity, and moral qualities.³⁰⁸ For invalidating error of a quality of a person to occur, “the quality, erroneously believed to be present, must be an intrinsic part of the object of consent.”³⁰⁹ Motivating error alone does not invalidate, because it is “an error which leads a person to act, but does not necessarily influence the substance of the act itself.”³¹⁰ A quality is directly intended “when it constitutes the *immediate* object of the will-act.”³¹¹ It is principally intended “when the will seeks it ‘prevalently’ or ‘before the person,’ and not secondarily or incidentally.”³¹² An invalidating error is one in which the quality intended is so important to the one in error that if the quality is not present, then the marriage (and consequently, the person) is not wanted.³¹³ To directly and principally intend a quality means the existence of the quality is a *sine qua non* condition to the marriage.³¹⁴ The distinction between a quality that causes the contract (but does not enter the will) and one

307. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1305.

308. Augustine Mendonça, "Error of Fact: Doctrine and Jurisprudence on Canon 1097," *Studia Canonica* 34 (2000): 55-72.

309. The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, "Title VII: Marriage," 614.

310. Provost, "Error as a Ground in Marriage Nullity Cases," 309.

311. Mendonça, "Error of Fact: Doctrine and Jurisprudence on Canon 1097," 43.

312. *Ibid.*, 44.

313. If the error about a quality of a person is due to malicious deception for the purpose of obtaining consent and the quality is such that it would gravely disturb the *consortium*, then canon 1098 would apply.

314. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 49.

that was directly and principally intended is a fine, technical, and theoretical distinction which can lead to practical difficulties in the courts:

The dividing line between the two situations must be drawn in the field of the operations of the human psyche, obscure and complex beyond telling. Moreover, those who intended to marry have not made their decisions according to our fine distinctions. The judges will have to decide if one set of facts (as narrated to them often many years after the event) falls rather into the one than the other category. It is doubtful that the non-technical report of the parties and their witnesses in matters so subtle and delicate can ever provide them with enough evidence to make a well grounded choice instead of a vague conjecture.

It is not prudent to make the validity of marriages to depend on such refined theoretical distinctions that even the experts find them hard to explain.³¹⁵

This criticism could pertain to many of the canons on consent. The juridical distinctions are subtle and technical, so much so that it may prove practically impossible to apply them to real marriages as recounted through the parties' understanding of the marital relationship. That being said, should it be proven that a person valued a quality of a person over the person, then clearly an interpersonal commitment to love another for life has not been made, and the consent is invalid.

5.5.5 Error of Law or Determining Error

Canon 1099—Error concerning the unity or indissolubility or sacramental dignity of marriage does not vitiate matrimonial consent provided that it does not determine the will.

In both c. 1097 and c. 1099, the scholastic dichotomy between the mind and the will is evident. Although the categories of *error simplex* (error that remains in the intellect) and *error pervicax* (error that is so deeply ingrained that it becomes a second nature) of the earlier Code are not used here, the mind/will separation is apparent. This theoretical distinction between error that does not determine the will and error that does determine the will is hard to imagine in practice:

315. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 138.

Of course, one can admit in theory that *if* there is knowledge that is so purely cerebral that it does not affect the decisions and action of a person, *then*, that knowledge should be discounted in evaluating a decision. But the question is precisely if such an internal split between knowledge and decision can ever occur in a normal person. The answer of the Code is: yes it can. The answer of depth psychology is: no, it is not likely; if it does, a serious personality disorder may be hiding below the surface.³¹⁶

Örsy brings to light another discrepancy with this canon. “It implies that a human person can commit himself or herself to a lifelong obligation without knowing about it.”³¹⁷ If a person erroneously believes that marriage is dissoluble in a way that does not determine the will, how, in fact, does that same person make a commitment to an indissoluble marriage? Örsy adds, “The ordinary assumption should be rather that every person wants marriage as it is known to him: indissoluble or otherwise.”³¹⁸ Error that determines the will occurs when the person intends the distorted object of consent and is *unaware* of the erroneous judgment. One explanation for the plausibility of error that does not invalidate could be if a person thinks that marriage is dissoluble and divorce is an option, yet upon learning of the church’s teaching on indissolubility, the one in error persists in consenting to marriage; in conjunction with c. 1098, if awareness of one’s erroneous judgment *does not* gravely disturb the *consortium* of conjugal life, then it was not determining error, and the marriage is valid. However, in the Church in the United States today where marriage preparation is required, it is hard to imagine how one could be unaware of the church’s teaching on marriage. Robitaille suggests a scenario where error determining the will is possible in this context:

316. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 141.

317. *Ibid.*

318. *Ibid.*, 142.

Thus, as an example, a person might truly believe that marriage is dissoluble; he or she might go to marriage preparation classes and learn the Church's teaching on indissolubility, but that teaching does not affect him or her because that person truly believes that the Church's teaching has nothing to do with him or her. In this sense, the person is in error not of the Church's understanding of indissolubility in itself, but of the fact that the Church expects this understanding to apply to him or her and the marriage about to be entered.³¹⁹

Marital consent is not a generic intention (a general disposition, attitude, or preference) or a habitual intention (an enduring, intellectual tendency), because it is an intention directed toward marriage, which is characterized by unity, indissolubility, and possibly sacramental dignity with a particular person. A person's generic or habitual intention may "remain in the intellect" if he or she tries to escape living morally by avoiding self-consciousness. Effective freedom can be limited by one's culture and even through one's previous decisions to live self-conscious-less.

To invalidate consent according to the ground of determining error, the person chooses a distorted object of consent, yet does so unknowingly. This is one of the reasons identifying the object of consent is significant and, at the same time, challenging. Provost denotes three approaches to identifying the object of marital consent.³²⁰ First, one may look to the canons on marital consent, specifically c. 1055, §1, c. 1056, and c. 1057, §2. This was the main approach used in this study. The second approach is by looking to the canon on simulation, that is, c. 1101, §2. This canon was referred to briefly, and will be addressed in depth shortly. The third approach to identifying the object of consent is to look at the canon on ignorance, c. 1096, which offers a very minimal sketch of what marriage is. Provost asks, "Given that there are three approaches

319. Lynda A. Robitaille, "Simulation, Error Determining the Will, or Lack of Due Discretion? A Case Study," *Studia Canonica* 29 (1995): 413.

320. Provost, "Error as a Ground in Marriage Nullity Cases," 310-11.

in the law stating what the object of matrimonial consent is, is there any one of the three which is imposed over the other two, and hence establishes the requisite element in order for error about the object of consent to invalidate marriage?"³²¹ Assuming the object of consent can be identified through a combination of all three approaches, we need to look more closely at the canon on simulation.

5.5.6 Simulation of Consent

Canon 1101--§1. The internal consent of the mind is presumed to conform to the words and signs used in celebrating the marriage.

§2. If, however, either or both of the parties by a positive act of the will exclude marriage itself, some essential element of marriage, or some essential property of marriage, the party contracts invalidly.

Canon 1101 states another legal presumption, which according to c. 1584 is thus defined: "A presumption is a probable conjecture about an uncertain matter; a presumption of law is one which the law itself establishes; a human presumption is one which a judge formulates." This presumption so central to the validity of marriage "is really a confession on the part of the law of its incapacity to judge the presence or absence of an internal act such as consent."³²² A person's internal consent is presumed to correspond to the external, public expression of consent unless contrary evidence proves otherwise (see c. 1585). Because there is no definitive and absolute way to know that the external words and signs expressing consent are true to the act of internal consent, it is possible that one may simulate consent. Simulation occurs by a positive act of the will, meaning that "something is posited (an act takes place)."³²³ The corollary of this is that

321. Provost, "Error as a Ground in Marriage Nullity Cases," 311.

322. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 55.

323. James H. Provost, "Simulated Consent: A New Way of Looking at an Old Way of Thinking, Part I," *The Jurist* 55 (1995): 705.

“mere inadvertence or non-inclusion of the essential elements or properties of marriage does not constitute simulation.”³²⁴ The key to understanding this distinction is “positive act of the will” versus “inadvertence.” Örsy clarifies the distinction: “to exclude positively implies an act of rejection; it implies that a person who has become aware of a value decides to reject it.”³²⁵ Again the technical distinctions can be nearly impossible to apply to real cases. “The question can also be raised, and pertinently so, as to what is the difference between a person not intending indissolubility and another positively excluding it. The two situations can be so similar that to attribute to them different legal effect may not be sound jurisprudence.”³²⁶ On top of the distinction between exclusion and non-inclusion, a myriad of additional technical distinctions are piled:

On the other hand, an act of the will need not be actual, absolute, or explicit to invalidate marriage; it is sufficient that the act be virtual, hypothetical, or implicit. An act of the will is actual if it is, in fact, elicited at the time of the wedding; it is virtual if it is formulated prior to the external exchange of consent, even a long time prior to it, and never retracted. An act of the will is absolute if it excludes marriage itself or one of its essential elements or properties without qualification; it is hypothetical when it excludes marriage or one of its essential elements or properties only if certain conditions are met.³²⁷

Because the term “implicit simulation” is central to this study, it requires greater analysis to be conducted shortly.

324. The Canon Law Society of Great Britain and Ireland in association with The Canadian Canon Law Society, “Title VII: Marriage,” 617.

325. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 144.

326. Örsy, “Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107,” 56.

327. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1312-13.

Simulation can be total (exclusion of marriage itself) or partial (exclusion of an essential property or essential element). Total simulation occurs when one excludes marriage itself from consent. A person can simulate totally in the following ways:

- (1) By not intending to contract marriage at all, i.e., by reducing the ceremony to an empty show;
- (2) By undergoing the ceremony solely to obtain an end absolutely extrinsic to marriage itself;
- (3) By excluding from the object of his/her consent the very core of marriage, i.e., the exchange of the perpetual and exclusive right over the body;³²⁸
- (4) By excluding sacramentality from the marriage;³²⁹
- (5) By substituting for the Christian idea of marriage some other notion which is genuinely antithetical to marriage.³³⁰

Partial simulation occurs when a person excludes from consent an essential property or an essential element. The essential properties of unity and indissolubility (c. 1056) have already been discussed, and the question of what constitutes the essential elements of marriage has been explored as well. Örsy reasons, “The ‘elements’ in all probability stand for the ‘ends.’”³³¹ Provost cites different lists of essential elements from various canonists before concluding with “a more practical listing of essential elements listed in the canons as belonging to the very nature of marriage, such as the following: the good of the spouses (c. 1055, §1), the procreation and education of children (c. 1055, §1), the right to conjugal acts which are per se suitable for the generation of children (c. 1061, §1), the perpetuity and exclusivity of the marital bond (c. 1134), and for baptized person,

328. This explanation is a reversion to the *ius in corpus* of the previous code.

329. Whether or not the exclusion of sacramental dignity from consent amounts to total simulation is a matter of continued debate and will be addressed subsequently.

330. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1313.

331. Örsy, "Matrimonial Consent in the New Code: *Glossae* on Canons 1057, 1095-1103, 1107," 56.

the sacramental dignity of their union (cc. 1055,1134).³³² Although exclusion of an essential element is listed as a ground for nullity, jurisprudence has focused on the three Augustinian *bona* (*contra bonum prolis, contra bonum fidei, and contra bonum sacramenti*).³³³ Due to the focus on the three *bona*, exclusion of the *bonum coniugum* has been met with resistance; the first sentence judged on this ground did not occur until the year 2000, seventeen years after the promulgation of the revised Code.³³⁴ In order to understand these grounds of partial simulation, particularly exclusion of the *bonum coniugum*, it is necessary to examine implicit simulation.

Implicit simulation (implied exclusion) involves a positive act of the will.

Provost explains how an implicit act of the will can be, at the same time, a positive act of the will:

A positive act of the will can be explicit or implicit. An explicit act is a direct act; e.g., someone externally consents to marry, but internally refuses marriage. The person lies at the altar. An implicit act is folded into something else (“implicit”—*in plico*, in the fold). It is implicit because it is contained in another act; e.g., one who simulates by willing something incompatible with marriage.³³⁵

Robitaille articulates the distinction in another way:

There has to be the knowledge of what the Church believes marriage to be, and a positive rejection of that belief. Even though there must be a positive rejection of the Church’s understanding of marriage, that rejection can be an implicit one. In other words, the rejection does not have to be so explicit that if the petitioner does not say “I do not believe in the Church’s understanding of marriage,” then the act of the will has not been proven. No, the act of the will can be implicit: it can be

332. James H. Provost, "Simulated Consent: A New Way of Looking at an Old Way of Thinking, Part I," 703-05.

333. *Ibid.*, 705.

334. Mendonça, "Recent Developments in Rotal Jurisprudence on Exclusion of the *Bonum Coniugum*," 380.

335. James H. Provost, "Simulated Consent: A New Way of Looking at an Old Way of Thinking, Part I," 706.

understood by the court through the person's actions, not only through his or her words.³³⁶

Marital consent is an act of rational self-consciousness in which one chooses to give oneself and accept the other in order to form a communion of life and love. The wedding liturgy is an external expression of the giving and receiving that is promised for life. However, it is possible that in either or both of the spouses resides an implicit will contrary to the explicit will expressed. Again, the legal presumption is that the spouses are willing together a lifetime commitment to one another that is faithful, fruitful, and forever. In cases of implicit simulation, the actual will of the spouse or spouses does not conform to the expressed intention, and this contrary will is revealed through his or her actions.

Robert Sanson affirms the canonical meaning of consent. The very minimal description of what is promised in marriage makes possible the fullness of conjugal love theologically understood:

There is no doubt, however, that the minimal commitment and consent must be mutual, marital, and loving. The reciprocal giving of self and receiving of the other cannot include any reservations that would exclude any essential elements of marriage. The gift of self must be minimally given and effective enough to form a basis for a lifelong, stable commitment. It may not be enough for a person to intend marriage as personally conceived, or to be "in love." The actual intention reveals itself in behavior that must include all the essentials of marriage. For marriage to have a chance of success, both parties must wholeheartedly give and accept that minimal type of consent adequate to support a marriage. Each party must be willing to accept the other realistically, as is, without demand or expectation of remaking the other person according to one's own wishes.³³⁷

336. Robitaille, "Simulation, Error Determining the Will, or Lack of Due Discretion? A Case Study," 411-12.

337. Robert J. Sanson, "Implied Simulation: Grounds for Annulment?" *The Jurist* 48 (1988): 753-54.

Sanson notes that the total gift of self mutually exchanged in consent does not imply an unattainable ideal. He continues, “Jurisprudence must distinguish in the concrete case whether a person has made even the minimal necessary gift of self. Yet unless the initial commitment is wholehearted, the proper love and motivation will not be there to sustain them through difficult times.”³³⁸ This point resonates with Lavin’s assertion garnered from Thomistic thought that *matrimonium in fieri* and *matrimonium in facto esse* are not strictly temporal categories.³³⁹ The possibility for realizing a marriage characterized by unity and indissolubility (and sacramentality) and ordered to the *bonum proles* and *bonum coniugum* must be present at the time of consent. That possibility is found in the initial commitment. However, he clarifies that there is a difference between defective consent due to implied exclusion and failure to remain faithful to a valid commitment. “There is also the problematic popular mentality growing in the United States that regards individualism and self-fulfillment as a higher value than lifetime commitment and obligation. Judges must carefully discern whether a specific case is one of simulation, or merely a subsequent refusal to maintain the commitment once validly made.”³⁴⁰ Simply because a marriage has failed does not necessarily mean that consent was defective. Implicit exclusion requires proof of a positive act of the will. Arriving at the judgment that an implicit act of exclusion has been proven with moral certainty is a demanding and somewhat tricky juridical analysis of the evidence.

338. Sanson, "Implied Simulation: Grounds for Annulment?" 754n18.

339. Lavin, "Approaches to Traditional Grounds and the *Bonum Coniugum*: Something Old, Something New, Something Borrowed, Something Askew," 123-24.

340. Sanson, "Implied Simulation: Grounds for Annulment?" 754.

An interesting phenomenon in canon law occurred during the time between the Second Vatican Council and the promulgation of the revised Code in 1983.³⁴¹ Beginning in 1971 with a decision from John Humphreys, British jurisprudence began to take an interest in the ground of implicit simulation. Ralph Brown employed and advanced this ground which was formulated using various names such as: inadequate consent, lack of commitment, non-inclusion, and defective consent amounting to simulation.³⁴² In a 1976 article titled, "Lack of Commitment in Consent," Humphreys argues that the fact that exclusion required proof of a positive intention against an essential property was due to the presumption that "when people marry they wish to do what human beings usually do, and therefore that they wish to enter a union which is indissoluble, implies fidelity and is open to children."³⁴³ This presumption dates from 1767 when Benedict XIV in *De synodo dioecesana* expressed the presumption that when people marry, they have the intention to marry as Christ wills, and this intention overcomes any personal error they may have regarding marriage.³⁴⁴ This presumption is the source of the distinction between simple error which does not invalidate and determining error which does. Humphreys, along with many jurists including Brown, questions the reliability of this presumption in the rising culture of divorce. In addition, Brown seriously questions the presumption that people inwardly intend and mean what they outwardly express and say.³⁴⁵ Using examples, Brown explains implicit simulation as a kind of "non-inclusion"

341. Peter Kitchen, "Matrimonial Intention and Simulation," *Studia Canonica* 28 (1994): 347.

342. Sanson, "Implied Simulation: Grounds for Annulment?" 755.

343. John Humphreys, "Lack of Commitment in Consent," *Studia Canonica* 10 (1976): 350.

344. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1309.

345. Ralph Brown, "Non-Inclusion: A Form of Simulaiton?" *CLSA Proceedings* 41 (1979): 1.

rather than an explicit exclusion of one or more of the Augustinian *bona*.³⁴⁶ “That is to say the person directly and explicitly intends *this* sort of marriage; and no other. But within this thing which is directly and explicitly willed (this sort of union) there is an accompanying non-existence of one of the essential elements of marriage.”³⁴⁷ Sanson explains that this non-inclusion is not mere inadvertence in that it is still a positive act of the will, although an implicit one:

Authors such as Brown situated the grounds under the classic heading of simulation. Even his concept of “non-inclusion” is not an absence of a positive will, but a very positive plan to enter a marital arrangement that effectively excludes the consortium or one of its essential elements or properties. The fact that it may be virtual and implicit does not make it any less effective in vitiating consent.³⁴⁸

Brown focused on the object of consent as being defective rather than a lack of commitment or inadequate consent in the subject due to the difficulty in assessing the quality or degree of consent. Brown states, “The term I first had problems with was *lack of commitment*. I felt the term seemed to imply the necessity of a device to measure the consent in terms of the amount of its ‘thrust.’”³⁴⁹ He questions, “What could possibly be the yardstick for measuring such thrust?”³⁵⁰ In a 2001 article, Brown explains the shift in formulation:

Practically speaking, it was impossible to determine from the individual circumstances of the case whether the necessary consent had been given. Was the ordinary man’s concept of marriage present or not? How was the “volume” of

346. Brown, "Non-Inclusion: A Form of Simulaiton?" 2.

347. *Ibid.*, 6.

348. Sanson, "Implied Simulation: Grounds for Annulment?" 756.

349. Ralph Brown, "Simulation Versus Lack of Commitment," *Studia Canonica* 14 (1980): 335.

350. Ralph Brown, "Total Simulation: A Second Look," *Studia Canonica* 10 (1976): 237.

consent measured? One term employed at this time was “white hot commitment”; but was *his* commitment more white or more hot than *her* commitment? It became clear that this (i.e., the nature of the proof required) was not going to be an easy nor profitable area to cultivate. Hence the direction of the investigation turned back once more to examine more closely the concept of what was included or not included in a person’s consent.³⁵¹

Brown notes that at the time the ground of implicit simulation (inadequate consent, lack of commitment, non-inclusion) was being developed, a “new toy” was occupying the attention of English-speaking canonists. This “new toy” was the development of the grounds of lack of due discretion and the inability to assume the essential obligations of marriage, which were eventually “canonized” in c. 1095, 2 and c. 1095, 3 of the 1983 Code.³⁵² Brown believes the misleading formulation of implicit simulation as either inadequate consent or lack of commitment was due to misunderstanding the burgeoning concept of lack of due discretion and misconstruing the ground of total simulation.³⁵³ “I had understood (and I don’t think I was in a minority of one) that total simulation always took with it an element (if not considerably more than that) of malice in a person simulating.”³⁵⁴ Therefore, in a case where malicious intent was not found, total simulation was not considered. Both the development of the ground of implicit simulation and the development of the grounds of lack of due discretion and the incapacity to assume occurred during the rising culture of divorce, with the divorce rate peaking around 1980. Juridically, the church seemed to be trying to make sense of the rapid breakdown of the institution of marriage and find a practical way to deal with

351. Ralph Brown, "From Total Simulation to Error Determining the Will," *Studia Canonica* 35 (2001): 155-56.

352. *Ibid.*, 154-55.

353. Brown, "Total Simulation: A Second Look," 239.

354. *Ibid.*, 238.

the reality of so many divorced and remarried Catholics. Once the grounds of consensual incapacity were canonized, attention to simulation waned, at least in the United States which accounts for the majority of the world's declarations of nullity. The overuse of c. 1095, 2^o and c. 1095, 3^o in the English-speaking countries was the subject of the allocutions to the Roman Rota of John Paul II in 1987 and 1988 as already described. Brown relates that there were comments from the Apostolic Signatura contained in unpublished documents to tribunals regarding too many cases judged under c. 1095.³⁵⁵ Peter Kitchen suggests, "One possible explanation why the possible influence of lack of commitment on validity has not been of greater concern to canon lawyers could be that cases brought to our tribunals where there are indications that the commitment of the parties is suspect, are frequently dealt with under the title of 'lack of due discretion' or 'incapacity.'"³⁵⁶ Cultural attitudes can exert an influence on both grounds of simulation and incapacity, yet Kitchen maintains there is a difference between one who *cannot* elicit valid consent and one who *did not* elicit valid consent but "who could have, and should have."³⁵⁷ It is my argument that greater attention to implied exclusion, particularly exclusion of the *bonum coniugum*, could encourage greater understanding of what is happening to marriages in the United States, even sacramental marriages.

According to Kitchen, some of the ambiguity surrounding implicit simulation or lack of commitment in consent can be clarified by focusing on intention. "The 'right

355. Brown, "From Total Simulation to Error Determining the Will," 156-57.

356. Kitchen, "Matrimonial Intention and Simulation," 348.

357. *Ibid.*, 349.

intention,' for the canon lawyer, is that which the law requires to produce the juridical effect."³⁵⁸ The general norm regarding the validity of juridic acts is found in c. 124:

Canon 124—§1. For the validity of a juridic act it is required that the act is placed by a qualified person and includes those things which essentially constitute the act itself as well as the formalities and requirements imposed by law for the validity of the act.

§2. A juridic act placed correctly with respect to its external elements is presumed valid.

Canon 124 is the general norm stating the presumption that the “manifested will” is in congruence with the “intended will.”³⁵⁹ This presumption can be overturned by sufficient proof. If the intended will is contrary to the manifested will, then the juridic act is invalid. During a wedding, the spouses intend *something*; the legal presumption is that they intend to form a lifelong, faithful, and fruitful (sacramental) union with the other. The ground of inadequate consent is misleading, because it does not make sense to say that they lack intention or that the intended will is absent. In the act of getting married, the couple intended something; however, their internal, intended will may be contrary to their external, expressed will. Implicitly, they may intend an erroneous view of marriage lacking in some essential element or property. In addition, the ground of inadequate consent or lack of commitment was used for couples who seemed to drift into marriage without the degree of commitment that is due a relationship of this importance.³⁶⁰ As Brown suggests, such a case could be adjudicated on the ground of lack of due discretion.³⁶¹ Of course, each case is heard and judged individually, and so it is

358. Kitchen, "Matrimonial Intention and Simulation," 349.

359. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 179.

360. Humphreys, "Lack of Commitment in Consent," 357.

361. *Ibid.*, 359.

impossible to make a general conclusion. That being said, the ground of lack of due discretion should not be used as “a kind of umbrella under which one can put everything.”³⁶² Marriages declared invalid due to a lack of due discretion should involve a true incapacity. In advocating for the ground of lack of commitment in 1976, Humphreys agrees that there is great difficulty in measuring one’s degree of commitment, yet such difficulties should not discourage further investigation. He mentions cases in which those who knew the couple were convinced the marriage would not last. He concludes,

We are not seeking to establish that everyone who marries must do so in a white-hot heat of passion—but we all know that there is a minimum which must be there if it is to be a full commitment of the person in the most intimate relationship possible. We may not be able to describe it positively or give any yardstick to measure it, but we are aware when it is absent and this, I submit, is sufficient.³⁶³

Although written nearly forty years ago, such cases where one or both spouses lack the commitment necessary are prevalent today. Greater attention to the role of intention will aid in understanding these cases from both a juridical and theological perspective.

5.5.7 Intention and Consent

Peter Kitchen argues that a shift in focus to “the essential elements of matrimonial intention places the emphasis on the personal and qualitative determining factors. Intention connects the motivating force for the consent and elective choice with the consequence.”³⁶⁴ The subjective and objective aspects of consent are related through

362. Humphreys, "Lack of Commitment in Consent," 360.

363. *Ibid.*, 362.

364. Kitchen, "Matrimonial Intention and Simulation," 353.

intention.³⁶⁵ The presumption that people always intend what they say is not always the case:

However, the choice, consent, and the will could all be quite adequate for what is intended but that which is intended does not correspond to the meaning of marriage. The meaning of the words of the marriage ceremony may not coincide with the intended meaning. Where this disparity originates in the intention of one of the parties, it seems appropriate to speak in terms of simulation.³⁶⁶

The focus on intention seems particularly appropriate considering the tenet previously discussed that it is intention that is constitutive of the sacrament of marriage. From the time of Aquinas it has been the teaching of the church that the validity of sacramental action depends upon right intention.³⁶⁷ For sacramental action to be efficacious, the intention of the participants must be in accord with the intention of the church. In its Propositions on the Doctrine of Christian Marriage, the ITC states, “The intention of carrying out what Christ and the Church desire is the minimum condition required before consent is considered to be a ‘real human act’ on the sacramental plane.”³⁶⁸ In his study on exclusion of the sacramentality of marriage, Mendonça concludes,

According to the prevailing doctrinal and jurisprudential positions on the issue, a person who, for lack or absence of faith, is not properly disposed to receive the sacrament may either explicitly or implicitly exclude the sacramental aspect and thereby cause the nullity of marriage. It is the positive contrary intention, and not the lack or absence of faith per se, which would underlie the nullity.³⁶⁹

From this teaching, Kitchen brings to light that there is an *obligation to right intention*:

365. Kitchen, "Matrimonial Intention and Simulation," 353n21.

366. Ibid., 353.

367. Wrenn, "Sacramentality and the Invalidity of Marriage," 225.

368. International Theological Commission, *Propositions on the Doctrine of Christian Marriage*. 1977, prop. 2.3, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html (accessed Feb 23, 2013).

369. Mendonça, "Exclusion of the Sacramentality of Marriage: Recent Trends in Rotal Jurisprudence," 47.

The situation to be considered is that of a person who fails to meet the requirements of “right intention” but not because of an incapacity to form the proportionate discretionary judgment required for marriage. The person could have and should have the “right intention” but fails in their duty with respect to some essential element or elements of intention. In such circumstances it seems appropriate to investigate and suggest responsibility for an exclusion when one has occurred.³⁷⁰

From this, Kitchen finds a parallel in the tradition of English common law regarding responsibility by negligence using the heuristic device of *mens rea/actus reus*.³⁷¹ Here *mens rea* does not refer to a “moral assessment but a legal one of imputability.”³⁷²

Recalling the difference between inadvertence and negligence in English common law, Kitchen argues that “there could be a *mens rea* of culpable neglect if it can be established that the bride and groom have a duty with respect to the intention of certain elements.”³⁷³

Using this heuristic device, one need not attribute malice to the simulator as Brown admitted he had mistakenly done in the past.³⁷⁴ *Mens rea* refers to the judgment of the court that the evidence proves affirmatively that the person is responsible for the exclusion, *actus reus*.³⁷⁵ It has been explained that consent makes marriage, and one must be capable of eliciting valid consent; this has been developed in jurisprudence. What needs further development is the prevalence of many cases where persons are capable of right intention and yet fail in the “duty of genuine intention to give oneself and

370. Kitchen, "Matrimonial Intention and Simulation," 356.

371. *Ibid.*, 357-58.

372. *Ibid.*, 358.

373. *Ibid.*, 359.

374. *Ibid.*, 363.

375. *Ibid.*, 387.

receive the other.”³⁷⁶ The undue focus on incapacity has been to the detriment of intention. Kitchen continues, “Capacity to bring to term and fulfill the matrimonial consent was developed in psychological terms. Capacity alone does not effect the achievement. Also required is an intention towards such an achievement. The irrevocable and personal and faithful covenant to be achieved requires beyond capacity, an intention to perpetuity and fidelity.”³⁷⁷ Intention is pivotal in understanding what an action means for the subject. Just as *matrimonium in fieri* was described as containing all that *matrimonium in facto esse* can be, so the content of the intention determines the living out of the intention throughout the marital relationship.³⁷⁸ Intention drives meaning and directs not only the present act of consent (whether valid or invalid) but also the future of the marital *consensus* (whether valid or invalid).

The lines of demarcation, which differentiate the various grounds of nullity one from another, are quite fine. Calling it “an epistemological exercise,” Kitchen asserts the extreme difficulty of distinguishing among these grounds, both in theory and in practice.³⁷⁹ Among jurists, the criteria for differentiating among the grounds are varied as well. After analyzing a few significant Rotal decisions, Brown concludes, “From this little selection of cases with reasonably comparable facts and circumstances, it shows that it depends very largely on the judge as to how the circumstances are to be viewed and how the grounds seem to vary from *total simulation*, both explicit and implicit (whether by reason of *error pernicax* or not) to the *lack of due discretion*. The same can be said of

376. Kitchen, "Matrimonial Intention and Simulation," 373.

377. *Ibid.*

378. *Ibid.*, 376.

379. *Ibid.*, 362, 367.

conforming sentences.”³⁸⁰ An example of how the same juridic facts can lead to affirmative judgments yet on different grounds is Robitaille’s study of the “Bologna hippy case.”³⁸¹ In this case two seemingly incompatible grounds of nullity, total simulation and grave lack of due discretion, were judged to be substantially conforming because the tribunals relied on the same juridic facts.³⁸² Traditionally, these grounds are considered mutually exclusive, because incapacity means one is unable to give consent, whereas simulation means one is able to give consent but for a reason (*causa simulandi*) did not give consent validly. In Sean Sheridan’s study of equivalently or substantially conforming sentences regarding incapacity and simulation, the complexity of the evaluation of specific cases under various grounds of nullity is revealed.³⁸³ Sheridan concludes that the proper use of equivalent or substantial conformity of sentences “can be a welcome and time saving resolution of cases,” thus allowing persons full participation in the sacramental life of the church.³⁸⁴ One may well wonder if such a complex system open to a great deal of interpretation is the most suitable structure for promoting justice and sacramental participation. Perhaps concentrating on intention can help differentiate the various grounds of nullity relating to defects of consent.

Anthony Kerin differentiates among the various grounds through a look at the intentions that would cause defective consent. Invalidating consent due to **determining**

380. Brown, "From Total Simulation to Error Determining the Will," 166.

381. Robitaille, "Simulation, Error Determining the Will, or Lack of Due Discretion? A Case Study."

382. Pontifical Council for Legislative Texts, *Dignitas Connubii*, art. 291 §2.

383. Diagrams are utilized for each case to designate the decision of each tribunal up to the fourth instance court for some cases.

384. Sean O. Sheridan, "Incapacity and Simulation: Mutually Exclusive Grounds or Key Juridic Facts Underlying Conforming Sentences?" *The Jurist* 70 (2010): 367.

error (c. 1099) occurs when a person conveys through words and/or actions, “‘I want marriage as I understand it.’ I don’t know that I am wrong. I am not even aware that I am in error. I want what I consider to be marriage.”³⁸⁵ This person intends one’s own particular marriage as he or she understands it unaware and inadvertently in error.³⁸⁶

Invalidating consent due to **partial simulation** (c. 1101, §2) occurs when a person conveys through words and/or actions, “‘I want marriage but without the children, or without the permanence or fidelity.’”³⁸⁷ In partial simulation, one has intentionally chosen marriage devoid of one or more of the Augustinian *bona*, essential properties, or essential elements.³⁸⁸ Included in that which could be excluded is sacramental dignity. Traditional jurisprudence considers exclusion of sacramental dignity to be total simulation, because the contract and the sacrament are inseparable for the baptized.³⁸⁹ Some jurists consider sacramentality an essential property that inheres to the essence of marriage for the baptized, thus making possible the exclusion of the property of

385. Anthony L. Kerin, "Simulation: New Lyrics to an Old Tune," *CLSA Proceedings* 73 (2011): 158.

386. Jurists do not agree about how error causes invalidity. Here, determining error has been presented as an autonomous ground in that the person chooses what he or she knows even if the object is defective. The consent is invalidating, because the object of consent is defective, disordered, or deficient; consequently, the “marriage” would be as well. Other jurists hold that determining error is a species of implicit simulation, because the error causes a positive act of exclusion implicitly contained in the act of willing an erroneous view of marriage. Finally, some jurists hold that error causes nullity by attaching an implicit condition *sine qua non* to the will. See John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000), 1310.

387. Kerin, "Simulation: New Lyrics to an Old Tune," 158.

388. Admittedly, there is overlap among the *bona*, the properties, and the elements; this is not surprising considering they all pertain to the essence of marriage.

389. Mendonça, "Exclusion of the Sacramentality of Marriage: Recent Trends in Rotal Jurisprudence," 13.

sacramentality.³⁹⁰ Still others consider sacramental dignity an essential element added on to the natural institution of marriage as symbol of grace.³⁹¹ In either case, it is “the positive contrary intention, and not the lack or absence of faith per se, which would underlie the nullity.”³⁹² Partial simulation can occur when the *bonum coniugum* is excluded as well, because the ordination of marriage to the *bonum coniugum* is an essential element. Invalidating consent due to **total simulation** (c. 1101, §2) occurs when a person conveys through words and/or actions, “‘I want a wedding but I don’t want a marriage.’ They want a wedding for some other effect such as residency, a work permit, inheritance or legitimacy of offspring, but they do not want a lifelong union of man and wife.”³⁹³ Total simulators “intend a wedding while pretending a marriage.”³⁹⁴ Finally, invalidating consent due to **condition** (c. 1102) occurs when a person conveys through words and/or actions, “‘I want a marriage but I want it on my terms.’ These are the ground rules for this union. If they are not fulfilled, then the marriage is off.”³⁹⁵

Canon 1102—§1. A marriage subject to a condition about the future cannot be contracted validly.

390. Mendonça, "Exclusion of the Sacramentality of Marriage: Recent Trends in Rotal Jurisprudence," 13.

391. *Ibid.*, 34. Whether sacramentality is an essential property or element is immaterial, because the positive exclusion of either from consent invalidates. That being said, I would argue that sacramentality is an essential property for the baptized faithful, just as unity and indissolubility are for all the married. It is one with marriage and *descriptive* of its essence. On the other hand, essential elements are *constitutive* of marriage, that is, parts or components that make up the whole. Sacramentality is not something that is added on to marriage, but rather the characteristic of a marriage transformed by Christ. If sacramentality is understood as marriage transformed by Christ through faith and baptism, then the traditional position of the exclusion of sacramentality as total simulation would be accurate as well.

392. Mendonça, "Exclusion of the Sacramentality of Marriage: Recent Trends in Rotal Jurisprudence," 47.

393. Kerin, "Simulation: New Lyrics to an Old Tune," 158.

394. *Ibid.*, 159.

395. *Ibid.*, 158.

§2. A marriage entered into subject to a condition about the past or the present is valid or not insofar as that which is subject to the condition exists or not.

§3. The condition mentioned in §2, however, cannot be placed licitly without the written permission of the local ordinary.

Örsy explains, “When the act of consent is conditioned, the covenanting party intends, *with the very same act*, to commit himself *and* to suspend the effect of the commitment.”³⁹⁶ Marital consent subject to a condition seems like an oxymoron. “There is something absolute in the marital promises; to give them away conditionally verges on the absurd.”³⁹⁷

5.5.8 Exclusion of the *bonum coniugum*: A Consideration

Of these grounds the exclusion of the *bonum coniugum* is a source of nullity worth further exploration in relation to commitment and the reality of so many failed marriages today. Robitaille offers such an exploration suggesting “that the exclusion of the *bonum coniugum* occurs more than we recognize today.”³⁹⁸ As mentioned previously, until the year 2000 not a single case had been judged by the Tribunal of the Roman Rota on exclusion of the *bonum coniugum*.³⁹⁹ Although the rule of case precedent is not recognized in canonical jurisprudence, these cases make clear that the ordination of marriage to the *bonum coniugum* is an essential element of marriage, and therefore, can be the object of partial simulation, either explicitly or implicitly. We have already discussed how the *consortium totius vitae* fosters maturation and sanctification when spouses are committed to one another in a life together characterized by unity and

396. Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions*, 146.

397. *Ibid.*, 147.

398. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," 149.

399. Mendonça, "Recent Developments in Rotal Jurisprudence on Exclusion of the *Bonum Coniugum*."

permanence (and sacramentality). Marriage itself does not spontaneously mature and sanctify the spouses, but rather, the spouses' commitment to the good of the other as well as oneself within the marital relationship moves the *consortium* toward the *bonum coniugum* and the *bonum prolis*. Conjugal love (as any love) leads to its own perfection while at the same time expanding generously for the good of children that may come and the good of the wider community. It is this commitment, a deliberate, conscious human act of responsibility, expressly made and continually lived that effects marriage's salvific purpose. The presumption of law is that spouses intend their marriages to lead to the *bonum coniugum*, that their consent is truly an act of love. Cases judged on the ground of exclusion of the *bonum coniugum* must demonstrate proof that in a particular case such a presumption can be overturned. Using the two Rotal cases from 2000 and another decided in 2004, Robitaille explores how this is a real possibility in contemporary American culture.

Due to the nature of the ground of exclusion of the *bonum coniugum*, it would be rare indeed for the exclusion to be explicit; the Jemolo case would be an example of the explicit exclusion of the *bonum coniugum* and such a case is quite outrageous. However, cases on the ground of implicit exclusion of the *bonum coniugum* could become quite prevalent due in part to the ethos of contemporary American culture, particularly the rise of individualism as described in the previous chapter. The intended exclusion is implicit in the simulator's actions, attitudes, and lifestyle. Robitaille argues, "Nevertheless, I think there is an exclusion of ordination to the good of the spouses that we see in our North American society fairly frequently, the exclusion that is seen when a person puts him or herself and his or her own needs first before and above any needs of the couple,

and certainly before any needs of the spouse.”⁴⁰⁰ Here we can recall Lonergan’s explication of the three biases causing cultural decline in which individuals are short-sighted and self-centered refusing to look at the larger issues and the long-term view necessary for marital commitment. In a marriage, each spouse accepts responsibility for his or her unilateral contribution to the *consensus*. Consent is *bilateral, a mutual giving and receiving of persons*, and should one person fall short (through choice, not incapacity) by intentionally choosing a marriage bereft of the giving necessary for the *consortium*, the marriage could be invalid:

What I am highlighting as a possibility, rather, is the case where there is not a psychic anomaly so grave that it affects the person’s ability to consent. Rather, a person who is so self-centered—not to the point of illness that is going to remove the possibility of consenting validly—that the choice he or she makes is to choose a unilateral ‘partnership’ marriage for the sake of his or her own betterment or his or her own purposes, with no regard for the betterment or purposes of the other, or for themselves as a couple.⁴⁰¹

Just as the possibility of making prudent decisions rests upon the prerequisite desire for the good, so also in marriage, the possibility of living up to the obligations of marriage once created will be greatly dependent upon the desire and intention toward the goods or values of marriage. One must intend the goods of marriage initially in order to be able to experience those goods throughout the marriage. This includes the *bonum coniugum*. According to a recent decision of the Canadian Appeal Tribunal *coram* McCormack, the necessary elements for the “perfection of the spouses precisely as spouses” (the *bonum coniugum*) consist of “the *right* to the dignity of the person, the *right* to fundamental

400. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," 162-63.

401. *Ibid.*, 163.

human rights, which include the right to one's physical, moral, spiritual, sexual, psychological integrity, etc."⁴⁰²

Marriage is inherently ordered to the conjugal good of BOTH spouses. The real danger in the myth of "The One," the soul mate theory, and the view of marriage as a SuperRelationship is that marriage is believed to be that extraordinary relationship where all MY needs will be met. In this view, marriage is intended primarily for self-fulfillment. In the process of consenting, the crucial step of surrender to what is and what will be is missing. The consent is defective, because a "commitment" is made to an ideal instead of a real, human person. John O'Rourke interprets this view as a sign of immaturity. He states, "In much of North American society the expectations fostered by society concerning personal fulfillment are out of hand; these expectations are transferred to marriage by many and they simply cannot be met. To have unreal expectations is a sign of immaturity."⁴⁰³ This is not surprising considering the phenomenon of extended adolescence described previously. It is precisely in accepting our responsibilities and meeting challenges that persons mature. Adolescence prolonged into one's late twenties or even thirties means spending many years postponing responsibilities and focusing purely on oneself. This cultural phenomenon of extended adolescence has the potential to breed immaturity.⁴⁰⁴ Maturation is a continuum with immaturity and maturity as the

402. The Canadian Appeal Tribunal *Coram McCormack* 15 December 2009, "Jurisprudence: Exclusion of *Bonum Coniugum*," *Studia Canonica* 44 (2010): 261.

403. John J. O'Rourke, "Shorter Studies: Lack of Due Discretion," *The Jurist* 52 (1992): 722.

404. This is not to say that marriage is necessary to mature all persons. It is in accepting the responsibilities of one's own vocation, whether single, married, priestly, or religious, that a person matures. Extended adolescence is characterized by childish behavior, lack of discipline, blurring of generational lines, financial dependence in varying degrees, and valuing of recreation over creation (professional or familial).

poles on either end in which most people are located along the line of “not yet mature.”⁴⁰⁵ As mentioned previously, psychological maturity is the terminus of human development.⁴⁰⁶ Mature persons are characterized by integrity, self-possession, and self-determination. Robert Guiry defines maturity as the following: “Maturity is, within reasonable limits, the age appropriate to the concordance of autonomous behavior, response, emotion, and cognition, in accord with the cultural, familial and gender milieu of the individual.”⁴⁰⁷ A key characteristic of maturity is the “ability to defer gratification”⁴⁰⁸ and the ability to see things from another person’s point of view.⁴⁰⁹ In many ways, maturity corresponds to virtue. The mature person responds to others, rather than impulsively reacting.⁴¹⁰ In a mature person, there is a proper and proportionate ordering of behavior, emotions, thoughts, and relationships reminiscent of virtue previously discussed. However, people may be mature in one area and not in another.⁴¹¹ One’s level of maturity can be deduced from a person’s ideas, attitudes, and behaviors in five areas: money, sex, children, family, and planning.⁴¹² Levels of maturity may differ among all the areas so that one may be mature in his or her profession but not so in family relationships. In addition, the process of maturation can be stunted by various

405. Robert W. Guiry, "Immaturity, Maturity, and Christian Marriage," *Studia Canonica* 25 (1991): 95.

406. McAreavey, *The Canon Law of Marriage and the Family*, 98.

407. Guiry, "Immaturity, Maturity, and Christian Marriage," 98.

408. *Ibid.*

409. McAreavey, *The Canon Law of Marriage and the Family*, 99.

410. Guiry, "Immaturity, Maturity, and Christian Marriage," 99.

411. *Ibid.*, 95.

412. *Ibid.*, 100.

factors and circumstances including poor education, child abuse, addiction, and lack of affection.⁴¹³ If one is lacking in the canonical minimum of maturity relative to the seriousness of the marital commitment, then consent may be invalidating on the grounds of consensual incapacity, determining error, simulation, or condition.⁴¹⁴ It should be remembered that the canonical level of maturity necessary for marital consent is found in most people. When intended as a lifelong, faithful, fruitful relationship, marriage itself matures people. The duty to love inherent in the marital commitment tends to the *bonum coniugum*. The *bonum coniugum* is that maturing of the persons and characters of the spouses which comes from fidelity to the obligations of the married commitment. In a case from the Brooklyn Tribunal in 1973, Leon Salzman, a psychiatrist called as a *peritus* in the case, articulated the connection between commitment and maturity:

I feel that many people grow up marriage. You don't have to be grown up before you get married. If that was the case, there would be very few around. People who get married and grow in the marriage are already people who have made some kind of commitment in a mature way to begin with, one of love, one of understanding, one of desire for intimacy . . . That is one marked evidence of immaturity, the inability to give.⁴¹⁵

Factors such as extended adolescence, the myth of "The One," lack of or delay of commitments, and immaturity have a direct effect on the validity of marriages. The great difficulty for judges is evaluating in a particular case whether one has elicited invalidating consent or one has simply failed to live up to a commitment truthfully made.

Marital consent is a human act of choosing together (a union of wills) that which could be otherwise, a life lived for and with another faithfully. Of course, there are those

413. McAreavey, *The Canon Law of Marriage and the Family*, 101.

414. Augustine Mendonça, "Rotal Approaches to Affective Immaturity as a Cause of Consensual Incapacity for Marriage," *Studia Canonica* 34 (2000): 293-354.

415. This statement of Salzman is reported in Guiry, 106.

cases where one or both spouses are truly incapable of eliciting valid consent, but Robitaille wants to draw attention to those cases in which a person intends from the beginning “marriage on his or her own terms (the definition of any kind of partial simulation).”⁴¹⁶ Although exclusion of one or more of the Augustinian *bona* may apply as well, exclusion of the *bonum coniugum* is evident when one does not intend, will, choose a marriage that will involve real self-sacrifice throughout a lifetime. Robitaille offers examples:

Think of the examples we see regularly: people who have never had to work for anything in their lives, or sacrifice for anything in their lives; people who expect that everything they want, the way they want it, will come to them. People who see the world superficially, for its wealth, beauty, material goods. Do we not see examples of such people who enter a commitment which they expect to be lifelong, faithful and open to children, but who also expect that marriage will not expect anything of them that they do not choose to give? They are willing to take from their spouses, but they are not willing to give of themselves, to let themselves die to the reality of the couple that they are becoming in the marital partnership. I suggest that at times with such cases we witness an exclusion of the good of the spouses.⁴¹⁷

Demonstration of selfish character alone does not prove this ground of partial simulation. In a case of simulation, proof usually involves “the confession of the simulator (whether judicial or extra-judicial), the reason for marrying (the *causa contrahendi*), the reason for simulating (the *causa simulandi*), the positive act of the will—explicit or implicit—by which the *bonum coniugum* was excluded.”⁴¹⁸

Although the line between them is very fine and blurred, implicit simulation and error can be differentiated. Regarding implicit simulation Robitaille states,

416. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," 163.

417. *Ibid.*, 163-64.

418. *Ibid.*, 164.

One point that must be highlighted here: in traditional jurisprudence regarding exclusions, the positive act of the will must be a conscious choice. However, more and more there has been an understanding that the choice can be made through an implicit act of the will, a choice made by the person because it is the only reality he or she knows.⁴¹⁹

Error that is deeply rooted, intransigent, and tacitly accepted can become an implicit act of exclusion, but I would argue that there must be, at least minimally, some consciousness that this choice differs from what the church teaches regarding marriage, its essential elements, or essential properties. However, as Sanson states, “Persons may be unconscious as to nullifying implications and effect, but are conscious as to what is wanted or demanded, and what will clearly not be tolerated or acceptable.”⁴²⁰ Robitaille says as such in an earlier article. “It cannot be merely an habitual opinion; rather, there must exist at least an implicit, actual intention against marriage. There has to be the knowledge of what the Church believes marriage to be, and a positive rejection of that belief.”⁴²¹ The key difference between error and simulation is awareness, however slight; in cases of simulation some evidence of awareness of a contrary intention should be found in order to demonstrate one was responsible for the exclusion (*mens rea*). Robitaille notes that determining error does not invalidate concerning the *bonum coniugum*; therefore, intransigent error regarding the *bonum coniugum* can only invalidate through a case of partial simulation or incapacity to assume.⁴²² The person who is truly unaware of his or her selfishness and lack of concern for others would

419. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," 164.

420. Sanson, "Implied Simulation: Grounds for Annulment?" 767.

421. Robitaille, "Simulation, Error Determining the Will, or Lack of Due Discretion? A Case Study," 411.

422. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," 164.

probably elicit consent that would be invalid under c. 1095, 3.⁴²³ It is important to distinguish among the sources of nullity, because those seeking an annulment do so (almost in every case) in order to obtain a declaration that one is free to marry. Consequently, if the marriage is judged invalid, it is vital to understand what went wrong in the first relationship. In fact, this is a critical part of the ministry of canon law. Robitaille adds, “Notice also, the consequence of this invalidity: if the person suffers from an incapacity due to a psychic anomaly, then that person may not marry again in the Church until that incapacity has been addressed (if it ever could be addressed).”⁴²⁴ If a marriage is declared invalid due to total or partial simulation on the petitioner’s part, then great pastoral and judicial care should be directed to the future marriage.⁴²⁵

These canons related to consent and the sources of nullity demonstrate the complexity of what it means to make a marital commitment. The initial commitment is central to and determinative of the resulting relationship. The juridic concept of consent has been explicated while always keeping in mind the internal, psychological, and interpersonal reality of consent as the standard for the canonical concept. Beal explains,

Consequently, consent cannot be adequately understood merely as a disembodied juridic act. An adequate understanding of consent must also include an appreciation of its personal and interpersonal dimensions and its concreteness. Thus, one can never overlook the influence of culture, society, family, and personal experience on individual couples’ consent.⁴²⁶

Trying to capture the rich psychological and interpersonal concept of consent in juridic categories is like trying to recreate the sunset in a paint-by-number picture. The picture

423. Robitaille, "Exclusion of the *Bonum Coniugum*: Interpreting and Assessing Evidence," 168.

424. Ibid.

425. The role of the *vetitum* and *monitum* will be discussed in the final chapter.

426. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1296-1297.

may resemble the reality, but something is surely lost. However, that loss does not mean that it should not be attempted, only that it can be improved upon. The fact that the Code is written in various literary forms combining biblical terms with philosophical theories and psychological constructs reveals that the law is human and can be amended to better serve the good of the faithful. In addition, the elaborate distinctions that are even difficult for canonists to understand, much less for the faithful being served by the law to comprehend, reveal the need to evaluate and revise the canons on consent and the matrimonial processes so that the picture comes closer to the reality and justice may come.

5.6 Synthesis of Marital Consent in Canon Law

Canon law of marriage and family is the church's system of structures, norms, and procedures that enable persons to reach out for and appropriate the values of marriage identified by theology in order that the church may grow in faith, hope, and love for the salvation of souls. It serves to protect and promote the goodness of marriage while balancing both individual and communal goods of the family. Traditionally, the three Augustinian goods of marriage have been upheld in theology as that which makes marriage good and thus utilized in canon law to designate what is essential to marriage. The *bonum prolis*, *bonum fidei*, and *bonum sacramenti* are values of marriage that should be protected and promoted in canonical structures and norms. These inherent features that demonstrate marriage's goodness are not the same as the ends, that is, the intrinsic finality of marriage. Marriage is ordered to the *bonum prolis* and the *bonum coniugum*, which are identified in c. 1055 §1. In a teleological understanding of marriage, the ends

are like promises or gifts that are hoped for, yet not entirely within the control of the spouses. Children are a gift just as the maturation and sanctification of the spouses is a gift as well. Marriage is created in covenant which brings about the partnership for the whole of life, *consortium totius vitae*. The content of this consortium may vary from culture to culture and time to time; therefore, the term is left open to the development of jurisprudence. According to c. 1055 §2, there is an inseparability between the marital contract and the sacrament for the baptized. This inseparability is encapsulated in canon law, although it is not at all clear that the difficulties inherent in this assertion have been resolved theologically. Finally, c. 1056 identifies the essential properties of marriage as unity and indissolubility, which flow from the essence of marriage. From these instances of doctrinal law, it is clear that the church teaches that there is an essence, however loosely defined, to marriage that needs to be protected and promoted.⁴²⁷

Canon 1057 denotes that consent creates marriage; consequently, consent is of the essence of marriage. All that marriage is to be in the *consortium totius vitae* must be present in consent given and received initially. The spouses must be qualified by law to exchange consent, meaning there are no impediments disqualifying them from marriage. In addition, this consent must be legitimately manifested according to canonical form. In c. 1057 §2, consent is deemed an act of the will, which emphasizes the aspect of responsible choice in marital consent but at the same time fails to capture the fullness of this deep, internal act of the spirit. According to John Paul II in his Address to the Roman Rota in 1999, consent is the “conscious, responsible assumption of a commitment.” This internal acceptance of a promise given and received by the spouses needs to be expressed externally, socially, ritually, and communally. The object of

427. This is why in judicial matrimonial processes, there is assigned a defender of the bond.

consent is not so easily identified. To say the object of consent is marriage merely begs the question. While it is theologically true that what is chosen in marriage is union with the other, such a formulation is juridically imprecise. The formal object of consent is the complex of essential rights and obligations of marriage. These essential rights and obligations of marriage derive from the *bona*, the essential elements (which are not explicitly listed in the Code but derive from the ends), the essential properties, and sacramentality for the baptized. Again, such a description lends itself to further debate and interpretation.

The effect of consent validly and licitly given and received is the conjugal bond. In continuity with c. 1056, this bond is perpetual and exclusive. Through the marital covenant, spouses choose to inscribe into their history a new direction and orientation to their lives with a new set of rights and obligations. For the baptized, the Holy Spirit through the sacrament consecrates the spouses to fulfill these duties by empowering them to experience Christ's unfailing love and fidelity, which they are to symbolize in their union. Due to their inherent dignity as human persons, each spouse has equal duties and rights related to marriage. Because marriage is ordered to the *bonum prolis*, spouses who become parents have the significant and serious duty and right to care for their children's physical, social, cultural, moral, and religious needs. The canonical structures and norms of marriage exist to protect and promote the *bonum totius familiae*.

Since the time of the medieval debate regarding what makes marriage, the unilateral will-act of marriage has been emphasized. However, marital consent has a bilateral dimension as well, which is complementary to the "act of the will." The bilateral dimension connotes the union of wills in the marital relationship. Following

Aquinas, one consents with a person, not an object. Consent implies union, a “feeling with” another. The bilateral dimension gives juridical expression to the reality that marriage is a process, begun in the dating relationship, which is given permanent juridical status during the wedding ritual. The moment of consent presupposes a history of consenting and anticipates a future of consenting to marriage again and again with one’s spouse. Recognition of the bilateral dimension reinforces the need for effective marriage preparation, particularly in the area of discernment.

Although consent is bilateral, meaning a union of wills, the unilateral dimension cannot be negated. The unilateral dimension corresponds to Lonergan’s fourth level of conscious intentionality where one is responsible for his or her own contribution to the consensus. Canon 1060 states the presumption that marriage enjoys the favor of the law, meaning that the validity of a marriage is presumed and upheld unless the contrary can be proven. Various canons state the substantial defects of consent that render marriage invalid. In the 1980’s near the peak of divorce, the number of affirmative judgments in annulment cases rose explosively leading John Paul II to caution jurists regarding the overuse of the ground of consensual incapacity, which was new to the revised Code. The source of nullity must be a true incapacity and not a difficulty which is common to every marriage. Other grounds for defective consent related to commitment that were addressed in the study include ignorance, error about the person, determining error, simulation, and condition. The distinctions among these grounds can be very fine and intricate, and the application of concrete, real marriages into these not so neatly defined categories can be cumbersome. A more careful look at how intention can differentiate among the grounds can be illuminating. Finally, the ground of exclusion of the *bonum*

coniugum may shed light on the situation of many contemporary failed marriages. The evaluative question remains as to how effectively these canons promote and protect the values of marriage theology has identified and how greater attention to theological understandings of commitment and juridical articulations of consent can strengthen and support sacramental marriages in the United States.

CHAPTER SIX

TOWARD A PRACTICAL RESPONSE

6.1 How Do We Understand Current Concrete Practices of Commitment and Consent in Sacramental Marriages in the United States?

6.1.1 III Extraordinary General Assembly of the Synod of Bishops on the Topic: *The Pastoral Challenges of the Family in the Context of Evangelization, October 2014*

As an exercise in practical theology, this study moves toward a response rather than coming to a conclusion. Stated at the outset were the primary practical/pastoral problems to be addressed, namely: the failed state of too many Catholic sacramental marriages in the United States today, the explosion of cohabitation as a prelude to marriage or a replacement for marriage, and the changing cultural landscape of thought and practice regarding the ordering of our sexual lives in America. It cannot be denied that many factors contribute to these empirical trends and statistics. Cultural, social, psychological, economic and political explanations of American family disintegration and change are insufficient without the theological lens of sin through which to evaluate historical trends and sociological findings. This is not to say that the primary theological datum is the doctrine of sin, the experience of suffering, or the practical reality of innumerable fractured relationships. The primary theological datum is the confession of an equally merciful and just God Who loved the world enough to send his Son Jesus Christ as Lord and Savior. “The salvation which God offers us is the work of his

mercy.”¹ The corollary of this confession is that all are in need of salvation, hence, the doctrine of sin. Lonergan’s delineation of individual, group, and general bias gives expression to the force of inordinate, myopic, and insular self-preoccupation, self-protection, and self-promotion that operates on all levels. The human capacity for self-consciousness and freedom often leaves human persons “anxious about their finitude, status, self-cohesion, relationships, wealth—about anything that they believe important for their existence.”² In this state of uncertainty, human persons are susceptible to a narrow preoccupation with one’s own immediate concerns to the detriment of those outside one’s self, group, or current situation. This undue fixation on the individual and the immediate can manifest itself in self-aggrandizement or self-negation, as Valerie Saiving Goldstein has purported. Good human relationships are characterized by giving and receiving, the precondition of which is that one has a substantial self from which to give.³ The reality of ruptured relationships and the experience of disconnect must be viewed through the theological lens of sin, the admission that this reality is the fault of human persons. This is precisely the point of the primordial myths of the first chapters of Genesis. Any explanation of the suffering caused by broken promises and damaged relationships that does not address the doctrine of sin, and consequently human culpability and responsibility, is not only insufficient but also inaccurate.

1. Francis, *Apostolic Exhortation Evangelii Gaudium of the Holy Father Francis*. November 24, 2013, Libreria Editrice Vaticana, no. 112, http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html#I.%E2%80%82Some_challenges_of_today%E2%80%99s_world (accessed August 5, 2014).

2. Don S. Browning et al., *From Culture Wars to Common Ground: Religion and the American Family Debate*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2000), 70.

3. Valerie Saiving Goldstein, "The Human Situation: A Feminine View," *The Journal of Religion* 40, no. 2 (April 1960): 108-11.

The church, as the embodiment and continuation of Christ's work in and through the Spirit, responds to the sin of the world. The church is the practical solution to the practical problem of sin. The visible expression of the force of sin in the world is acutely concentrated in family disintegration where loss to all members in one form or another is profoundly felt. The church, comprising all believers in an "organically structured communion," offers a pastoral response in various ways in relation to the gifts of each.⁴ The picture of marriage and family in the United States painted at the onset of this study demonstrates that this effort has not been enough. The pastoral response of the church must address all stages of marriage preparation and the lifecycle of marriage. This pastoral ministry includes canon law. In addressing the Canon Law Society of America in 2007 regarding the past twenty-five years since the revision of the Code, Reverend Monsignor John Alesandro stated, "'Pastoral,' of course, means practical, and practical means *behavioral*—and behavior requires *law*."⁵ Canon law is an ecclesial science, but primarily it is a pastoral ministry serving the church by protecting and promoting freedom and good order so that the People of God may receive the gifts of the Spirit and the Spirit may freely and effectively work in the world. James Coriden summarizes, "Canon law is an organically developing ministry, not a closed system of laws. It is a theologically driven project of church leadership that strives to maintain both Christian freedom and good order, not a fixed set of uniform rules woodenly applied."⁶ In marriage ministry, canonists serve those who have experienced failed marriages or wish

4. Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, Minnesota: The Liturgical Press, 1992), 121.

5. John A. Alesandro, "Address: The Code of Canon Law: Reflecting on the Past Twenty-Five Years and Looking to the Future," *CLSA Proceedings* 69 (2007): 14.

6. James A. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church* (New York, NY: Paulist Press, 2000), 172.

to marry someone who has through establishing freedom to marry and protecting the rights of those involved, both spouses and children.

In advance of the III Extraordinary General Assembly of the Synod of Bishops, Cardinal Lorenzo Baldisseri together with the Ordinary Council of the General Secretariat released the *Instrumentum Laboris*. This working document contains the results of the consultation of the particular churches using the *Preparatory Document's* questionnaire in anticipation of the Synod for *The Pastoral Challenges of the Family in the Context of Evangelization* to be held in October 2014. This document “offers a broad, yet by no means exhaustive, perspective on the present-day situation of the family, on the challenges of the family and on the reflections related to the family today.”⁷

Regarding the cultural situation of the family today, this working document describes reasons given why so many do not agree with the church's teaching on family matters.

Many of these reasons have been purported throughout the present study:

The responses are also in agreement on the underlying reasons for the difficulty in accepting Church teaching, namely, the pervasive and invasive new technologies; the influence of the mass media; the hedonistic culture; relativism; materialism; individualism; the growing secularism; the prevalence of ideas that lead to an excessive, selfish liberalization of morals; the fragility of interpersonal relationships; a culture which rejects making permanent choices, because it is conditioned by uncertainty and transiency, a veritable “liquid society” and one with a “throw away” mentality and one seeking “immediate gratification”; and, finally, values reinforced by the so-called “culture of waste” and a “culture of the moment,” as frequently noted by Pope Francis.⁸

However dim this picture may seem, the preceding cultural depiction is predominant, at least for most in the United States. We have discussed how the law continues to presume

7. Synod of Bishops, *III Extraordinary General Assembly: The Pastoral Challenges of the Family in the Context of Evangelization Instrumentum Laboris*. June 24, 2014, http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20140626_instrumentum-laboris-familia_en.html (accessed September 24, 2014).

8. *Ibid.*, no. 15.

that Catholics today intend to marry as the church understands marriage. In this cultural context, is this a valid presumption?

As discussed previously, the legal presumption that when people marry they intend marriage as the church understands it has been seriously called into question. If the church can no longer presume that those marrying have the general intention to marry as the church teaches, then not only canon law but all of pastoral marriage ministry needs to be entirely rethought and reformed. Lynda Robitaille notes the difficulty with this presumption. “The problem of the will to marry is not seen from the positive aspect, that is, in relation to choosing to oblige oneself, but rather is seen negatively, in that only the intention not to oblige oneself has juridic effect. The intention to oblige oneself is seen as the general intention of doing what the Church intends when consenting to marriage.”⁹ Is such a general intention enough to elicit valid consent? I believe that it is. Despite the permeating liquid society and culture of the moment so characteristic of contemporary American culture, the presumption must stand; if not, the validity of every marriage in a culture with values contrary to the church’s teaching would be called into question. In addition, the requirement of marriage preparation lends further evidence that those preparing to marry have some awareness of what the church understands marriage to be and consent to that understanding of marriage. This legal presumption can only be overturned in particular cases. Randolph Calvo identifies levels of culture in order to determine points of impact on persons. These levels are like concentric circles illustrating how the impact of culture on a person’s marital consent becomes more

9. Lynda A. Robitaille, "Consent, Culture and the Code," *Studia Canonica* 33 (1999): 130n8.

profound the deeper the level.¹⁰ The outermost level or layer is the practical sphere, which is “observable and tangible” comprised of “art, music, language, communication, sports, fashion, entertainment, technology and so on.”¹¹ The second level concerns relationships, roles, rites of passage, and traditions and customs within families and society. The third level involves the values of a culture. These intangible values are expressed in the outer two levels of relationships and concrete practices. The final level of culture is the deepest and most pervasive. “It pertains to *worldview*, that is, the particular way a culture orients a group to understand and act towards the world. . . . This worldview and the meanings expressed in symbolic forms and in norms of conduct underlie a society’s values and shape social expectations and assumptions.”¹² This deepest level of culture *can* greatly impact a person’s marital consent, but it does not necessarily do so. Intransigent and deep-seated error was discussed in reference to the canons concerning determining error, simulation, and consensual incapacity. The impact of culture on marital consent must be decided on a case by case manner, because culture is everywhere impacting people on different levels. Calvo clarifies,

It is just there: Culture is part of the fabric of life woven through the various strata of our lives. It can be so much a part of the way we look at the world that we are largely unaware of culture’s influence. What appears natural and normal and what is to be expected all can be shaped over generations by forces called culture. *Culture doesn’t dictate the specific choices we make nor does it determine the exact way we behave, but it shapes the horizon of the choices and consequences that we perceive* [italics mine].¹³

10. Randolph R. Calvo, "The Impact of Culture in Marriage Cases," *CLSA Proceedings* 55 (1993): 114.

11. *Ibid.*, 111.

12. *Ibid.*

13. *Ibid.*, 115-16.

Pertinent here is Lonergan's notion of effective freedom. Effective freedom, the operational range of one's essential freedom, is limited by one's temperament and personality, one's level of maturation, one's past choices, and one's external circumstances, including culture. Effective freedom is the limited horizon of essential freedom, but ultimately human persons are free, free to make even vertical exercises of freedom to a different horizon. To assert that culture decides not only what we choose but how we choose is to deny essential freedom and ultimately the offer of grace. Moreover, particularly in our increasingly mobile and digital world, we are subject to more than one culture in varying degrees. The church has cultural influence. Religious beliefs and canon law are a form of culture.¹⁴ Komonchak's ecclesiology was explained at the beginning of this study, and it is relevant here. "A new community of meaning and value has been constituted in this natural world of ours: a new intersubjectivity in grace, with its own language and symbols, its own roles and institutions, its own interpretative and evaluative culture."¹⁵ It could be argued that one's choices regarding marriage and sexuality will be dependent upon which culture's deepest level has penetrated the person. Should a person identify only superficially with the church or not at all, then a tribunal may explore the possibility of overturning the legal presumption for that particular case, perhaps on the ground of determining error.

6.1.2 Faith, Hope, and Love and the Sacrament of Marriage

The health and vitality of all marriages are a concern for the church, but this study has focused on sacramental marriages in the United States. Marriage, as a

14. Robitaille, "Consent, Culture and the Code," 126.

15. Joseph A. Komonchak, "Foundations in Ecclesiology," ed. Fred Lawrence, supplementary issue, *Lonergan Workshop Journal* 11 (1995): 87.

sacrament, presupposes faith. As discussed in Chapter Three, faith is a virtue and an act, a readiness to believe and “humble submission and personal self-surrender to God.”¹⁶

Lawler contends, “The faith that is obedience and self-surrender to God, the traditional *fides qua creditor*, the act of faith by which one believes, is a free, and at least minimally conscious and explicit, act.”¹⁷ However, Susan Wood argues,

Faith, however, cannot be reduced to this explicit act. A person can possess the habit of faith both through the moral order and, most especially, through baptism.

Baptism is the “sacrament of faith” par excellence. Not only is the reception of this sacrament the occasion of the public confession of faith by the individual or, in the case of infant baptism, by the believing community on behalf of the individual, but the indelible “character” received at baptism comprises an ordination of the baptized to worship, the expression and public witness of faith.¹⁸

Faith can be “inchoate and implicit” in the intention of the baptized spouses for “indissolubility, fidelity, exclusivity, and openness to children.”¹⁹ Wood claims, “This ultimate kind of promise and love cannot be explained apart from a transcendence that is oriented to God.”²⁰ Lawler responds to this argument by asserting that it is the “virtue or the know-how of faith that is bestowed in baptism,” but because the act of faith does not necessarily flow from the virtue, the virtue “must be activated, freely, explicitly, consciously and however minimally.”²¹ Lawler concludes, “It is in such active personal

16. Juan Alfaro, "Faith," in *Sacramentum Mundi: An Encyclopedia of Theology*, vol. 2 (New York, NY: Herder and Herder, 1968), 313.

17. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (Collegeville, Minnesota: The Liturgical Press, 2002), 45.

18. Susan Wood, "The Marriage of Baptized Nonbelievers: Faith, Contract, and Sacrament," *Theological Studies* 48 (1987): 294.

19. *Ibid.*, 295.

20. *Ibid.*

21. Michael G. Lawler, *Marriage and Sacrament: A Theology of Christian Marriage* (Collegeville, Minnesota: The Liturgical Press, 1993), 32.

faith, and not just in the virtue of faith, that Will and Willma cooperate with God-in-Christ and Christ-in-the-church in the transformation of secular realities, including their marriage, into Christian sacraments. It is such active personal faith, again however minimal, that is required for right sacramental intention.”²² The difficulty is in ascertaining if, when, or how a baptized person’s faith has been activated? In spite of this difficulty, the claim can be made that even natural marriage presupposes faith, that is, trusting in the other spouse. Marriage is a relationship of faith. Marriage, which is rooted in the *foedus* of its partners, is a relationship begun and sustained in faith. The covenant of marriage is based upon faith and trust that the other will keep his or her word. Sacramental marriage is based upon faith and trust in God as well. In many ways, consent is an act of mutual entrustment in that the covenantal gift of self can only be received in faith and sustained in the hope that both will remain true to the promises made at the wedding. The sacrament presupposes a faith that recognizes the Spirit empowering the couple to be able to love each other as God intended and to manifest Christ’s unfailing love for His people. In the sacrament is the interconnection of faith, hope, and love. Christian spouses love through faith and in hope in time, because their love is not yet complete.

The sacrament of marriage works through the gracing action of God in Christ (*opus operatum*) and the free acceptance of this grace in faith (*opus operantis*). Todd Salzman relates the sacrament to freedom, love, and faith:

In terms of our distinction in scripture between *agape* and *philia* then, we can reasonably assert that it is *opus operantis*, the recognition and reception of God’s grace, which transforms *agape* and *opus operatum* into *philia*. Without acceptance of God’s gift, the offer remains *agape*, not *philia*. The deliberate and

22. Lawler, *Marriage and Sacrament: A Theology of Christian Marriage*, 32.

active reception of God's love is an expression of a living Christian faith. This faith is necessary for marriage to be a valid sacrament.

In summary, then, the efficacious and salvific nature of a sacrament is dependent upon mutuality. That is, God offers salvific love in and through Christ, and humans are free to either accept or reject that offer. The faith manifested in the acceptance of God's grace in and through sacrament creates a friendship between the individual and God transforming the very nature of the person, the relationships that the person enters into, and the acts that follow from those relationships.²³

Although I would not argue that *agape* transforms into *philia* with the acceptance of God's grace, Salzman's point is valid and illuminating.²⁴ Marital commitment and consent require that mutual exchange, reciprocal relationship, offer and acceptance that Salzman refers to here. Marital consent, as an act of mutual entrustment, is an act of faith and love. Perhaps the flux and disruption experienced in family relationships today calls for education or re-education in the meanings of the loves.

Throughout this study, the loves, *agape*, *eros*, and *philia*, have appeared and reappeared in an effort to understand what it means to promise to love another faithfully for life. The pain and suffering families experience as the result of family disintegration is in some way related to love, that is, the lack of love, the failure to love, the withholding of love, or the disordering of love. Because the reality of family fragmentation has been studied here through the theological lens of sin and human responsibility, a fitting response is a theology of love and a serious questioning of whether love is relevant in the

23. Todd A. Salzman, "Friendship, Sacrament, and Marriage: The Distinction between Christian Marital Friendship and Non-Christian Marital Friendship," in *Marriage in the Catholic Tradition: Scripture, Tradition, and Experience*, ed. Todd A. Salzman, Thomas M. Kelly, and John J. O'Keefe (New York, NY: The Crossroad Publishing Company, 2004), 120.

24. The loves remain distinct yet interrelated. To claim that one transforms into another would imply either the complete negation of the one transforming or, at the least, the sublation of one into the other. The loves have distinctive and necessary roles in a married relationship. In addition, this is an example of the tendency in some theologies to displace *agape* with *philia* and to give *philia* priority over the other loves, a tendency that was discussed in Chapter Four.

juridical realm. In marriage, each of the loves has a distinctive and necessary role, which needs to be recognized in order for married couples to understand how to love the other faithfully for life. Often *agape* is held up as the only truly Christian love. In his landmark study, Anders Nygren argues that *eros* and *agape* are conflicting, irreconcilable fundamental motifs throughout the course of history and that *agape* is the only Christian love.²⁵ He pits *agape* against *eros* as opposing types with *eros* being essentially egocentric and acquisitive, love that is evoked by recognizing value, whereas *agape* is essentially theocentric and sacrificial, love that is spontaneous and unmotivated thus creating value in its object.²⁶ Although a thorough critique of Nygren's argument and corresponding evidence is not possible here, I call attention to a few deficiencies in his argument that could impact a theology of marriage. Nygren's depiction of "Christian love" omits the emotional quality of love, confuses a myriad of self-relating actions, and excludes the importance of mutual relations.²⁷ *Agape* is not the only love that can be deemed Christian, because each has its own goodness and time and place.²⁸

Edward Collins Vacek describes love as "an emotional, affirming participation in the dynamic tendency of an object to realize its fullness."²⁹ Granted, this definition leaves much to be desired, as any definition of such a vast and rich concept would;

25. Anders Nygren, *Agape and Eros*, trans. Philip S. Watson (Philadelphia: The Westminster Press, 1953), 39.

26. *Ibid.*, 210.

27. For a critique of Nygren's theory of *agape* and Christian love see Martin C. D'Arcy, *The Mind and Heart of Love, Lion and Unicorn: A Study in Eros and Agape* (New York, NY: Meridian Books, 1956); Gene Outka, *Agape: An Ethical Analysis* (New Haven and London: Yale University Press, 1978); Edward Collins Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, Moral Traditions & Moral Arguments, ed. James F. Keenan (Washington, D.C.: Georgetown University Press, 1994).

28. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 310.

29. *Ibid.*, 44.

however, it does bring to light that love means “actively being affected” by the beloved.³⁰ Of course, the role of intellect and will are essential in a theology of marital commitment and its relation to consent as I have emphasized; that being said, the role of emotion cannot be underestimated. For instance, what is the theological significance of the absence of feeling in a marriage? Vacek delineates reasons why we may no longer “feel any love” in a relationship:

First, the love may in fact be gone. We may have become insensitive to the value of those we once loved, and they no longer make a difference to our lives. Second, although they still affect us, other emotions may dominate our consciousness, e.g., anger at them or at others. Third, we may be freely resisting or bracketing these feelings, for example, when we are trying to assert our independence. Fourth, we may still love them, but the receptive aspects may have become rather “quiet” or taken for granted. We feel right or fulfilled in being for and with the beloved, but these feelings do not occupy our attention. Perhaps only when the beloved is gone do we recognize that a peaceful joy had all along been a quiet but important part of our normal consciousness. Fifth, love may continue on in a deficient or incomplete mode. The perception of the beloved’s value may persist only as a memory of how we were once attracted by him or her. Or we can still perceive the beloved’s value, but we may be too stressed or tired to feel the resonance of that goodness in ourselves.³¹

A more intricate dissection of what exactly is happening when the feeling of love subsides is absolutely paramount, because so many families are changed forever for the vague statement, “I don’t love him (or her) anymore.” The specific meaning of such a statement can go unchallenged if the reasons for such a feeling are not brought to the surface. These reasons are not necessarily justifications for breaking a commitment; on the contrary, the absence of feeling is a signal that perhaps the relationship needs to occupy one’s time and attention, or the root of conflicting and overriding emotions needs to be identified, or one needs to recognize that the feelings associated with a loving

30. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 50.

31. *Ibid.*, 54.

relationship change over time as the relationship does. Vacek contends that even *agape* implies being affected. As a type of love, *agape* is an “*emotional* appreciation and concern for the good of the beloved.”³² This love is “directed to the whole value of the beloved.”³³ *Agape* loves the beloved for the sake of the beloved. It is a love that is freely given, unmotivated by the goodness of the beloved, and forgiving and redemptive.³⁴ However, the other-directed nature of this love does not deny or negate the reality of the self as the one who loves. The self being affected is an intrinsic aspect of all forms of love.

In every human action, particularly one so human as love, the self is the agent of the activity and so the action is self-enacting or self-expressive.³⁵ It is also true that a great deal of “human activity is at least partially self-interested.”³⁶ Human action that is self-satisfying or self-interested is not, in itself, evil or sinful. The problem occurs when there is *undue* regard for the self and an *unwillingness* to subordinate the self to the needs of the other. Agapic love *may* include self-sacrifice if the one suffers loss in loving, but sacrifice itself is not the defining criterion for *agape*.³⁷ When agapic love takes the form of self-sacrifice (as it surely will in any relationship) depends upon the context of the relationship at any given time. *Agape* works to repair, restore, and reorient a relationship in which inevitable differences in the individual needs of each conflict and compete. In a

32. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 160.

33. *Ibid.*, 171.

34. James P. Hanigan, *As I Have Loved You: The Challenge of Christian Ethics* (New York, NY: Paulist Press, 1986), 149-52.

35. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 208.

36. *Ibid.*, 212.

37. *Ibid.*, 208-23.

loving relationship, the abundance of needs, wants, desires, rights, and obligations to be met, respected, and honored for each person is a formidable challenge. *Agape* seeks to do that for the sake of the beloved. Attention to the fact that these needs and wants may conflict demonstrates love's relation to justice. "When our attitudes and acts promote our own self *and*, in order to do so, either deny or ignore what is due other persons or things, we call these attitudes and acts *selfish*."³⁸ Bias, as Lonergan used the term, is not a negation of the proper role of self-interest and self-love, but rather the refusal of the authentic pursuit of self-transcendence through disregard of the transcendental precepts. The myopic, insular, inordinate concern for oneself is the manifestation of the distortion of the loves, and ultimately the outcome of action born from fear rather than love.

Eros is an authentic love for another, yet, at the same time, a kind of self-love, because in erotic love the other is loved for the sake of the self.³⁹ "Eros affirms the other in view of the benefits the lover receives. These benefits might include goods received in return from the beloved, a certain enrichment from being united to the beloved, or merely the fulfillment that comes from acting. Eros ceases once those benefits are no longer in prospect."⁴⁰ The quest for the soul mate marriage, a marriage where couples expect high levels of intimacy, communication, and personal fulfillment,⁴¹ suggests a significant underlying presumption of the American culture of dating. That presumption is that the

38. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 209.

39. *Ibid.*, 247-49.

40. *Ibid.*, 247.

41. David Popenoe and Barbara Dafoe Whitehead, eds., *The State of Our Unions: The Social Health of Marriage in America, 2001* (New Brunswick, NJ: The National Marriage Project at Rutgers University, June 2001), <http://www.virginia.edu/marriageproject/pdfs/SOOU2001.pdf> (accessed June 26, 2010).

love associated with dating and marriage is *eros*, and the disappearance of this love during the course of the relationship is motivation, if not reason, to break the commitment. If a relationship is based purely, or even primarily, on *eros*, then the nature of *eros* dictates that the relationship will end when one's needs are no longer being met. Erotic love is an emotional, delightful, passionate desire to be one with the beloved.⁴² It is not the "possession" of the beloved that causes *eros* to cease; rather, "eros is proved by drying up when we are no longer nourished."⁴³ *Eros* can energetically begin a relationship and drive a relationship forward, but it alone cannot sustain it over time. The other loves are necessary. A theology of marriage must include *eros* to some degree as a healthy self-love is indispensable in a mutual loving relationship. "Those without *eros*, however, have little to lose."⁴⁴ Because it is a distortion of love to sacrifice and deny oneself for the sake of the other out of hatred for the self, *eros* and ordinate self-love are necessary yet not sufficient for marriage.⁴⁵

Love in marriage requires love for the other and self-love, because love begins in and aims for communion. *Philia* is love for the other for the sake of the relationship shared. The distinguishing feature of *philia* is mutuality. It is love that is reciprocated. Neither *agape* nor *eros* requires any return of love for it to be a genuine love, but *philia* does. In this way, *philia* is not able to be directly willed, because its existence depends

42. Hanigan, *As I Have Loved You: The Challenge of Christian Ethics*, 148.

43. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 254.

44. *Ibid.*, 262.

45. It could be argued that in some cultures marriage is based upon partnership, sacrifice, work, and care without any reference to *eros*. It should be remembered that *eros* takes many forms and is not reduced to sexual attraction and passion. In such marriages, *eros* may be experienced in its spiritual or psychological form through shared religious practices or common ideals. However, a marriage completely bereft of any form of *eros* would seem to me lacking, thus leaving spouses in danger of the temptation to experience it outside of marriage.

upon the free consent of the other. In relationships characterized by *philia*, we are very much dependent on the other since “we cannot will a mutual love.”⁴⁶ The inability to will this kind of love is part of the precarious nature of marriage. Its vitality is not dependent on one’s own will but on the mutual commitment of both persons. Vacek describes how our family relationships are truly *filial* and related to consent:

Philia relationships are beyond our direct will for another reason. Some of our special relations begin prior to any possible choice, e.g., we are born into our family or baptized into our church as infants. In order for these special relations to become fully human *philia* relations, we can and must subsequently accept and ratify them, but this consent is not a matter of willing them into existence. In these and other *philia* relations, mutual love may grow imperceptibly and may never be *explicitly* chosen for itself. The bond will be implicitly consented to through the choices we make to do things in accord with the relationship. There are some *philia* relations, however, that are so important that, once they have arisen, we want to ratify them through an explicit commitment, e.g., marriage. We want to bind our future and to safeguard the relationship against the contingencies of life as well as our own inconsistencies. We want to declare and not just consciously live in and from the relation. Still, even in these cases, it is a matter not of willing the relation into existence. Rather we consent to it as and after it arises.⁴⁷

Within the context of a theology of love, the bilateral dimension of consent comes to light. A marital relationship may begin in *eros*, the experience of falling in love, which can feel like it is beyond one’s choice, an act of passive receptivity. The relationship becomes one of mutual love and friendship as they consent to the bond that is forming between them, explicitly on their wedding and implicitly throughout the lifecycle of marriage.

For a theology of marriage, too great an emphasis has been placed on *agape* as THE form of love, such as in Nygren’s theory. Martin D’Arcy states, “God is *agape*, and

46. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 303.

47. *Ibid.*, 303-4.

we should naturally expect someone to be the beneficiary of that love, and as beneficiary to respond. But if this theory [Nygren's] is taken literally there is no one to respond. There is no need of that intercommunication which is essential to love."⁴⁸ Nygren's anticipatory response to this query is the following:

Naturally, there is no question of Paul's wishing to eliminate the spiritual reality denoted by the phrase "love towards God"; he merely seeks to give it its proper name, which he calls "faith." Faith includes in itself the whole devotion of love, while emphasizing that it has the character of a response, that it is reciprocated love. Faith is love towards God, but a love of which the keynote is receptivity, not spontaneity.⁴⁹

Without accepting the whole of Nygren's argument, his connecting love and faith is reminiscent of the contention that marital consent is an act and promise of mutual entrustment. Although Nygren's account of the God-human relationship is unidirectional (with God giving love and the human person receiving love from God), the sacrament of marriage which is a symbol of it is a mutual relation of giving and receiving love. For the baptized, this is also an act of faith in God and an acceptance of God's promise to be faithful.

This inextricable intertwining of faith and love is present in sacramental marriage, because mutual, embodied love is the matrix of the sacrament.⁵⁰ The marital relationship can reveal *philia* as a form of God's love. This form of love is a particular, affectionate, emotional, and self-connecting friendship that tends toward enduring communion.⁵¹

Philia is involved in forming the couple into the intimate communion of life and love,

48. D'Arcy, *The Mind and Heart of Love, Lion and Unicorn: A Study in Eros and Agape*, 82.

49. Nygren, *Agape and Eros*, 125-27.

50. Lawler, *Marriage and Sacrament: A Theology of Christian Marriage*, 20.

51. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 287-300.

which implies that *philia* has a history and “is subject to the erosion of time’s passage.”⁵² Should *philia* fail,⁵³ as it does in the case of divorce, the bond does not cease to exist, but rather, it “persists as a failed and presently unfulfilled promise.”⁵⁴ The bond, the *res et sacramentum*, is not a juridical fiction, as some may claim in the case of a divorced couple. It persists as a mutual promise of love unfulfilled. The reality that *philia* is absent, dead, or non-existent in a marital relationship does not necessarily mean the bond is as well. Whether or not the bond can be dissolved or proven in the external forum to have never truly formed can only be evaluated on a case by case basis. In this way, *philia* can help make sense of the doctrine of indissolubility. Should a couple reconcile, there is no canonical need to renew consent because the bond remains.

Although *philia* is found in all marriages, *philia* of sacramental marriages includes the person of Christ into the marital bond:

As we have seen, while faith, or the conscious, free, and deliberate choice, is necessary to establish friendship with God, so too, faithful consent is necessary to establish the bond of friendship between husband and wife united in and through Christ. While faith establishes mutuality and friendship in relation to God in terms of sacrament, faithful consent establishes mutuality and friendship between husband and wife united with Christ in the sacrament of matrimony.⁵⁵

Although consent makes marriage, what distinguishes sacramental marriage is “faithful consent, a consent grounded in each of the spouse’s living faith in Christ, whereby they

52. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 302.

53. To say that *philia* may fail in no way implies that God’s love fails. Rather, this mutual love is dependent upon both spouses to build and nurture it. God promises to sustain and grow it, but like a bridge built upon mutually supportive beams and cables, should there be fault or fracture in any one, the whole structure can crumble.

54. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 302.

55. Salzman, “Friendship, Sacrament, and Marriage: The Distinction between Christian Marital Friendship and Non-Christian Marital Friendship,” 120.

commit to each other in lifelong friendship united in Christ.”⁵⁶ However minimal and inchoate, this faithful consent contains awareness of the presence of Christ:

The difference is in awareness, and how that awareness shapes the identity of the couple and what they are doing when they perform such actions. Within Christian marital *philia*, these actions are a committed response to God’s offer of friendship, which strengthens the bond of friendship between the couple, their friendship with each other and Christ, and extends this to all relationships.⁵⁷

To enter a valid, sacramental marriage, baptized Christians must intend to commit faithfully to each other and to Christ for a lifetime. Such an intention implies awareness and openness to God’s offer of Himself in Christ. Karl Rahner describes how a sacramental marriage re-presents Christ’s love for the church, because the unifying love of the married couple genuinely participates in the unifying love of Christ for the church:

Marriage, then, opens out into the mystery of God in a much more radical sense than we could have suspected just from the unconditional nature of human love. Everything is indeed still hidden under the veil of faith and hope, and perhaps all of this has not yet unfolded from out of the secret depths of our existence into our everyday life. Nor is there any question that this truth does not come about without man and his freedom and his interior assent. Hence there is no doubt that those who are united in married love experience this reality to the same degree that they open their hearts to it in faith and love. Perhaps it has become clear that this theology of marriage may not be understood in an introverted and “privatized” sense, but rather that genuine Christian marriage in every age is a real representation of the unifying love of God in Christ for mankind. The church becomes present in marriage: marriage is really the smallest community of the redeemed and the sanctified.⁵⁸

Thus, Rahner demonstrates the interconnection of faith, hope, and love in sacramental marriage, the experience of which is dependent upon human freedom. The prophetic symbolizing function of the sacrament operates to make Christ’s love present in the midst

56. Salzman, “Friendship, Sacrament, and Marriage: The Distinction between Christian Marital Friendship and Non-Christian Marital Friendship,” 122.

57. *Ibid.*, 124.

58. Karl Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity*, trans. William V. Dych (New York, NY: Crossroad, 1993), 420-21.

of human finitude and sin. “At present we see indistinctly, as in a mirror, but then face to face. At present I know partially; then I shall know fully, as I am fully known. So faith, hope, love remain, these three; but the greatest of these is love.”⁵⁹ Lawler explains how this very human reality of marriage is capable of revealing the divine:

This doctrine does not mythicize marriage as an imitation of the marriage of some divine pair, nor does it idealize it so that men and women will not recognize it. Rather it leaves marriage what it is, a secular reality in which a man and a woman seek to become one person in love. What is added is only this, simple and yet mysteriously complex. As they become one body-person in love, they provide through their marriage a prophetic symbol of a similar oneness that exists between their Christ and their Church.⁶⁰

Through faith and baptism, married couples participate in the sacrament in their mission to make Christ present to the world. However, the presence of active faith in every baptized person cannot be presumed, which leaves the problem of baptized nonbelievers.

The practical problem of baptized nonbelievers is clearly recognized and addressed in the *Instrumentum Laboris*.⁶¹ First, the distinction needs to be made between nonbelievers and non-practicing Catholic that are weak in faith. Nonbelievers should refer to “those who never came to any act of faith in spite of their baptism, or explicitly rejected all belief in the Christian mysteries.”⁶² The working document notes that this case is “a very remote possibility.”⁶³ In the case of engaged baptized nonbelievers,

59. 1 Cor 13:12-13.

60. Michael G. Lawler, “Marriage in the Bible,” in *Perspectives on Marriage: A Reader*, 2nd ed., ed. Kieran Scott and Michael Warren (New York: Oxford University Press, 2001), 17-18.

61. Synod of Bishops, *III Extraordinary General Assembly: The Pastoral Challenges of the Family in the Context of Evangelization Instrumentum Laboris*, no. 105.

62. Ladislav Örsy, *Marriage in Canon Law: Texts and Comments, Reflections and Questions* (Wilmington, DE: Michael Glazier, 1986), 57.

63. Synod of Bishops, *III Extraordinary General Assembly: The Pastoral Challenges of the Family in the Context of Evangelization Instrumentum Laboris*, no. 105.

Familiaris consortio clearly states, “However, when in spite of all efforts, engaged couples show that they reject explicitly and formally what the Church intends to do when the marriage of baptized persons is celebrated, the pastor of souls cannot admit them to the celebration of marriage.”⁶⁴ The theological consequence of such a position is that baptized nonbelievers are deprived of their natural right to marry, because the contract is purported to be inseparable from the sacrament and they do not intend the sacrament. Perhaps some resolution could come to this problem with greater attention to what it means to reject explicitly and formally what the church intends to do when the marriage of baptized persons is celebrated. *Only those* who reject explicitly and formally what the church intends to do should be considered baptized nonbelievers. The reason for that restriction is due to the interiority of faith. How and when the virtue of faith is freely and consciously activated is known only to God. While faith should always be expressed in one way or another, its presence is not dependent upon its outward manifestation. The only way to overturn the presumption of the intimate connection of faith and baptism is by the formal and explicit rejection of faith by a baptized person. In such a case, “the pastor of souls cannot admit them to the celebration of marriage.”⁶⁵ John Paul II does not express what recourses are available to the couple then. If they are refused sacramental marriage due to rejection of faith, can they enter a valid natural marriage? Lawler argues that the question is left open:

Most interestingly, though the way was then open to him both to ask whether civil marriage of these baptized nonbelievers was a valid marriage and to reply that it

64. John Paul II, *Apostolic Exhortation of Pope John Paul II Familiaris Consortio*. November 22, 1981, Libreria Editrice Vaticana, no. 68, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html (accessed July 24, 2005).

65. *Ibid.*

was not, because “a valid marriage contract cannot exist between baptized persons without its being by that very fact a sacrament,” he did not do so.

I acknowledge the force of the axiom *ex silentio nihil probatur*. I find it difficult to accept, however, that the Pope’s passing over in silence the new Canon 1055.2, approved if not yet promulgated, was simply an oversight. Rather, I find it an unexpected sign that the marriage of baptized nonbelievers is regarded as possibly valid and that the theological discussion peremptorily ended by the Code in 1917 is, in response to the demand of the Synod, quietly reopened.⁶⁶

When a juridical “solution” is given to an unresolved theological question, greater confusion and uncertainty arise, along with the very real possibility of injustice. The just and merciful response of the church regarding marriage for those who have rejected explicitly and formally what the church intends when the marriage of baptized persons is celebrated is the possibility of natural marriage. Theological and canonical clarity would be needed to define precisely what this means in real life.

Recourse to the canonical formula: “*actus formalis defectionis ab ecclesia catholica*” could be made, but in recent years, this seems to have caused more pastoral problems and juridical uncertainty. The 1983 Code granted three exemptions from ecclesiastical law related to marriage for those who formally defected from the Catholic Church; these exemptions are found in cc. 1086 §1, 1117, and 1124. Danilo Flores explains, “In other words, these specific exceptions established by the three canons suspended the obligations of law arising from the impediments of *disparitatis cultus*, the mandatory canonical form of marriage celebration and the prescription on mixed marriages.”⁶⁷ These exemptions were made “to facilitate the exercise of the ‘*ius*

66. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (Collegeville, Minnesota: The Liturgical Press, 2002), 60.

67. Danilo R. Flores, "Formal Defection from the Catholic Church and Its Canonical Consequences in Marriage in the Light of the *motu proprio Omnium in mentem*" (University of Santo Tomas: Faculty of Canon Law, 10-11 January 2013), 5, https://www.academia.edu/7347927/Formal_Defection_From_the_Catholic_Church_and_its_consequences_in_marriages_-_Danilo_R._Flores (accessed Oct 5, 2014).

connubii.”⁶⁸ Questions regarding what constitutes a formal separation from the Catholic Church were answered on March 13, 2006 by the Pontifical Council for Legislative Texts regarding the canonical procedure for formal defection. The basic elements include: “(a) the internal decision to leave the Catholic Church; (b) the realization and external manifestation of that decision; and (c) the reception of that decision by the competent ecclesiastical authority.”⁶⁹ Although juridically clear, such a procedure is “almost impracticable if one should observe literally the minutiae of the Protocol.”⁷⁰ In addition, these exemptions led to pastoral problems and juridical uncertainty leading Benedict XVI to issue the *motu proprio Omnium in mentem* on October 26, 2009 to modify the Code of Canon Law.⁷¹ Flores explains,

The legislator, therefore, decided to formally end the legal uncertainties created by the exemption. By repealing the exemption clause in the three canons, the juridical certainty is established: every Catholic or he who is received into the Catholic Church—whether defected in whatever manner or still remains in ecclesial communion—he is *semper et ubique* bound to observe the ecclesiastical law on disparity of cult and canonical form under the pain of invalidity of marriage.⁷²

Those who formally defect from the Catholic Church may do so to join another church or ecclesial community, not necessarily due to explicit and formal rejection of faith; therefore, there is not equivalence between formal defection from the Catholic Church

68. Flores, "Formal Defection from the Catholic Church and Its Canonical Consequences in Marriage in the Light of the *motu proprio Omnium in mentem*," 5.

69. The complete text from the Pontifical Council for Legislative Texts is found in Flores' paper, Appendix 1. Flores, "Formal Defection from the Catholic Church and Its Canonical Consequences in Marriage in the Light of the *motu proprio Omnium in mentem*," 20.

70. *Ibid.*, 19.

71. The complete text of the *motu proprio Omnium in mentem* is found in Flores' paper, Appendix 2. Flores, "Formal Defection from the Catholic Church and Its Canonical Consequences in Marriage in the Light of the *motu proprio Omnium in mentem*," 22-23.

72. *Ibid.*, 18.

and formal and explicit rejection of what the church intends to do when the marriage of baptized persons is celebrated. However, this example brings to light the practical difficulties that ensue when trying to facilitate the exercise of the *ius connubii* while at the same time trying to maintain juridical certainty. Flores concludes, “The exemption clause facilitated the exercise of the natural right to marry at the expense of the juridical certainty, while the *Omnium in mentem* assures the juridical certainty at the expense of the exercise of the *ius connubii*. Is there any other way to harmonize the natural right to marry and the juridical certitude?”⁷³ This is the exact difficulty with the case of baptized nonbelievers. The difficulty stems from c. 1055 §2, which is juridically precise yet denies the baptized nonbeliever *ius connubii*.⁷⁴

Clarification on the meaning of invalidity may be helpful at this point. When the church declares a marriage invalid in general, it does not mean that the marriage is nonexistent but rather “that it is lacking strength or wellness. It is, in other words, infirm.”⁷⁵ The church’s pastoral practice of refusing baptized nonbelievers is a practice based upon the recognition that the marriage should image the love relationship of Christ for the church and does not. It is lacking in spiritual health. Lawrence Wrenn clarifies the meaning of a declaration of invalidity in general:

We are saying that the marriage suffered from some substantial defect that prevented it from achieving its principal effect of creating between the spouses a perpetual bond. We are saying that, from its inception, the marriage did not enjoy the kind of wholeness or integrity or soundness or health that the Church, at a

73. Flores, "Formal Defection from the Catholic Church and Its Canonical Consequences in Marriage in the Light of the *motu proprio Omnium in mentem*," 19.

74. In addition, it leaves the baptized believer married to a non-baptized person unable to receive the sacrament, a clear exception to the inseparability doctrine.

75. Lawrence G. Wrenn, "When is an Invalid Marriage Null?" *CLSA Proceedings* 60 (1998): 39.

given point in history, requires for a marriage to be considered perpetually binding.⁷⁶

A “natural” marriage between two baptized persons is lacking in health and wholeness. This is a union that was meant to symbolize Christ’s indissoluble love for the church and yet it cannot due to their lack of faith. However, does this mean that the rejection of faith on the part of a baptized person creates a defect that prevents the creation of a perpetual bond between the spouses? Unbaptized persons presumably lack faith and are able to form a perpetual bond between them. Baptized nonbelievers should be able to form a perpetual bond that may be extrinsically dissoluble (like any other non-sacramental marriage).

The case of baptized nonbelievers considered to be a remote possibility differs significantly from those with weak, inchoate, obscure, or implicit faith. Indeed, it is difficult to determine what “level” of faith is sufficient to constitute a valid celebration of the sacrament. Susan Wood cautions, “Even minimal faith would appear to suffice and, when it is at all possible, presumption is made in favor of faith.”⁷⁷ This type of case of non-practicing Catholics with questionable faith is prevalent. The *Instrumentum Laboris* testifies to the reasons for this common occurrence:

The primary reason for non-practicing Catholics to return to their parishes for the celebration of a marriage—in the opinion of all the responses which address this issue—concerns the “aesthetical aspects” of the celebration (atmosphere, attractiveness, photo opportunities, etc.) and, equally, a conditioning from the religious tradition of the families of the couple to be married, transmitted to them in some fashion.⁷⁸

76. Wrenn, "When is an Invalid Marriage Null?" 42.

77. Susan Wood, "The Marriage of Baptized Nonbelievers: Faith, Contract, and Sacrament," *Theological Studies* 48 (1987): 293.

78. Synod of Bishops, *III Extraordinary General Assembly: The Pastoral Challenges of the Family in the Context of Evangelization Instrumentum Laboris*, no. 105.

The admission of this problem in *all* the responses to this question regarding the pastoral challenge of non-practicing Catholics reflects the inordinate focus on the externals of the wedding ceremony as referred to in Chapter Four. In addition, it points to the dwindling impact of the faith on the concrete lives of those not yet married and the erroneous view that the sacraments are cultural milestones or family traditions without real faith commitment. The dichotomy of baptized believers and baptized nonbelievers is a theoretical polarization that artificially delimits the complex human and theological reality of faith development. The presumption that baptized engaged couples approaching the church for marriage intend to marry as the church understands marriage opens up a fertile opportunity for evangelization. Whether or not this opportunity is effectively utilized is a question for pastoral theology. The pastoral need and canonical obligation have already been addressed in previous chapters. In order for couples to be able to live not only their marital commitment but also their baptismal commitment, families need to be evangelized so that as young people grow in faith they will be able to elicit valid *faith-filled* consent and establish a sacramental marriage of mutual love in Christ.

All of the loves work together “in rhythmically occurring ways” in marriage for the good of the whole family.⁷⁹ It is clear that love is theologically significant, and a more differentiated understanding of love in marriage can help sustain marriage practices during the vicissitudes of life together. While acknowledging that a theology of love is beneficial for pastoral ministry, the question remains if love is relevant in the juridical realm. We can begin to answer that question by summarizing what has been gleaned regarding conjugal love and commitment in this study. In the Pastoral Letter, *Marriage:*

79. Vacek, *Love, Human and Divine: The Heart of Christian Ethics*, 310.

Love and Life in the Divine Plan, the United States Conference of Catholic Bishops affirms,

Conjugal love, the love proper to marriage, is present in the commitment to the complete and total gift of self between husband and wife. Conjugal love establishes a unique communion of persons through the relationship of mutual self-giving and receiving between husband and wife, a relationship by which “a man leaves his father and mother and clings to his wife, and the two of them become one body [flesh]” (Gn 2:24).⁸⁰

In his 1999 Allocution to the Roman Rota, John Paul II expresses the same assertion. “*Amor coniugalis*, therefore, is not only and not primarily a feeling, but is essentially a commitment to the other person, a commitment made by a precise act of the will.”⁸¹ He continues, “Once a commitment has been made and accepted through consent, love becomes conjugal and never loses this character.”⁸² Conjugal love is a specific kind of commitment to another person. It is a commitment to a life-giving, faithful, permanent relationship. In order for it to be truly conjugal, the love must be accepted by the other, that is, mutual. John Paul II adds, “This consent is nothing other than the conscious, responsible assumption of a commitment through a juridical act by which, in reciprocal self-giving, the spouses promise total and definitive love to each other.”⁸³ Marital consent is the assumption of mutual commitment (union of wills) to be faithful to one another in a lifelong, loving, and generative union.⁸⁴ That being said, conjugal love

80. United States Conference of Catholic Bishops, *Marriage: Love and Life in the Divine Plan* (Washington, D.C.: United States Conference of Catholic Bishops, 2009), <http://www.usccb.org/laity/loveandlife/MarriageFINAL.pdf> (accessed June 26, 2010), 8.

81. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. January 21, 1999, Libreria Editrice Vaticana, no. 3, http://www.vatican.va/holy_father/john_paul_ii/speeches/1999/documents/hf_jp-ii_spe_19990121_rota-romana_en.html (accessed November 12, 2008).

82. *Ibid.*

83. *Ibid.*, no. 4.

84. This description of marital consent emphasizes the bilateral dimension of consent and the

understood as a commitment to another person is certainly relevant in the juridical realm. When the promise of total and definitive love to the other is accepted or assumed consciously and intentionally, a marriage is created. This is the juridical act of consent, which has theological, psychological, spiritual, moral, and social consequences. This act of choosing one another in marriage is a free act “but as soon as they perform this act they establish a personal state in which love becomes something that is owed, entailing effects of a juridical nature as well.”⁸⁵ The indication that love becomes something owed with consequent juridical effects is very difficult for many immersed in the contemporary American culture of the “soul mate marriage” to accept.

In a culture fixated upon “the outward, the immediate, the visible, the quick, the superficial and the provisional,” it is not difficult to imagine how to those who adhere to such a culture’s worldview the church’s teaching that love is *owed* and decisions have *moral and juridical* consequences would be rejected.⁸⁶ However, this is precisely what happens through consent. This is not to say that the rejection of church teaching and practice is due purely to opposing cultural values. Admittedly, the church has failed pastorally in many ways, leaving the baptized lacking a “sense of belonging to the Church.”⁸⁷ The *Instrumentum Laboris* reports that some episcopal conferences attribute disagreement with church teaching on the family to “a want of an authentic Christian

covenantal aspects; however, that does not negate the unilateral dimension or the contractual aspects. Americans understand the nature of contracts.

85. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1999*, no. 4.

86. Francis, *Apostolic Exhortation Evangelii Gaudium of the Holy Father Francis*. November 24, 2013, Libreria Editrice Vaticana, no. 62, http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html#I.%E2%80%82Some_challenges_of_today%E2%80%99s_world (accessed August 5, 2014).

87. *Ibid.*, no. 63.

experience.”⁸⁸ The pastoral activity of the church should encourage and foster “a truly engaging Christian experience.”⁸⁹ A dispensational account of the sacraments focusing on “administering the sacraments apart from other forms of evangelization” diminishes their truly grace-filled potential, thus making pastoral activity ineffective.⁹⁰ Although these responses seem to admit humbly that the church in many ways is stifling the Spirit through insufficient pastoral responses, implicit in this remark is the suggestion that should persons have “a truly engaging Christian experience,” that is, experience Christ on a personal level, they would then agree with magisterial teaching on the family. Such a position fails to account for the *sensus fidei*, “the supernatural appreciation of the faith (*sensus fidei*) of the whole people, when, ‘from the bishops to the last of the faithful’ they manifest a universal consent in matters of faith and morals.”⁹¹ The *sensus fidei* is founded theologically on the sacraments empowering all of the faithful through the gifts of the Spirit to renew and build up the church.⁹² In *Dei verbum* 10, the Council fathers stress the listening function of the magisterium as the servant of the Word of God. Pamela McCann asserts that “the Second Vatican Council articulated its understanding of the *sensus fidei* as a feature belonging to the entire Church: a gift of supernatural discernment in matters of faith.”⁹³ However, “there is no reference at all to either the

88. Synod of Bishops, *III Extraordinary General Assembly: The Pastoral Challenges of the Family in the Context of Evangelization Instrumentum Laboris*, no. 15.

89. *Ibid.*

90. Francis, *Apostolic Exhortation Evangelii Gaudium*, no. 63.

91. *Lumen Gentium*, no. 12.

92. *Ibid.*

93. Pamela McCann, “The *Sensus Fidei* and Canon Law,” *Studia Canonica* 44 (2010): 224.

sensus fidei or the *sensus fidelium* in the legislation of the 1983 Code of Canon Law.”⁹⁴

An ecclesiology of *communio* needs to be open to discernment, reform, and revision from the ordained and non-ordained, theologians, canonists, scholars, pastoral ministers, and the faithful at every level of government within the church. The only way this is possible is if canonical structures are in place to ensure this process. In line with Rahner, McCann does point out the role of custom “as a Spirit-led phenomenon which allowed for the participation of all the faithful in the law-making function of the church.”⁹⁵ Örsy argues, “Thus, there is wisdom in the old maxim re-stated in canon 27: ‘Custom is the best interpreter of laws.’ But there is also a latent irony in the fact that our legal system goes a long way to inhibit the emergence of customs.”⁹⁶ At the same time, the *sensus fidei* is not to be equated with popular opinion. Understanding the incongruity between the practices of Catholics and the teachings of the magisterial church in matters of sexuality and family cannot be reduced to any simple explanation. That being said, the unprecedented increase in cohabitation and the prevalence of divorce can be seen in the light of what has been articulated regarding commitment and consent in order to determine a practical response to this phenomenon.

94. McCann, "The *Sensus Fidei* and Canon Law," 225.

95. *Ibid.*, 240.

96. Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, Minnesota: The Liturgical Press, 1992), 116.

6.2 What Should Be the Church's Praxis in this Concrete Situation?

6.2.1 Cohabitation, Commitment, and Consent

In a predominantly secular culture in which apprehension toward all institutions is acutely present, the privatization of the family is to be expected along with fluid and loosely defined family relationships. The exploding phenomenon of cohabitation outside of marriage can be attributed in part to changing economic and cultural conditions in America. Kay Hymowitz and her colleagues conclude that the unavailability of decent-paying jobs for less-educated Americans discourages them from marrying. “Under these circumstances, it is no surprise that growing numbers of Middle Americans are postponing marriage to their late twenties or thirties, or foregoing marriage altogether, as they search for jobs that will provide them with a middle-class lifestyle.”⁹⁷ This is not only a concern for men who are hoping to support a family but also for women who “expect, and are expected, to become economically independent whether they hope to marry or not.”⁹⁸ This changed economic condition holds such influence over marriage practices, because the way people think about marriage has changed so significantly:

Earlier generations looked at marriage as their entry point into adulthood and the crucial vehicle for defining themselves as mature individuals. By contrast, young men and women today expect to achieve an individual, autonomous identity before they become part of a bound couple. . . .

In this new environment, marriage is transformed from a cornerstone to a capstone of adult identity. No longer the stabilizing base for the life one is building, it is now more of a crowning achievement.⁹⁹

97. Kay Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage In America* (The National Marriage Project at the University of Virginia, The National Campaign to Prevent Teen and Unplanned Pregnancy, and The Relate Institute, 2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/04/KnotYet-FinalForWeb-041413.pdf> (accessed July 10, 2014).

98. *Ibid.*, 24.

99. *Ibid.*, 24-25.

With the emergence of the developmental stage of extended adolescence coupled with the quest for the soul mate, marriage has become an endpoint versus a journey. “As fully formed individuals who are financially and psychologically independent, they expect to meet each other on a higher emotional plane.”¹⁰⁰ This view of marriage differs in many ways from the theology of marriage discussed in this study, because marriage as articulated in this study is more of a cornerstone. Consent in marriage begins a life *together* of growing and learning *together* and building a life *together* rather than the view that two people have grown and learned and built all they need to bring to a marriage alone and are now “ready” to get married.

Although it is increasingly being utilized as such, cohabitation is not a replacement for marriage. They are not equivalent. In their report on delayed marriage in America, Hymowitz and her colleagues found that “today’s young people of all education levels are entering their first coresidential relationship at about the same age as in the past; it’s just that now they are far more likely to be ‘living together’ than married.”¹⁰¹ In addition, these households resemble marriage in that they often contain children. “In 2000, about 40 percent of unmarried-couple households included one or more children under age 18. For unmarried couples in the 25 to 34 age group, the percentage with children is higher still, approaching half of all such households.”¹⁰²

100. Kay Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage In America*, 25.

101. Ibid., 28; Casey E. Copen et al., "First Premarital Cohabitation in the United States: 2006-2010 National Survey of Family Growth," *National Health Statistics Report*, no. 64 (April 4, 2013), 3.

102. National Marriage Project and Center for Marriage and Families, "Social Indicators of Marital Health & Well-Being: Trends of the Past Five Decades," in *The State of Our Unions* (Charlottesville, VA: National Marriage Project and Institute for American Values, 2012), 93.

Despite similarities in appearance, married and cohabiting couples differ significantly in terms of the thrust of this study: commitment and consent.¹⁰³

Without “the conscious, responsible assumption of a commitment through a juridical act,”¹⁰⁴ that is, the mutual consent that makes marriage, the cohabiting relationship is ambiguous.¹⁰⁵ In the theology of marriage presented here, conjugal love is expressed and made present through the mutual exchange of promises. The wedding celebration is a clear expression of a *consensus* already begun and the desire and will for that union to continue into the future.¹⁰⁶ Presuming that one’s internal consent conforms to the expressed consent, spouses articulate the promises they are making to one another from that day forward. The wedding liturgy itself is a tangible point of reference for spouses to return to during the vicissitudes of married life. In contrast, cohabitation has no clearly defined cultural emblems attached to it nor any explicitly circumscribed parameters to identify the nature of the relationship. Cohabitation lacks the symbolizing function that marriage has. Often men and women in cohabiting relationships have very

103. Family disintegration occurs in both family forms. Pastoral marriage ministry should seek to prepare people to make lifelong, loving, faithful commitments, to strive to keep families together in healthy, loving relationships and to aid in the process of healing and recovery should the family fragment. This applies if the couple is married or cohabiting. However, consent in canon law and a theology of marital commitment recognize that there are many stakeholders in intimate family relationships and that the choice (with varying degrees of deliberation) needs support and structure from the surrounding community, particularly the church. Canon law of marriage is recognition that these family relationships are valuable and fragile and require norms, processes, and structures surrounding them to protect the freedom of individuals and promote good order in the family as community.

104. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1999*, no. 3.

105. Scott M. Stanley, Galena K. Rhoades, and Howard J. Markman, "Sliding Vs. Deciding: Intertia and the Premarital Cohabitation Effect," *Family Relations* 55 (October 2006): 503.

106. As symbolic beings, human persons express themselves. Particularly, for something as significant as starting a family with someone, the consent, commitment, and decision should be expressed. The lack of a decision in “deciding” to cohabit is a problem in itself to be addressed shortly.

different expectations regarding the permanency of the relationship.¹⁰⁷ Without this symbolizing function, the relationship lacks clarity for those inside and outside of the relationship, thus contributing to the instability of the relationship. Stanley and his colleagues explain,

The very ambiguity of cohabitation may undermine the ability of some couples to develop a clear and mutual understanding about the nature of their relationships. In contrast to ambiguity, a high level of commitment generally speaks to a sense of security and mutual clarity between partners and within their social networks about exclusivity and a future. For many couples, the ambiguity of cohabitation becomes part of the pathway toward a marriage more prone to distress or divorce because of relationship inertia, described next.¹⁰⁸

Relationship inertia is the tendency of some cohabiting couples to slide into marriage due to relationship constraints that arise from living together rather than intentionally deciding to marry.¹⁰⁹ The “cohabitation effect,” or the “association between premarital cohabitation and poorer marital outcomes,” is due to selection effects (i.e., those who cohabit have pre-existing characteristics associated with increased risk for divorce and marital distress) and experience (i.e., the experience of cohabitation itself increases risk for divorce and marital distress).¹¹⁰ The effect of relationship inertia on consequent marriage is that couples who may not have married due to incompatibility or other factors end up marrying without sufficient deliberation due to the inertial force created by cohabitation. In contrast, marital consent is an act of rational self-consciousness. Through marital consent, spouses freely choose to be bound to one another in love for

107. W. Bradford Wilcox, "Men and Women Often Expect Different Things When They Move In Together," *The Atlantic*, July 8, 2013, <http://www.theatlantic.com/sexes/archive/2013/07/men-and-women-often-expect-different-things-when-they-move-in-together/277571/> (accessed August 31, 2013).

108. Stanley, Rhoades, and Markman, "Sliding Vs. Deciding: Intertia and the Premarital Cohabitation Effect," 503.

109. *Ibid.*, 503-4.

110. *Ibid.*, 500.

life. Marital consent embodies *both* dedication and constraint commitment. The explicit promise to love another for life and accept their love in return implies that forward-moving, internal sense of devotion to another characteristic of dedication. Valid marital consent includes elements essential to what has been defined as dedication. “*Dedication* refers to intrinsic interpersonal commitment and is characterized by a sense of working as a team or as a ‘we’ (i.e., couple identity), a desire for a long-term future together, a readiness to give one’s partner or the relationship high priority, and a willingness to make personal sacrifices for the good of one’s partner or relationship.”¹¹¹ At the same time, marital consent is the willing acceptance of constraints and obligations and binding forces that discourage one from abandoning a promise once made. Marriage is strong in both of these kinds of commitment, whereas both dedication and constraint commitment are limited and lack vigor in cohabitation. The choice to cohabit outside of marriage is an intentional avoidance of legal and canonical constraints and the evasion of the positive, explicit, public promise to devote oneself to another for life. Marriage is definite and demarcated versus cohabitation, which is ambiguous and uncertain, and it is the conscious, intentional assumption of a commitment that differentiates the two.

It is possible that cohabiting couples can make a commitment to faithfully love one another for life and even to be open to children, only to do so privately. Such a commitment is radically different than the juridical act of marital consent. The very fact that it is expressed privately (if at all) changes the nature of the act itself. The belief that some private form of commitment is sufficient is evidence of the pervasiveness of

111. Galena K. Rhoades, Scott M. Stanley, and Howard J. Markman, "Pre-Engagement Cohabitation and Gender Asymmetry in Marital Commitment," *Journal of Family Psychology* 20, no. 4 (2006): 553.

individualism, considering how extensive cohabitation is. As argued in earlier chapters, the private and the public are not mutually exclusive.¹¹² On the contrary, they are intricately intertwined. The belief that what happens in the home is purely private and does not spill out into the public realm is dangerously naïve and completely false. Although written many years ago, the argument of *Habits of the Heart* is still relevant and true today. “What would probably perplex and disturb Tocqueville most today is the fact that the family is no longer an integral part of a larger moral ecology tying the individual to community, church, and nation. The family is the core of the private sphere, whose aim is not to link individuals to the public world but to avoid it as far as possible.”¹¹³ The choice to live together as an alternative to marriage is the epitome of accepting the privatization of the family. In such a nebulous form of family life, cohabitating couples are “free” to determine the terms of their arrangement. However, as David Matzko McCarthy argues, “The price for freedom from formal constraints of marriage is a lower commitment in enduring relationships.”¹¹⁴ Hymowitz and her colleagues find the same evidence: “Cohabitation in the United States is far more unstable, conflicted, and short-lived—and far more associated with child abuse—than marital relationships.”¹¹⁵

112. Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life*, 3rd ed. (Berkeley, CA: University of California Press, 2008), 163.

113. *Ibid.*, 111-12.

114. David Matzko McCarthy, *Sex and Love in the Home: A Theology of the Household*, 2nd ed. (St Albans Place, London: SCM Press, 2004), 210.

115. Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage In America*, 32.

We must make an important caveat here. Galena K. Rhoades and her colleagues have found that there is a difference between couples that cohabit prior to engagement and those that cohabit after engagement:

The basic findings are in line with previous research, as there were no significant differences between individuals who cohabited after engagement versus not until marriage, but those who cohabited before engagement reported significantly lower quality marriages and greater potential for divorce than those who cohabited only after engagement or not at all until marriage.¹¹⁶

Couples that cohabit after engagement have made “a mutual, public commitment to marry” through the symbolic functioning of the engagement itself.¹¹⁷ These couples are not subject to relationship inertia, because they have made the promise to marry in the future *prior to* cohabitation. Rhoades and her colleagues conclude that “the premarital cohabitation effect could be more fundamentally cast as the *pre-engagement* [italics mine] cohabitation effect.”¹¹⁸ The conscious decision to marry in the future, engagement, is a culturally recognized symbol of the couple’s commitment level to each other. In a recent study from Rhoades and Stanley, they explain that “the problem of inertia is compounded by the fact that people tend not to make decisions about living together.”¹¹⁹ Often, couples move in together hastily without due consideration of the consequences or

116. Galena K. Rhoades, Scott M. Stanley, and Howard J. Markman, "The Pre-Engagement Cohabitation Effect: A Replication and Extension of Previous Findings," *Journal of Family Psychology* 23, no. 1 (2009): 110; See also Rhoades, Stanley, and Markman, "Pre-Engagement Cohabitation and Gender Asymmetry in Marital Commitment, 554" and Galena H. Kline et al., "Timing is Everything: Pre-Engagement Cohabitation and Increased Risk for Poor Marital Outcomes," *Journal of Family Psychology* 18, no. 2 (2004): 311-18.

117. Rhoades, Stanley, and Markman, "The Pre-Engagement Cohabitation Effect: A Replication and Extension of Previous Findings," 110.

118. *Ibid.*, 111.

119. Galena K. Rhoades and Scott M. Stanley, "Before 'I Do': What Do Premarital Experiences Have to Do with Marital Quality Among Today's Young Adults?" (The National Marriage Project at the University of Virginia, 2014), <http://nationalmarriageproject.org/wp-content/uploads/2014/08/NMP-BeforeIDoReport-Final.pdf> (accessed September 15, 2014).

long-term effects of their actions. It is possible that relationship inertia can factor in to marriage nullity cases under the *caput* of lack of due discretion.¹²⁰ As discussed in Chapter Five, lifestyle choices can impact one's capacity for eliciting valid consent. "Speed and ambiguity can combine to land people in situations that are hard to exit because of inertia from constraint—situations that couples might not otherwise have chosen if they had been more deliberative."¹²¹ Marriage is a very different reality, and it is the consenting and surrendering to a given structure for the permanence and viability of the relationship that makes the difference. McCarthy continues, "The basic structure of marriage precedes them, and they accept that they will have to bend to it, that their attitudes and habits will be shaped by this given structure of life. Marriage in the church is framed by its place as a sign of God's grace and by the journey of discipleship."¹²² Of course, the particular beauty, failures, flaws, and blessings will be dependent upon the uniqueness of each couple as they symbolize (or fail to) the enduring love of Christ for the church, but the essence is the same for all. These are the essential properties and elements that were discussed in relation to canon law. These properties and elements must find their basis in theology and the lived experience of married persons. These include unity, indissolubility, sacramentality, and the ordination of conjugal life to the *bonum prolis* and the *bonum coniugum*. As stated in Chapter Five, the essential elements are not specifically listed in the Code but can be extrapolated from other canons and

120. Kevin Quirk, "Seminar: Cohabitation: Canonical & Pastoral Consequences," *CLSA Proceedings* 69 (2007): 180-81.

121. Stanley, Rhoades, and Markman, "Sliding Vs. Deciding: Intertia and the Premarital Cohabitation Effect," 504.

122. McCarthy, *Sex and Love in the Home: A Theology of the Household*, 209.

jurisprudence. This leaves canon law open to the promptings of the Spirit in the theological development of marriage.

The difference between cohabitation that occurs prior to engagement with the intention to marry in the future and cohabitation that occurs without the intention to marry is a significant difference that hinges on commitment. In his proposal regarding cohabitation and marriage, Michael Lawler names committed cohabitation “*prenuptial* cohabitation, because marriage is consciously intended to follow it.”¹²³ Such a distinction is helpful, because pre-nuptial and non-nuptial cohabitation (without the conscious intention to marry) are very different realities, as noted. Lawler is clear that his proposal refers *only* to pre-nuptial cohabitation. “It is only those cohabitants with an emphatic intention to marry who are my concern.”¹²⁴ After demonstrating the “parallel between the pre-modern, pre-Tridentine, pre-Victorian and the modern or post-modern practices” of cohabitation and marriage along with the African parallel, Lawler offers his proposal for the Catholic Church. “My proposal is straightforward: a return to the processual marital sequence of betrothal (with appropriate ritual to ensure community involvement), sexual intercourse, possible fertility, ceremonial wedding to acknowledge and mark the consummation of both valid marriage and sacrament.”¹²⁵ Lawler’s proposal is in line with previous research on the similarities between pre-nuptial cohabitants and married cohabitants. It is my argument that these similarities are founded upon the restriction of his proposal to *only* pre-nuptial cohabitants. His proposal concerns already

123. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (Collegeville, Minnesota: The Liturgical Press, 2002), 166.

124. *Ibid.*, 175.

125. *Ibid.*

committed cohabitants. This study has emphasized the need to publicly express this commitment in ritual, which his proposal does as well. In Lawler's proposal, the public expression of this commitment is moved from the wedding, consent to marry in the present, to the betrothal, consent to marry in the future. Several questions and concerns follow from this. First, Lawler states that prenuptial cohabitants "are committed to one another, though they have not articulated that commitment in public ritual; they fully intend to marry when the psychological and, especially, the economic restrictions modern society puts upon their right to marry are removed."¹²⁶ This is clearly the capstone model of marriage. What exactly are the psychological and economic restrictions that modern society puts upon them? How are those restrictions *not present* in a cohabiting situation that essentially resembles marriage, particularly when children are already present? Children cannot be counted as an economic reason not to marry; cohabiting households increasingly contain children. The marriage tax penalty may be an economic factor, but the marriage tax penalty does not usually apply to those with low incomes, and cohabitation is more common among those of lower educational and income levels.¹²⁷ Lawler continues, "Modern society has established socioeconomic structures for marriage which the couple are presently unable to achieve."¹²⁸ If this is the case, then the primary strategies for changing marital practices should focus on social justice and alleviating

126. Lawler, *Marriage and the Catholic Church: Disputed Questions*, 179.

127. Jim Wang, *How Much the Marriage Tax Penalty Will Cost You*. March 12 2014, Money, U.S. News & World Report, <http://money.usnews.com/money/blogs/my-money/2014/03/11/how-much-the-marriage-tax-penalty-will-cost-you> (accessed October 24, 2014). W. Bradford Wilcox and Elizabeth Marquardt, eds., *The State of Our Unions, Marriage in America 2010: When Marriage Disappears: The New Middle America* (Charlottesville, VA: National Marriage Project and the Institute for American Values, December 2010), 76, http://www.virginia.edu/marriageproject/pdfs/Union_11_12_10.pdf (accessed June 1, 2011).

128. Lawler, *Marriage and the Catholic Church: Disputed Questions*, 180.

undue economic injustices imposed upon couples. The reasons for the growing marriage gap between the highly educated and the moderately educated needs to be researched in greater detail.¹²⁹ In addition, Lawler's proposal does not address how to deal with broken betrothals, either pastorally or juridically. The pain and devastation that accompany divorce is the result of broken relationships and broken promises; this is true of betrothed relationships as much as marriages, even more so when children are involved. Lawler's proposal simply shifts the "when" of commitment from the betrothal to the wedding. In describing marriage as prophetic symbol, Lawler explains,

They come to realize that, though their marriage is already *a* sacramental sign of the covenant between Christ and his church, it is not yet the *best* sign it can be. That best sign takes time. In Christian marriage, even more than in any other marriage, the answer to the age old question of when are two people married is simple: a lifetime after they exchange consent.¹³⁰

There is no question that a couple is "more married" after a lifetime together and that milestones, like significant anniversaries, should be celebrated along the way. That being said, if the wedding is celebrated later in life, when is the commitment ritually celebrated and expressed? Lawler's failure to address this reality is unfortunate, because any practical proposal for marriage should have as its aim to help individuals to discern their vocation and once marriage is begun, even inchoately, to keep those families together, unless the marriage is abusive. Finally, Lawler completely omits the role of discernment

129. For example, the capstone model of marriage is particularly detrimental to men who are not stably employed and for which a college education is not a real possibility. These men may be viewed by themselves and potential partners as "less eligible marriage material." Renewed respect for the trades and increased opportunities for apprenticeships could be a workable strategy for decreasing the marriage gap. However, this does not explain why women and men may be willing to lower their expectations for a cohabiting partner than for a spouse, unless they view the cohabiting relationship as easier to leave. See W. Bradford Wilcox and Elizabeth Marquardt, eds., *The State of Our Unions, Marriage in America 2010: When Marriage Disappears: The New Middle America*.

130. Michael G. Lawler, *Marriage and Sacrament: A Theology of Christian Marriage* (Collegeville, Minnesota: The Liturgical Press, 1993), 24.

in choosing a spouse, and his proposal leads to the problem of relationship inertia as discussed previously. He states, “This inchoate marriage period would be a perfect time for the Church community to assist the couple in honing their relationship with an ongoing marriage preparation program aimed precisely at their relationship.”¹³¹ Lawler’s argument may be a somewhat convincing argument for the moral legitimacy of premarital sexual acts within the context of prenuptial cohabitation, but it lacks an adequate theology of marital commitment necessary for practical strategies of marriage preparation in terms of discernment and preventing failed relationships. Lawler’s vision of the processual coming-to-be of marriage resonates with the public nature of consent and the bilateral dimension of consent of this study, but he places the beginning of the marriage in betrothal rather than consent. “My proposal envisages a marital process that is initiated by symmetrical, mutual commitment and consent, is lived in mutual love, justice, equality, intimacy, and fulfillment, in a prenuptial cohabitation pointed to a wedding which consummates the process of becoming married in a mutually just, human, and public manner.”¹³² By limiting his proposal to prenuptial cohabiters, Lawler fails to account for the many non-nuptial cohabiters who use it to test the relationship or to coax the more reluctant partner (usually the man) into marriage.

The critical element of surrender in consent was underscored in the previous chapter. The practical judgment that this particular marriage with this particular person is chosen is a movement of the will in the complete acceptance of the other now and always. It is an act of mutual surrender not only to the other but also to the new reality begun together. This element of consent and commitment is crucial, because it takes

131. Lawler, *Marriage and the Catholic Church: Disputed Questions*, 182.

132. *Ibid.*, 181.

seriously the doubts, misgivings, disappointments, and regrets that accompany the *consortium totius vitae*. McCarthy expresses the givenness of marriage and the element of surrender in consent:

Save the nuptial “I do,” marriage and family life are sustained as much by consent—by a kind of resignation—as by choice. The reality of family life is that we look back and think that we could have made a better choice. We may not have the husband or wife we imagined that we would have when we looked in his or her face and said “I do.” We may choose to have children, but in the natural course of things, we may have children that we would not have chosen to have. Family life is largely about acceptance rather than choice; not withdrawal (or passive resignation), but the “yes” of the adopted child . . . who consents to what “the taking on” of family has made of him.

Consenting to our place in a family means that we hope that in accepting the demands upon us and the relationships into which we are drawn, we will find the depths of friendship that we desire—or that through consenting to family we will learn to desire relationships that give us genuine and lasting hope.¹³³

The element of surrender in consent is an unconditional acceptance of the full reality of one’s spouse as he or she changes over a lifetime. Consent is expressed during the marriage liturgy, but spouses must continue to accept the other as he or she is every day thereafter. That is the reason fidelity is essential to marriage. Fidelity is the mobile virtue that connects commitment to change.¹³⁴ “Marital fidelity combines commitment and change as two persons seek to grow in the same direction; fidelity is the careful tending of both the commitments and the changes necessary in a maturing love.”¹³⁵

The view of marriage as cornerstone of adult identity versus capstone corresponds to the theology of marriage espoused here. In the cornerstone model, marriage is

133. McCarthy, *Sex and Love in the Home: A Theology of the Household*, 205.

134. Evelyn Eaton Whitehead and James D. Whitehead, *Marrying Well: Stages on the Journey of Christian Marriage* (Garden City, New York: Image Books, 1981), 389.

135. *Ibid.*

considered the “stabilizing base for the life one is building.”¹³⁶ One of the essential ends of marriage is the *bonum coniugum*, that maturing of spouses that happens through the fidelity of the spouses to their marital commitment. The capstone view of marriage implies that individuals have already achieved their own personal and professional perfection, so that they are now ready for marriage. The popular view that couples should live together until they have reached some elusive level of “readiness” is antithetical to the understanding that marriage is ordered to the *bonum coniugum*, because the conjugal good is *what marriage is directed toward*, not what needs to be present in order to be ready to get married. It is what happens to couples in a life well-lived *together*. Marital consent is the beginning of the journey of growing in goodness together. The wedding celebration is a necessary and formative component of the marital journey, because it externally manifests the *consensus* that is forming and each person’s will that this union continue for a lifetime.

In the sweeping tide of the phenomenon of cohabitation, the Church needs to better explain the difference between marriage and cohabitation and how commitment makes a difference in the context of the relationship. The ordering of our sexual lives and family relationships is a very personal matter, but not private. The church’s interest in family relationships does not arise from a desire to impose extraneous and cumbersome institutional armor on a self-sustaining, precious, private escape from the world. The external commitment of marriage strengthens the relationship from the inside and links it to the greater community, church, and world. Through marital consent, couples step into the structure of marriage in order that they will be able to share in the *consortium totius vitae*. The wedding celebration invites the church into this relationship

136. Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage In America*, 25.

to protect and support it. The canonical form of marriage is the juridical expression that the spouses are the ministers of the sacrament, yet the ordained along with the witnesses accept that consent and promise the continued prayer and care of the church community. The commitment to love another for life in a faithful, life-giving union is much too difficult to uphold alone. Rhoades and Stanley argue that the public nature of the wedding ritual contributes to the health and vitality of the committed relationship. The wedding liturgy “symbolizes a clear decision to commit one’s marriage,” and “making a clear, deliberate decision to commit to one option and reject alternative options strengthens a person’s tendency to follow through on the commitment.”¹³⁷ They continue, “Wedding ceremonies ritualize the foundation of commitment.”¹³⁸ Beginning in faith formation for children and reaching out to the public in evangelization, the Church should be teaching the significance of this commitment and how the conscious decision to commit along with its public expression changes the nature of the relationship itself.

This effort to educate the faithful and the world regarding the distinctiveness of marital consent and the nature of the relationship it produces should be the collaborative work of catechists, ministers of marriage preparation, theologians, canonists, clinical psychologists, married couples, and ordained ministers. Considering the prevalence and continued increase in cohabitation as a replacement for marriage, this needs to be a sustained and structurally organized effort. Such meetings should be regular and collaborative for the practical purpose of marriage ministry. Marriage ministry in all of

137. Rhoades and Stanley, "Before 'I Do': What Do Premarital Experiences Have to Do with Marital Quality Among Today's Young Adults?" 13.

138. *Ibid.*

its stages would be considered for research, discussion, and decision. Those pastoral ministers involved with marriage preparation and formation would benefit tremendously from the expertise of canonists and tribunal advocates that have listened in depth to the stories of broken relationships. The very personal and painful stories of those who have gone through the annulment process can be used redemptively to work toward preventing divorce through strengthening marriages, more effectively preparing couples for marriage, and finding creative ways to incorporate lessons on commitment into children's faith formation.

6.2.2 Needed: A Theology of Dating and Discernment

A topic of particular importance and urgent need is the lacuna in theological literature and the church's documents on the role of dating and discernment in marriage preparation. In Chapter Four, we elucidated the groundless and, therefore dangerous, assumption implicit in church documents that couples approaching the church for marriage have already discerned their vocation to marriage with their intended spouse with the help of the community and pastor. This is an outlandish assumption. The phenomenon of "sliding versus deciding" identified by Stanley, Rhoades, and Markman is evidence that discernment is precisely what is NOT to be assumed. The transition many couples make from noncohabitation to cohabitation is "often a nondeliberative and incremental process."¹³⁹ Although cohabitation resembles marriage in many ways, this ambiguous state is considered by many to be part of the process of dating. Kline and her colleagues hypothesize how negative interaction patterns may contribute to the "decision" to cohabit as a part of dating:

139. Stanley, Rhoades, and Markman, "Sliding Vs. Deciding: Intertia and the Premarital Cohabitation Effect," 505.

We speculate that negative interaction patterns may be part of the reason some couples decide to move in together before committing to marriage. These couples may be in love, but also may wish to “test” their relationships because they are having trouble getting along. Their lower confidence and interpersonal commitment scores may reflect this sense of wanting to test the relationship. In contrast, couples who were less negative during dating may have decided to marry instead of cohabiting first, feeling less need to test their relationships.¹⁴⁰

The theory of relationship inertia reveals why cohabitation is not a good strategy for testing the relationship or using it as a part of the dating and decision process.

“Obviously, many cohabiting couples break up, but it may be harder to break up when cohabiting than when not. Thus, cohabitation itself may not cause risks as much as it makes it harder to terminate a riskier union, thus constraining the search for a better partner fit.”¹⁴¹ In short, cohabitation defeats the very purpose of dating. In addition, when cohabiting there is a greater chance of bringing children into an already uncertain and tenuous union. It is a process that is inherently at odds with the rights of children.

For the care and preparation of those who do approach the church for marriage, whether cohabiting or not, there is still the need for greater clarity and precision regarding how and when their commitment forms. The prevalence of affirmative decisions of nullity on the grounds of defective consent speaks to this theological and pastoral gap. This is precisely where conclusions drawn from the myriad of cases brought before tribunals could benefit those ministering to the engaged. What are the dominant trends in affirmative sentences across dioceses? How could have more effective marriage preparation either helped this particular marriage to thrive or prevented it from happening altogether? Marriage preparation is happening way too late

140. Kline et al., "Timing is Everything: Pre-Engagement Cohabitation and Increased Risk for Poor Marital Outcomes," 316.

141. Stanley, Rhoades, and Markman, "Sliding Vs. Deciding: Intertia and the Premarital Cohabitation Effect," 504.

with inordinate focus on immediate preparation. At this time, external pressures from family and the wedding industry make this the worst possible time for discernment, as Fintan Gavin explains: “One very practical difficulty with these courses is that couples tend to do them in the months or indeed the weeks leading up to their wedding when the decision has already been made and the preparations are already in place for the wedding. It means that these courses or programmes are too late to help people with making this critical decision to marry.”¹⁴² The church is painfully absent from the process of discernment, if it happens at all in dating.

In order to formulate a practical response to the Church’s absence in the dating process, a theology of dating needs to be further explored. Jason King and Donna Freitas have attended to the theological and spiritual meaning of dating.¹⁴³ They point out that all too often Christian perspectives on dating equate dating with premarital sex in the context of sin, or these perspectives view dating as an “intrusion” into one’s relationship with God, with marriage being the only relationship that is “divinely ordained.”¹⁴⁴ King and Freitas conclude that dating can be the subject of theology and a spiritual reality:

Those who are dating are called to view each other as clues to a mystery, assistance in a journey, or preparation for a quest. The mystery, journey, or quest is a process of discerning each one’s response to God’s call. Hence, dating must a) be a relationship that is loving since that is the only proper response to mutually exchanged clues, assistance, and preparation, and b) be a relationship that is evaluated in light of God’s call.¹⁴⁵

142. Fintan Gavin, "Canon 1063: Marriage Preparation as a Lifetime Journey," *Studia Canonica* 39 (2005): 191.

143. Jason King and Donna Freitas, "Sex, Time, and Meaning: A Theology of Dating," *Horizons* 30, no. 1 (2003): 25-40. See also Donna Freitas and Jason King, *Save the Date: A Spirituality of Dating, Love, Dinner, and the Divine* (New York, NY: Crossroad, 2003).

144. King and Freitas, "Sex, Time, and Meaning: A Theology of Dating," 26-27.

145. *Ibid.*, 39.

Dating can have a profound spiritual impact on persons when engaged in consciously and intentionally and when both the self and the other are treated with the honor and respect proper to human dignity. Within a theological horizon, the Church can be involved pastorally in the context of dating in many ways. The website, “For Your Marriage,” that grew out of the USCCB’s National Pastoral Initiative for Marriage is a tremendous resource for people involved in all stages of marriage preparation, including pastoral ministers.¹⁴⁶ Parishes should provide discussion groups, Bible studies, sponsor couple programs, and social events in support of the process of discernment in dating. Catholic schools could provide mandatory marriage courses for upperclassmen. Resources should be made available for group discussion or private study to educate the faithful on vocational discernment and mate selection.¹⁴⁷

Although engaged couples are required to participate in the canonical inquiry into the freedom to marry, these prenuptial investigations are failing to prevent many invalid marriages in the church. The focus of immediate preparation is primarily instructional, whether in the form of classes, retreats, or sponsor couples. However, with many declarations of nullity granted under c. 1095, is instruction sufficient preparation?

William Woestman posits this question:

Prenuptial *instructions* are needed, but it is rare that a tribunal declares a marriage null because one or both of the parties lacked the knowledge required for validly contracting marriage. Most marriages are declared null because a person was *incapable* of getting married. In a word, our pastoral practice of preparing couples for marriage has not caught up with the Code and the jurisprudence followed by our tribunals. Prenuptial investigations must address

146. For Your Marriage, <http://www.foryourmarriage.org> (accessed October 1, 2014).

147. One very valuable resource for those who are dating is John Van Epp, *How to Avoid Falling in Love with a Jerk: The Foolproof Way to Follow Your Heart Without Losing Your Mind* (New York, NY: McGraw Hill, 2007).

the real problem of the Church's assisting at the marriages of persons *incapable* of getting married.

At first glance it may seem that the natural right to marry militates against the Church's right to refuse to witness a couple's marriage. But no person has a right to do what the individual *cannot* do.¹⁴⁸

Although Woestman refers here to preventing marriages that would be invalid due to incapacity, the same difficulty applies to couples that may marry invalidly due to determining error, simulation, or condition. Clearly and ideally, one would hope these marriages could be discouraged and the attempt to marry abandoned; however, the critical question is: how do pastors and their marriage preparation teams make this assessment and do so with great pastoral care and sensitivity? Klaus Lüdicke disparages the acceptance of a minimalist concept of consent in marriage nullity cases in light of the changes to canon law in the revised Code and the theology of the Second Vatican Council. "Canon law on consent assumes that an indiscriminate, unreflective consent that corresponds to the minimum standards of c. 1096 suffices for a marriage, and that only the qualifying defects mentioned in the Code lead to nullity."¹⁴⁹ He proposes that the Church should "raise the bar" by permitting only couples "who have been sufficiently prepared by the Church itself for such a demanding community of life."¹⁵⁰ Practically speaking, is such a task even possible without turning many people in need of evangelization and pastoral care away from the Church, possibly forever? An even greater difficulty is in the doubtful assumption that parishes are equipped with the resources to make this kind of assessment of every couple. That being said, if greater

148. William Woestman, "Too Many Invalid Marriages," *Studia Canonica* 24 (1990): 201.

149. 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): 503.

150. *Ibid.*

resources are not allocated to pastoral means of marriage preparation in all of its stages, then more resources are needed on the other end of the process for tribunals in adjudicating declarations of nullity.

6.3 What Means and Strategies Should Be Used to Promote and Protect More Loving, Generative, Lifelong Sacramental Marriages?

6.3.1 Collaboration

The specific means and strategies should grow out of collaboration at all levels: local, diocesan, national, and universal. The Extraordinary Synod on the Family in 2014 to be followed by the Ordinary General Assembly in 2015 is evidence that this is already happening in a significant way. According to c. 342, the purpose of the synod of bishops is “to foster closer unity between the Roman Pontiff and bishops, to assist the Roman Pontiff with their counsel in the preservation and growth of faith and morals and in the observance and strengthening of ecclesiastical discipline, and to consider questions pertaining to the activity of the Church in the world.” The creation of the synod grew out of the spirit of communion and collegiality of the Second Vatican Council.¹⁵¹ The synod works to foster unity between the Pope and the bishops, to supply accurate information, and to facilitate agreement in doctrinal and pastoral matters.¹⁵² As a consultative body, the synod does not resolve issues but offers the pope information, perspectives, and

151. For greater detail into the nature, purpose, authority, and structure of the synod see cc. 342-348. These derive in great part from Paul VI, *Apostolic Letter Issued motu proprio Apostolica Sollicitudo*, September 15, 1965.

152. Paul VI, *Apostolic Letter Issued motu proprio Apostolica Sollicitudo*, II.

suggestions, and the Pope is free to ratify the decisions of the synod or not.¹⁵³ As Walter Kasper says in *The Gospel of the Family*, the synod is “the common (*syn*) path (*odos*) of the entire Church, the path of attentive listening to each other, exchanging ideas, and prayer.”¹⁵⁴ The gathering of thoughts, opinions, and suggestions from the preparatory document along with the presence of non-voting auditors at the Extraordinary Synod on the Family demonstrates a willingness to hear and learn from the faithful on the part of the bishops. This is the kind of collaboration that should happen at the local, diocesan, and national levels on a regular basis. These findings and decisions can then be communicated at the synodal assembly for papal consideration.

Because each diocese and community is so diverse, it is impossible to give concrete practical strategies and solutions to be implemented and utilized for the protection and promotion of vibrant sacramental marriages in the United States. Those specific means and strategies would be the outcome of these regular, sustained, structurally organized meetings. The admitted impossibility of doing so brings up the question of the suitability of codification of canon law. Codification removes canon law from the particular contexts and pastoral situations from which the canons arose. In addition, the revised Code does not provide a structural process for necessary revision and renewal.¹⁵⁵ Unless the concept of a universal code is to be abandoned altogether, processes for the Code’s ongoing adaptation need to be promulgated. In August 2014, Pope Francis established a Special Commission for the study of the reform of the

153. Canon 343.

154. Cardinal Walter Kasper, *The Gospel of the Family*, trans. William Madges (New York, NY: Paulist Press, 2014), Google Play eBook, 9-10.

155. James A. Coriden, *An Introduction to Canon Law*, rev. ed. (New York, NY: Paulist Press, 2004), 28-29.

matrimonial process in canon law, according to the Holy See Press Office. The reform of canon law in marriage matters should be studied and evaluated every five years or whenever an urgent need develops at the discretion of the magisterium. John McAreavey points out that the Code “presupposes that the principles and procedures it contains will require further application in the historical and cultural context of each region or diocese, whether by Bishops’ Conferences or by individual diocesan Bishops.”¹⁵⁶ Examples of the Code acknowledging the importance of particular law and custom are canon 1067 on the investigation of freedom to marry and canon 1072 on the marriages of the young. In addition, canon law acknowledges civil authority and the civil effects of marriage, thus demonstrating that canon law is to be “in continual dynamic dialogue with the culture in which it is being applied.”¹⁵⁷ McAreavey continues, “The effective application of the canon law of marriage presupposes a dialogue between the general law of the Church and the particular culture of the region or diocese in which it is being applied. This demands pastoral creativity and imagination, as well as fidelity to the tradition of the Church.”¹⁵⁸

6.3.2 Pastoral and Juridical as Integrated Unity

Although specific practical strategies will not be delineated here, many of these potential policies, plans, and procedures would revolve around one central question: Do

156. John McAreavey, *The Canon Law of Marriage and the Family* (Portland, OR: Four Courts Press, 1997), 16-17. Örsy laments that the conferences of bishops are “mere ‘associations’ of individual bishops,” because any decision of the conference must be unanimously approved, thus denying the conferences of bishops the ability to partake in the collegial power of the episcopate. He argues, “The operational norms of episcopal conferences must have two dimensions: they must preserve and promote the unity of the whole college under the presidency of Peter, and they must give scope to the local conferences to work to the full measure of their capacity.” By allowing a synodal power to the conferences of bishops, the law would allow “a healthy blending of the Gospel message and the local culture.” See Ladislav Örsy, *Receiving the Council: Theological and Canonical Insights and Debates* (Collegeville, Minnesota: Liturgical Press, 2009), 16-34.

157. *Ibid.*, 16. See cc. 1057, 1059, 1071, 1672, 1689, 1692.

158. McAreavey, *The Canon Law of Marriage and the Family*, 17.

the current pastoral means of care and juridical structures stifle or facilitate the working of the Spirit in the concrete marriages of the faithful and those preparing for marriage? Many areas of dispute and disagreement in the church's treatment of marriage stem from the false dichotomy between pastoral ministry and law. An example of this misunderstanding of the pastoral nature of canon law is found in Joseph Martos' argument that the classical conception of the sacramentality of marriage operates within the framework of scholastic theology, and this conceptual framework has been surpassed.¹⁵⁹ He states,

It [scholastic theology] is the conceptual framework within which both the 1917 and the 1983 Code of Canon Law operate, and although Catholic theologians have consciously abandoned Aristotelian metaphysical categories (matter and form, essence and existence, potency and act, etc.), they still inadvertently attempt to pose and solve problems using the linguistic residue of scholastic theology.¹⁶⁰

Without considering the possibility that the language and conceptual framework of the Code could be translated and transposed into a new framework, Martos proposes abandoning the tribunal system completely:

The approach to the sacramentality of marriage here proposed avoids making juridical pronouncements about the presence or absence of the *sacramentum et res*, the sacramental marriage bond or contract, in any existing or previous marriage, for that concept simply does not enter into this conceptual framework. It therefore dispenses with the possibility of declaring the nullity of marriages, for the concept likewise has no place in this frame of reference. If any portion of it were adopted by the church in the future, it would permit the dismantling of the current tribunal system, suggesting that the church devote its full institutional energies to the pastoral care of engaged and married persons.¹⁶¹

159. For a more detailed account of Martos' position regarding annulments, see Pierre Hégy and Joseph Martos, eds., *Catholic Divorce: The Deception of Annulments* (New York, NY: Continuum, 2000).

160. Joseph Martos, "A New Conceptual Context for the Sacramentality of Marriage," *Horizons* 22, no. 2 (1995): 222.

161. *Ibid.*, 235.

In agreement with Martos, this study proposed that were greater time, attention, care, and resources spent on the pastoral care of those preparing for marriage and those already married, then there would be less need for the ministry of the tribunals; however, canon law is still necessary to ensure the rights of persons are protected and the good order of the community is promoted. There is no opposition between the juridical and the pastoral. The language of the code and the intricate distinctions among the sources of nullity could be updated and reformed to better reflect theological realities without abandoning the entire system.

The inaccurate mutual exclusion of the pastoral from the juridical dimensions of the church can be traced to a false understanding of justice and mercy. The 1990 Address of John Paul II to the Tribunal of the Roman Rota focuses on the relationship between pastoral ministry and law in the church.¹⁶² John Paul II explains the root of the mistaken idea regarding law and pastoral practice:

This distortion lies in attributing pastoral importance and intent only to those aspects of moderation and humanness in the law which are linked immediately with canonical equity (*aequitas canonica*)—that is, holding that only the exceptions to the law, the potential non-recourse to canonical procedures and sanctions, and the streamlining of judicial formalities have any real pastoral relevance. One thus forgets that justice and law in the strict sense—and consequently general norms, proceedings, sanctions and other typical juridical expressions, should they become necessary—are required in the Church for the good of souls and are therefore intrinsically pastoral.¹⁶³

162. Canon law does not claim to capture the full theological or existential reality of marriage. That is why it needs to be revised on a regular basis. Pastoral ministry is a much broader category, and canon law is one ministry within the umbrella.

163. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota*. January 18, 1990, Libreria Editrice Vaticana, no. 3, http://www.vatican.va/holy_father/john_paul_ii/speeches/1990/documents/hf_jp-ii_spe_19900118_roman-rota_en.html (accessed November 12, 2008).

Not only are the juridical and pastoral dimensions of the church not in opposition, they are “united inseparably.”¹⁶⁴ “In effect, juridical-canonical activity is pastoral by its very nature. It constitutes a special participation in the mission of Christ, the shepherd (*pastore*), and consists in bringing into reality the order of intra-ecclesial justice willed by Christ himself.”¹⁶⁵ In his 2014 Address to the Roman Rota, Pope Francis uses the image of the Good Shepherd in describing the function of the ecclesiastical judge.¹⁶⁶ John Paul II continues in his 1990 Address,

It is not true that, to be more pastoral, the law should become less juridical. Surely, the very many expressions of that flexibility that have always marked canon law, precisely for pastoral reasons, must be kept in mind and applied. But the demands of justice must be respected also; they may be superseded because of that flexibility, but never denied. In the Church, true justice, enlivened by charity and tempered by equity, always merits the descriptive adjective pastoral. There can be no exercise of pastoral charity that does not take account, first of all, of pastoral justice.¹⁶⁷

Immediately following this description of the pastoral nature of canon law, John Paul II emphasizes the necessity of understanding “the harmony between justice and mercy.”¹⁶⁸ Mercy does not mean the relaxation of justice, because “love and mercy cannot put aside the demands of truth.”¹⁶⁹ In *The Gospel of the Family*, his address given to the consistory in anticipation of the Extraordinary Synod on the Family, Cardinal Walter Kasper

164. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1990*, no. 4.

165. *Ibid.*

166. Francis, *Address of Pope Francis to the Officials of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year*. January 24, 2014, Libreria Editrice Vaticana, http://w2.vatican.va/content/francesco/en/speeches/2014/january/documents/papa-francesco_20140124_rota-romana.html (accessed September 17, 2014).

167. John Paul II, *Address of John Paul II to the Tribunal of the Roman Rota, 1990*, no. 4.

168. *Ibid.*, no. 5.

169. *Ibid.*

reiterates the deep connection between the juridical and pastoral dimensions of the church and seeks to proffer an explanation of the pastoral nature of canon law and how this encompasses both justice and mercy:

What does pastoral mean? Certainly not simply indulgence, which would be a false understanding both of pastoral care and of mercy. Mercy does not exclude justice; it is no cheap grace or a kind of clearance sale. Pastoral care and mercy are not contradictory to justice, but are, so to speak, the higher righteousness because behind every individual legal appeal stands not only a case that can be viewed through the lens of a general rule, but rather a human person, who is not only a case, but rather a being who possesses unique personal dignity. That makes necessary a hermeneutic that is juridical and pastoral and that applies a general law with prudence and wisdom, according to justice and fairness, to a concrete, often complex situation.¹⁷⁰

The intrinsic connection between justice and mercy means that the church cannot sacrifice the truth or eliminate justice for the sake of mercy.

Although some may deem Kasper's recommendations regarding the pastoral care of the divorced and civilly remarried more merciful, he is clear that justice and mercy are not contrary. His thoughts regarding divorced and civilly remarried persons are not a call for the reversal of the doctrine of the indissolubility of sacramental marriage.¹⁷¹ Mercy cannot obliterate what is or pretend something is other than it is.¹⁷² Mercy deals with sin,

170. Kasper, *The Gospel of the Family*, 32.

171. *Ibid.*, 29-30.

172. John Beal offers an analogy that may shed light on the "objective situation" of divorced and remarried persons. "It is traditional Catholic doctrine that, when the eucharistic species become so corrupted that they are no longer recognizable by common estimation as bread and wine, that is, when they cease to be naturally capable of signifying, Christ's sacramental presence ceases as well. If this traditional doctrine is applied analogously to marriage, one could argue that, when spouses' love is so corrupted or destroyed that it is no longer capable of signifying the faithful love of Christ for his Body the Church, their marriage has ceased to be a sacrament. If so, there would be no doctrinal obstacle to the Church's declaring that the sacrament has ceased and, after the spouses have completed a suitable period of penance, assessing the possibility of re-admitting them to the sacraments, much as the Church can reconcile those who have brought about the cessation of the sacrament of the eucharist by desecrating the species." John P. Beal, "Intolerable Marriage Situations Revisited: Continuing the Legacy of James H. Provost," *The Jurist* 63 (2003): 253-311. In this way, the situation of divorced and remarried spouses is seen in the light of their incapacity to signify the indissoluble love of Christ for the church. Although this proposal is subject to

suffering, and injustice with incalculable love. In his 1983 *Theology of Christian Marriage*, Kasper illustrates the reality of civil remarriage after divorce, a passage worth quoting at length, because it is in continuity with his current proposals:

A broken marriage is not simply cancelled out. It continues to exist, even though it can be compared with a ruin. It is therefore not possible to replace it with a second marriage equal to the first. What is possible, however, and in many cases necessary for survival, is some kind of emergency accommodation. This image would seem to be in accordance with the way in which God acts in the history of human salvation. He often writes on crooked lines. It is on the basis of this point of view that the Church constructed its order of penance in the past—God does not let us perish after the shipwreck of sin, but he also does not simply allow us to board a comfortable new ship. What he does is to offer us the plank of penance so that we can save our lives. A third comparison may also help us to understand this problem. Guilt wounds us and the wound does not simply disappear. It forms a scar and such scars are lasting signs that can hurt again, but they allow us to go on living a humanly fulfilled life that may be all the more mature because of suffering.

These images, then, point to the possible ways of preserving the lasting reality of the first marriage and therefore the continued existence of the Christian bond of marriage on the one hand and of recognizing, on the other, the human and Christian values of a second civilly contracted marriage in cases where people are prepared for conversion and reconciliation and do what is humanly possible in their situation.¹⁷³

Kasper's approach to the problem of divorced and civilly remarried persons is envisaged within "the pastoral care for marriage and family life in their totality."¹⁷⁴ This pastoral care encompasses remote marriage preparation through the entire lifecycle of marriage, including the pastoral care of persons whose marriages have irretrievably broken down. Kasper is clear that pastoral care means recognizing and beginning from the unique and unrepeatable character of every person. Recalling the parable of the Good Shepherd,

abuse, it takes seriously the need for the human matrix to be a real symbol of that which is made present in the sacrament.

173. Walter Kasper, *Theology of Christian Marriage* (New York, NY: Crossroad, 1983), 67-68.

174. Kasper, *The Gospel of the Family*, 29.

Kasper calls attention to the fact that “no human being is simply an instance of general human nature, and no human being can be judged only according to a general rule.”¹⁷⁵

With the qualification that “there cannot be a general solution for all cases,” Kasper mentions two situations that he believes should be seriously considered at the synod.¹⁷⁶ These “intolerable marriage situations” have been discussed and debated for many years.¹⁷⁷ The two situations have been called “conflict” and “hardship” situations:

To recall briefly, the “conflict” situation is one in which a previous marriage is objectively invalid, but for some reason it is not possible to prove this in the Church’s external forum. Before God the person is free to marry, but not in the Church, hence the “conflict.” The “hardship” situation is one in which a valid marriage has broken down irretrievably and one or both parties have married outside the Church.¹⁷⁸

Although John Paul II did not use these terms specifically in *Familiaris consortio*, he acknowledges the different situations, like the difference between “those who have sincerely tried to save their first marriage and have been unjustly abandoned, and those who through their own grave fault have destroyed a canonically valid marriage.”¹⁷⁹ He recognizes that sometimes there are those that remarry for the sake of the children and may or may not believe that their previous marriage was invalid. Despite these distinctions, John Paul II affirms the teaching that those who have divorced and remarried are not to be admitted to the Eucharist.¹⁸⁰ This teaching was reiterated by the

175. Kasper, *The Gospel of the Family*, 44.

176. *Ibid.*, 31-33.

177. James H. Provost, "Intolerable Marriage Situations: A Second Decade," *The Jurist* 50 (1990): 573-612.

178. *Ibid.*, 574.

179. John Paul II, *Apostolic Exhortation of Pope John Paul II Familiaris Consortio*, no. 84.

180. *Ibid.*

Congregation for the Doctrine of the Faith in 1994 and again in 2000 by the Pontifical Council for Legislative Texts.¹⁸¹ Regarding conflict situations, Kasper does not recommend a doctrinal change but questions if there may be “more pastoral and spiritual procedures” available and proposes that the bishop entrust this task to a priest with pastoral experience as a penitentiary or episcopal vicar.¹⁸² In addition, he questions how pastoral it can be for cases to be decided at a second or third hearing without contact with the spouses.¹⁸³ Regarding hardship cases, Kasper argues that the refusal of divorced and civilly remarried persons to the Eucharist calls into question the entire sacramental structure.¹⁸⁴ If the divorced and civilly remarried are still members of the church yet denied the sacraments, then one must assume that the sacraments are extraneous to the path of salvation. With the admission that experts are not in agreement on the details surrounding the practice of the early church in marriage matters, Kasper brings to light those practices involving Christians in a second marriage who “had available to them, after a period of penance, admittedly no second ship—no second marriage—but indeed a plank of salvation through participation in communion.”¹⁸⁵ The image of the plank and the ship from his earlier work reinforces the point that he is not arguing that the bond is

181. Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church Concerning the Reception of Holy Communion by the Divorced and Remarried Members of the Faithful*. September 14, 1994, Libreria Editrice Vaticana, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_14091994_rec-holy-comm-by-divorced_en.html (accessed September 10, 2014) and Pontifical Council for Legislative Texts, *Declaration Concerning the Admission to Holy Communion of Faithful Who Are Divorced and Remarried*. June 24, 2000, Libreria Editrice Vaticana, http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20000706_declaration_en.html (accessed September 10, 2014).

182. Kasper, *The Gospel of the Family*, 32.

183. *Ibid.*

184. *Ibid.*, 33.

185. *Ibid.*, 34.

not indissoluble but rather that the church find a way to deal with these situations through forgiveness, which is the supreme gift of the faith. His pastoral solution is for the “smaller segment of divorced and remarried individuals who are honestly interested in the sacraments.”¹⁸⁶ With so many divorces and remarriages and so few of those seeking annulment, his concern is that the next generation will be lost due to rigidity in pastoral practice.

In addition to these recommendations, Kasper mentions the principle of *oikonomia* of the Orthodox churches. *Oikonomia* is a “spiritual and pastoral basic attitude that applies the gospel like a good paterfamilias, understood as *oikonomos*, in conformity to the model of the divine economy of salvation.”¹⁸⁷ Örsy describes this pastoral practice that has legal effects but is not strictly part of the legal structure of the Orthodox churches:

Now, what happens in the case of *oikonomia* is that the bishop, the *oikonomos* of the house of God, turns to the Risen One and brings the insoluble situation before him. Through an *analogia fidei*, he searches and seeks how the Lord in his power would heal a wound, would redress an injustice, would bring peace where it is needed. Then, because the church has the power to “bind and loose,” the *oikonomos* himself (never less than a bishop, or a synod of bishops) brings redemption into the situation where everything seemed to be amiss.¹⁸⁸

J.M.R. Tillard explains the concept in this way: “Mercifulness may be the only way, recognized by the bishop, to heal tragic situations the *nomos* could not solve.”¹⁸⁹ Kasper is adamant that this is not a “cheap path” but rather a pastoral practice that takes seriously

186. Kasper, *The Gospel of the Family*, 35-36.

187. *Ibid.*, 48-49.

188. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 74.

189. O.P. Tillard, J.M.R., "Ecclesiology of Communion and Canon Law: The Theological Task of Canon Law: A Theologian's Perspective," *CLSA Proceedings* 58 (1996): 31.

the role of repentance and conversion in the Christian life.¹⁹⁰ In addition, it puts into practice the role of bishop as pastor of those entrusted to his care.

Oikonomia is to be distinguished from *epieikeia* which is “a virtue which helps us to apply rules rightly.”¹⁹¹ Hans-Georg Gadamer explains how *epieikeia* is the “correction of the law.”¹⁹² “The law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law.”¹⁹³ Örsy contends that the only way for justice to be realized and legalism avoided in any legal system is for *epieikeia* to prevail in the application of laws to complex, concrete situations.¹⁹⁴ Örsy further explicates how equity differs from *epieikeia*. *Epieikeia* and law belong to the same system as *epieikeia* is the virtue that balances out the generality of law when it is applied to concrete cases. Because the perfectly ordered law cannot be applied with full rigor to an imperfectly ordered situation, *epieikeia* must be invoked. On the other hand, equity comes into play when a value needs to be upheld and the law is unable to do so. “When, in concrete life, a case arises which cannot be justly resolved by law, it is right that the community should turn to philosophy or religion and let them prevail over the positive law. When this happens, there is authentic equity.”¹⁹⁵ Appeals to *oikonomia*, *epieikia*, and equity attest to the fact that the concrete lives of the faithful are complex and canon

190. Kasper, *The Gospel of the Family*, 48-49.

191. James A. Coriden, "The Tribunal as Last Resort," *The Jurist* 59 (1999): 72.

192. Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2nd ed. (New York, NY: Continuum, 2004), 316.

193. *Ibid.*

194. Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, 44.

195. *Ibid.*, 63.

law, no matter how well formulated, cannot be rigidly applied. Intolerable marriage situations are prime examples of the multifaceted situations of the faithful where the application of the law is far from clear, yet pastoral care needs to be given in a way that justice and mercy are balanced.

James Coriden offers a proposal for the pastoral care of the divorced and remarried in which the tribunal is only one pastoral solution offered, and it should be used as a last resort, as John Paul II had told a group of American bishops.¹⁹⁶ Coriden's argument is that for most divorced and remarried American Catholics, the diocesan tribunal is the "first and preferred option."¹⁹⁷ In other words, the church is approached only after the civil divorce and usually when attempt at another marriage is sought. Coriden argues that although the tribunal process often brings peace of mind and healing and lends itself to discovering the truth of the marital breakdown, it helps only a small portion of those Catholics affected by divorce and remarriage due to the unavailability of efficient tribunals in most parts of the world.¹⁹⁸ In addition, the process itself can be painful, embarrassing, and misunderstood. Coriden's vision of a renewed pastoral strategy for the care of the divorced and remarried has three phases "in parish communities, deaneries, vicariates, cities, or other appropriate subdivisions of dioceses, with the support of diocesan resources."¹⁹⁹ First, following c. 1063, a comprehensive approach to marriage preparation in local churches should be strengthened. This includes therapy and retreats for troubled marriages. Second, according to c. 1676, a judge is to

196. Coriden, "The Tribunal as Last Resort," 60.

197. Ibid.

198. Ibid., 65-66.

199. Ibid., 69.

use pastoral means to induce spouses to restore conjugal living. In other words, before a couple whose marriage is in trouble comes to the church seeking annulment, pastoral ministers (counselors, mediators, or sponsor couples) should become involved to help them reconcile. This phase testifies to the public nature of marriage and the belief that just as the church was present accepting their consent at their wedding, so also the church is present to support them as their *consensus* falters. This phase would seem to be the most difficult to implement. With the predominant view that marriage is private, people may be very reluctant to explore these options. A great deal of resources would need to be allocated to make this a real possibility, and a plan would need to be created and implemented to educate the faithful that the church cares about each marriage and is able to support and strengthen couples in significant and meaningful ways. The final phase occurs when couples have civilly divorced and remarried. A “pastoral diagnostician” would listen attentively to the couple and offer a range of options. Cordien notes that “the process of listening, recalling, reflecting, evaluating, and discerning may take several weeks or even months.”²⁰⁰ With the assistance of the pastoral minister, the couple would employ “their own spiritual authority of discretion as well as the virtue of *epikeia*” as they “choose a course of action which would lead them toward reconciliation with God and with the local church.”²⁰¹ These options include: a group process of penitence and reconciliation, access to the sacraments after a careful process of guided reflection, toleration of civil marriage, penitential recognition of non-sacramental remarriage, membership in another parish (or ecclesial communion) so as not to cause

200. Coriden, "The Tribunal as Last Resort," 70.

201. *Ibid.*, 72-73.

scandal, or petitioning the tribunal for a declaration of nullity.²⁰² Each of these options needs to be evaluated and only those that uphold the values of the unity, permanence, fidelity, generativity, and the conjugal good in marriage while at the same time allowing for the complexity of concrete, human marriages can be maintained.

The prohibition of divorced and civilly remarried persons from the Eucharist is found in **canon 915—Those who have been excommunicated or interdicted after the imposition of declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion.** The reasons for their prohibition from the Eucharist are that (1) “their state and condition of life objectively contradict that union of love between Christ and the Church which is signified and effected by the Eucharist”; (2) “if these people were admitted to the Eucharist, the faithful would be led into error and confusion regarding the Church’s teaching about the indissolubility of marriage”; (3) “Reconciliation in the sacrament of Penance which would open the way to the Eucharist, can only be granted to those who, repenting of having broken the sign of the Covenant and of fidelity to Christ, are sincerely ready to undertake a way of life that is no longer in contradiction to the indissolubility of marriage.”²⁰³ Canon 915 applies to those who are “obstinately persevering in manifest grave sin.” John Huels clarifies that this obstinacy implies that “the pastor or other church authority has expressly warned the offending party to cease committing the sin, but this warning is not heeded” and that this warning is to be given in the external forum

202. Coriden, "The Tribunal as Last Resort," 73-74.

203. John Paul II, *Apostolic Exhortation of Pope John Paul II Familiaris Consortio*, no. 84.

either orally or in writing.²⁰⁴ In addition, Huels contends, “The prohibition of the Eucharist by a minister in one community does not require that the person also be barred elsewhere where the sin may be known only to a few. This canon is directed to individual ministers of communion who must interpret it in the situation of their own community.”²⁰⁵ This canon seems to be a prohibition given to an individual obstinately and publicly persisting in grave sin given at the discretion of the pastor of the community, yet for the divorced and remarried, it is categorically applied to all. In addition, it is unfortunate and inconsistent that this canon is applied most often to “sexual sin” (civilly remarried persons being unfaithful to their first spouse). Other than the question of whether public officials with views antithetical to church teaching should be admitted to the Eucharist, there is little to no conversation about cases of obstinate, manifest grave sin in other areas. Currently, for the divorced and remarried, the only options for admission to the sacraments are to seek a declaration of nullity (or possible dissolution for non-consummated or non-sacramental marriages) or to live in the so-called “brother-sister” relationship. The “brother-sister” option should be abandoned, because it does not preclude scandal (because how are other parishioners to know their private sexual arrangement), and it can be detrimental to the marital relationship. If sexual intercourse is what consummates marriage, how can a couple be asked to exclude permanently that which is so essential that it effectively completes their consent? Presently, the only other option for divorced and remarried persons is to approach the tribunal for a declaration of nullity. In agreement with Coriden, I see the tribunal as the last resort when efforts to

204. John P. Beal, James A. Coriden, and Thomas J. Green, eds., *New Commentary on the Code of Canon Law*, Commissioned by the Canon Law Society of America (New York, NY: Paulist Press, 2000), 1110.

205. *Ibid.*, 1111.

understand, heal, and reconcile, though not in vain, have been unsuccessful. In those cases, the tribunal is a ministry of justice. In the vast majority of cases, a declaration of nullity is sought in order to demonstrate that a person is free to enter a new union. In the matter of the new union, the church has the responsibility to protect the prospective spouse.

According to c. 1683, once two conforming sentences have been issued and communicated to the parties, they are free to contract a new marriage unless a prohibition has been attached to the sentence. A judicial *vetitum*, which differs from the administrative *vetitum* or *monitum* of c. 1077, is a prohibition to marry and does not have an invalidating effect but prohibits a licit union. Robitaille explains, “A judicial *vetitum* is a statement made by a single judge or a college of judges that the reason for nullity in the person’s consent is feared to continue to exist at the time of the sentence declaring nullity.”²⁰⁶ Because marriage has public and social consequences, the church has a responsibility to prohibit a future marriage that would be invalid for the same reasons or for other reasons that surfaced during the course of the judicial process. In the preparation process for the new marriage, the provisions or conditions of the *vetitum* must be addressed. Although Craig Cox notes,

Tribunal officials, however, often express the concern that those preparing couples for marriage do not always take these prohibitions seriously enough, sometimes ignoring them entirely or treating them superficially. In part, this may reflect the fact that marriage preparation ministers do not have access to the acts of the case. Thus, they may not fully appreciate why the judge imposed the prohibition.²⁰⁷

206. Lynda A. Robitaille, "The *Vetitum* and *Monitum*: Consequences of Marriage Nullity or Pastoral Preparation for a New Marriage?" *Studia Canonica* 38 (2004): 63.

207. Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, 1778.

This is unfortunate, because used properly the *vetitum* could help the couple preparing for marriage to better understand the underlying issues that contributed to the previous, failed marriage. In a more integrated approach with a “pastoral diagnostician,” the *vetitum* or *monitum* (a warning regarding areas of concern) could be addressed and used as a tool in second marriage preparation. The processes for annulment proceedings are in need of reform, revision, and streamlining, but this cannot be at the cost of ascertaining truth and seeking justice. The process of seeking a declaration of nullity should be an opportunity to discover one’s own responsibility in the breakdown of the relationship. Through the prudential judgment of the tribunal and the compassionate assistance of advocates and staff, this process should aid in understanding and healing, so that ultimately persons are able to experience the forgiving and transforming love of God. It should never be treated as a formality in order to be able to participate in the sacraments or to contract a new marriage. The matrimonial nullity process should function in a way that spouses can come to terms with the reality of their history and current situation, so that they can grow and learn and change. The tribunal should be viewed as one vital and necessary part of the pastoral care of persons.

Admittedly, the tribunal system is imperfect and the intolerable marriage situations explained earlier will continue to exist no matter how well matrimonial processes are revised and streamlined. One can only think of the case of a spouse who has been abandoned. This is not to say that there is ever a completely innocent spouse in a marital relationship. However, the bilateral dimension of consent elucidated in this study along with the explanation of *philia* illustrates the element of powerlessness in every marriage. Each spouse is responsible for his or her contribution to the *consensus*,

yet ultimately the relationship's quality and success depends upon the mutual interdependence of their wills. This is why marriage is so precarious. Often, the sinful actions of one spouse are met with a sinful response and the pattern continues in small but significant ways until the structure folds. In a sacramental theology, the stabilizing force is the faithful will of God and the continual offer of grace. Spouses are then free to accept or reject that grace and open themselves to forgiveness and healing. In the case of an abandoned spouse, the determination of one spouse *alone* to forgive and to be faithful to the other cannot make the relationship last. Should that be a case where invalidity cannot be proven in the external forum (conflict) or where the marriage is valid but irretrievably broken (hardship), this spouse is now faced with the tremendous grief of being forsaken and the inability to marry again and at the same time be able to approach the sacraments for strength and solace and grace. In such cases, pastoral strategies need to be developed so that these persons can experience the shelter, love, and mercy of God in the sacraments even as the ruin of the first marriage remains.

One of the primary aims of the pastoral ministry of marriage and family in all its stages is to enable and empower children and adolescents, young adults, married couples, cohabiting couples, and divorced persons to live consciously and intentionally in the grace of God. Marital consent is a decision with such significant moral, social, and ecclesial effects that it is protected and governed by canon law. In a sacramental marriage *ratum et consummatum*, the marital promise once made and accepted is inscribed in the history of the spouses permanently. Objectively, it cannot be erased at the whim of the couple. However, on a case by case basis it may be discovered that the marriage is not valid due to diriment impediment, lack of canonical form, or defective

consent. In addition, the bond of a non-sacramental or non-consummated marriage can be dissolved when certain conditions are met.²⁰⁸ The choice to enter a sacramental marriage is the choice to allow one's marriage to make present Christ's faithful love for the church in the midst of ordinary trials and joys and extraordinary suffering and ecstasy. It is the choice to live consciously and intentionally in the grace of God with one's spouse. Lonergan's three escapes from living morally help to explain the current crisis in marriage and family. The first escape from living morally, which essentially is living beneath our created human dignity, is to avoid self-consciousness. Marital consent requires self-knowledge in order to have a self to give on the wedding day and every day thereafter. The avoidance of naked self-reflection is pervasive in our digitally distracted culture. The second escape from living morally is rationalization, that is, changing one's thinking (deceiving oneself) so that there is no inconsistency between knowing and doing. Marriages and, cohabiting relationships in particular, are filled with rationalizations to justify one's current behavior, simply because the work of change is too difficult. The third escape is moral renunciation. How often the ideal of faithful, loving, committed marriage is abandoned, because it seems impossible or out of reach. The gift of freedom and rational self-consciousness is that which makes us human and *imago Dei*. It is also that which is abused or used defectively that leads to broken promises and severed relationships.

If marital consent is a union of wills founded upon the mutual commitment to be faithful to another in a life-long, loving, and generative union, then one must value being true to one's word. Marital consent is the mutual exchange of promises, the giving and receiving of one's word, so that my promise remains in you and yours in me. Just as the

208. See cc. 1142-1150.

Word of God communicates God's Self to the other, so also does my word communicate who I am to the other. The Word of God becomes incarnate in Jesus Christ and the word given and received in marriage become incarnate in consummation. The promise needs to be expressed in word and body.²⁰⁹ Christ the Word was sent from the Father for the works of creation and salvation. In a similar way, spouses send their word, their promise, entrusting it to the other for the *bonum prolis* and *bonum coniugum*. These christological comparisons are to demonstrate that to give one's word is one of the most human acts we can perform and being true to that word approaches the divine. Without an understanding and appreciation of the value and beauty of freedom and commitment, surrender and consent, cohabitation will be preferred to marriage and divorce and family disintegration will continue to plague families. An effective pastoral response is an integrated approach with canon law serving as a ministry of justice and love in the complexity of the concrete lives of the faithful. Such a ministry requires prudence, creativity, clarity, collaboration, and conversion from the church.

209. The question of consummation is theologically undecided; therefore, it should not be decided through canonical norms. Can canonists in consultation with theologians find a way to express a more personalist view of consummation in clear juridical terms? If consummation is envisioned as occurring later in marriage when couples are "more married," then the understanding of absolute indissolubility of consummated, sacramental marriages would need to be reconsidered. Again, these are theological questions that should not be "resolved" through canon law.

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