

SOCIETY AND ETHICS: DIVORCE AND REMARRIAGE

So much has been written in recent years on the question of divorce and remarriage that it has become almost tedious to rehearse the issues yet one more time. Nonetheless, this question is not as settled in the minds of Roman Catholic ethicists as is, for example, the question of fertility control. It remains, as Richard McCormick indicates, "one of the most difficult and urgent tasks of the contemporary Church."¹ It is not even clear, as he further notes, that we have raised as yet the right questions in its regard. My intention here is not to find just the right questions or to probe in depth the troublesome questions that we already have. What I would like to do is to suggest that there is a kind of public-private split in current ethical considerations of the problem of divorce and remarriage, and that this split must be looked at carefully if the Church is to relate responsibly now to this question.

Public-private splits are evident in many of the ethical questions confronting Roman Catholic theology today. Thus, for example, there is an historical gap between social ethics and personal sexual ethics in the Roman Catholic tradition which, until it is bridged, constitutes a barrier to needed ethical insights into population questions.² Similarly, the present breach between the social policy proposals of the Christian churches regarding world hunger and their parallel efforts at a spiritual theology of hunger continues to impoverish a Christian ethics of hunger.³ Clearly the forms of a public-private split as it appears in the problem of divorce and remarriage are not the same as those which appear in problems such as population and world hunger. There are, however, some similarities. The relation between personal and social ethical questions in regard to divorce and remarriage, for example, has

¹R. McCormick, "Notes on Moral Theology," *Theological Studies* 36, 1 (March, 1975), 100.

²This is the thesis presented by David Hollenbach in "Private and Public Morality in the Catholic Population Ethic," paper presented in the Ethics Seminar, Catholic Theological Society of America annual meeting, June, 1975.

³See Drew Christiansen, "The Church and World Hunger: Theology and Public Policy," paper presented in Ethics Seminar, Catholic Theological Society of America meeting, June, 1975.

not yet been adequately resolved, and, indeed, constitutes a crucial point of continuing disagreement. Personal values and social values appear at odds in the context of a marriage where the life of the marriage seems irretrievably lost, and there is much confusion as to how to resolve the conflict between these values. Thus, some ethicists who have studied carefully the needs of individual persons for their life of faith have concluded that a change in discipline and doctrine is called for regarding the indissolubility of marriage. But other ethicists who are sensitive to the needs of the Christian community for a continuing support of marriage as an institution have concluded that there must be no change in the moral teaching of the Church regarding indissolubility—even though there may need to be changes in pastoral practice.

But this points to what is by far the most obvious, and perhaps most immediately pressing, public-private split regarding divorce and remarriage in the Roman Catholic community—namely, the current gap between, and sometimes opposition between, official moral teaching and pastoral practice.⁴ The split between teaching and practice is directly connected with the conflict between personal and social values. At least one of the reasons for the split is the belief that it offers a way to relate to individual personal needs without at the same time jeopardizing the community (for it does not entail an explicitly articulated change in teaching, and, in fact, it generally protects the community as a whole from even knowing about a change in discipline).

Yet the split between public teaching and private pastoral practice must be examined more closely for its own ethical justification. There are, of course, long-standing distinctions in the Roman Catholic tradition between moral teaching and pastoral counselling, between ethics and prudence, between essential and existential ethics, between law and individual conscience. The public-private split which presently obtains between official public teaching and pastoral practice regarding divorce and remarriage does not, however, exactly correspond to any of these other distinctions. It is the case that, at least in some dioceses, the tacit

⁴I am referring here to the present situation where, in at least some dioceses, "internal forum" solutions are available to couples in second marriages, but their availability is not uniform (in all dioceses) and there remains a large gap between explicitly articulated official justifications for these solutions and the solutions themselves.

approval of new norms for pastoral practice constitutes an unwritten and unspoken policy regarding the dissolubility of marriage. It is no longer a case where accepted moral norms are seen to have individually different applications, or existentially warranted suspension, or prudentially discernible modifications. It is true that, in some measure, changes in pastoral practice are only new applications of unchanged officially recognized norms—as, for example, when the three requirements for sacramental marriage (consent, consummation, and baptism) are more broadly interpreted (so that the grounds for annulment are expanded). But it is also true that other changes (specifically regarding the admission to the sacraments of persons in second marriages whose first marriage was indeed valid and sacramental) are not to be found mirrored even inchoately or implicitly in the present public norms.

But let us look more closely at the proposals which have been made by ethicists and canon lawyers as they relate to the present split between public teaching and private pastoral practice. These proposals are, in general, of three kinds: (1) advocacy of no change in public policy, but expansion of present uses of “pastoral solutions”; (2) recommendation for change in public policy regarding church discipline, but no change in official church doctrine; (3) recommendations for change in both official church discipline and doctrine.

It is clear that the first two proposals, as over against the third, favor sustaining some form of split between public teaching and private pastoral practice. Arguments in support of a continued split are made in terms of both individual good and social or common good. Thus, it is argued that the good of individuals is secured in at least two ways: First, it is easier to change pastoral practice than it is to change official teaching. (Some fear that the doctrine regarding marriage will never change, others that the change will take too long for it to help the thousands of persons presently in need of some solution to their alienation from the sacramental life of the Church, and still others hint that we simply do not yet know with any certainty what changes ought to be made in official teaching.) Hence, a separation between doctrine and practice is the only workable strategy if one wishes to alleviate the present needs of individuals. Secondly, maintaining the public-private split is a way of affirming that individuals should make judgments about their own freedom to marry or their own call to participate in the sacramental life of the Church. Establishing public policy in this

regard would infringe on the rights of individuals by attempting to codify conditions under which such judgments should be made.

It is also argued that the continuing split between official teachings and pastoral practice secures the common good. That is, it is at least a way to begin to let individual good take a new priority in contexts of divorce and remarriage without at the same time sacrificing the common good. Pastoral solutions emphasize the good of individuals, but preservation of the status quo in official teaching does not undermine the social good of generally stable marriages. What continues to be needed, according to this position, is an unambiguous proscription of divorce and remarriage, and any change in law that takes account of different pastoral solutions will have bad consequences for the institution of marriage generally.

Proposal (3), on the other hand, opposes a split between official teaching and private pastoral practice precisely by recommending a change in teaching to match practice. Arguments in favor of this change are most frequently made in terms of reasons internal to the doctrine of marriage itself. That is, it is argued that the doctrine should be changed not just to remedy the split between teaching and practice but because it is essentially inadequate as a doctrine (on the basis of new scriptural exegesis, or of new assessments of the nature of the norm of indissolubility qua ideal or qua precept with exceptions, or of new analyses of the sacramentality of marriage, along with new interpretations of consummation, etc.). Sometimes, however, it is also argued that the public-private split should be healed simply because of the present illogic between teaching and practice, an illogic that can be harmful to individuals even though it may be a way to affirm the common good. Seldom are arguments adduced for a change in official teaching for the sake of the common good. It is not difficult to see how infrequently and ineffectively the critical issues are joined between proponents of proposals (1) and (2) on the one hand and the proponents of proposal (3) on the other hand.

What I should like to do in the hope of joining more sharply the issues in the ongoing debate regarding divorce and remarriage is to argue in favor of proposal (3) (that is, in favor of a change in both doctrine and discipline) from the standpoint of both individual and social good. This can be done, I think, by examining more carefully the difficulties entailed in some of the arguments for maintaining the public-private

split and by exploring more fully the reasons for overcoming such a split. For purposes of clarity, I shall focus primarily on the question of persons in a second marriage (whose first marriage was fairly clearly a Christian marriage) participating in the sacramental life of the Church.⁵

First of all, then, we must take another look at the argument that sustaining a split between official teaching and private pastoral practice is a way to secure the good of individuals. Surely expansion of "pastoral solutions" has indeed helped individuals by allowing some of them to share more fully in the life of the Church. But, as others have argued, if it is important to affirm individual good in this way, how is it possible to justify affirming it for some and not for all? That is, unless there is a public policy whereby the Christian community as a whole is informed about the possibility of "pastoral solutions," many of those individuals who could benefit from them will remain in ignorance of this possibility.⁶ There seems to be at least the minimal demand of justice that changes in law or application of law be promulgated.

Moreover, those individuals who do benefit from a pastoral solution may also, in some way, be harmed by the Church's failure to change its public norms and teachings. The relationship between church teaching and pastoral ministry is more intimate than is sometimes recognized. It is a fact, for example, that one of the greatest difficulties encountered in implementing pastoral solutions is the sense of guilt which remains in individual persons as they begin again to receive the sacraments while remaining in a second marriage. Maintaining a split between what the Church teaches publicly and what is practiced privately has the inevitable result of compounding persons' sense of guilt rather than healing it. It is almost impossible to relate to problems pastorally in any full sense of that term when pastoral teaching is at odds with other dimensions of pastoral ministry. The public-private split, in this case, can be remedied by a change in church discipline (and official promulgation of this change). But finally, pastoral ministry

⁵This means that I am not dealing explicitly with, on the one hand, questions of remarriage where the first marriage was not a valid marriage (even though it cannot be legally established as invalid), nor, on the other hand, questions of entrance into a second marriage after a previous valid marriage.

⁶Others have expressed this same concern but from the perspective of the possibility of giving scandal if there is not general understanding of "pastoral solutions" in the Christian community.

which is for the sake of individual persons demands a form of teaching which clarifies the relationship between a doctrine of marriage, church laws regarding marriage, and individual options which are opened by both doctrine and laws. A change at one level necessitates at the very least some clarification at every other level. Without this, the contradictions which are introduced are not only a matter of illogic but of harm for individual persons.

There are serious difficulties, too, with the argument that the public-private split preserves the common good. If the maintenance of present law against divorce and remarriage did truly enable persons to be more faithful in marriage, then clearly it would contribute in an important way to the good of the community. But current estimates indicate that the rate of divorce among Roman Catholics is very nearly the same as that of the general population.⁷ The simple preservation of an absolute norm does not today of and by itself support the institution of marriage.

Moreover, the common good is jeopardized by the public-private split in so far as this split undermines general respect for law. As the discrepancy between law and pastoral practice, or between doctrine and law, becomes more widely known, there cannot help but be a growing sense of the meaningless of a law which has no rationale in church teaching or the incongruity of law which has no direct bearing on what is actually done in concrete situations.

Finally, maintenance of a split between public teaching and pastoral practice hinders the common good by making it impossible for persons to share fully in the life of the whole community. Despite the fact that under present pastoral solutions individual persons can return to the sacramental life of the Church, they must often do so in a clandestine way, and they can never do so in a way in which the whole community once again welcomes their presence.

In addition to recognizing the difficulties of maintaining the public-private split, there are important positive arguments to be made for eliminating the split. One of these emerges from reflection on the general role of law in the Christian community. Some of the Reformers found it helpful to distinguish three "uses" of the law: a coercive use (whereby we are made to do what we would not otherwise do), a

⁷See L. Wrenn, ed., *Divorce and Remarriage in the Catholic Church* (New York: Newman Press, 1973), pp. 144-5.

condemnatory use (whereby our violation of the law lets us know that we are sinners), and a pedagogical use (whereby the law teaches us and motivates us to grow into the fullness of life of which the law is an expression). It seems clear that the coercive and condemnatory uses of the law cannot be the major functions of the law regarding divorce and remarriage in the Roman Catholic community. The coercive function, as we have seen, is simply not effective as such. The condemnatory function may indeed be effective, but there is, as again we have noted, some evidence that in contexts of divorce and remarriage it produces guilt and fear in a way that hinders rather than helps persons' growth in fidelity.

In any case, the "third use" of the law has always been implicitly affirmed in the Roman Catholic tradition as central to the meaning of all law for the Christian community. This is not because law is only an ideal to be meditated upon and aimed toward, but because law can be seen as essentially a criterion for right love, an imperative which is at once binding and freeing, a call as well as a judgment, a source of light for and a help to a faithful love. But if a law is to have this function, it must be known and understood, in all of its dimensions, as far as this is possible. It must be itself a teaching, and accompanied by teaching, and emergent from teaching. It must, then, be more and more "public," more and more accessible to the ponderings of individual persons and the community as a whole. This argues against either a mode of law or response to law which alienates teaching from law or law from pastoral practice or teaching from pastoral practice. It does not mean that every aspect of individual decisions is codified in the law, but that the relation between doctrine, law, and individual decision-making is not one of contradiction or dissonance.

Considerations of the general role of law within the Christian community point to an even clearer context from which arguments can be made for the elimination of a split between official public teaching and private pastoral practice. If the law is to be pondered in a way that enhances fidelity in marriage, then what is to be pondered is the "law of marriage," the law of the marriage covenant. Now the law of marriage has both a private and a public, an interpersonal and a social aspect; and these aspects are importantly related even when the question with which the law is confronted is the question of divorce and remarriage.

When two persons marry they make a commitment to one another, undertake an obligation in relation to one another, yield a claim one to the other. They introduce into their own relationship a new law for their love—a law whose *raison d'être* is to aid love, to give it a framework and a future. Like the “law” of promise-keeping in general, or like the “law” of any unconditional commitment, it ceases to be binding if and when it becomes impossible to fulfill.⁸ The law of marriage becomes impossible to fulfill when it becomes so alien to love that it is destructive of love and of the graced life of the persons it is meant to aid.

Divorce is not, for the Christian, a decision to cease loving (for it is never justified to withdraw agape from any person), but a decision to change the framework of life within which love is qualified and shared in a certain way. This decision is justified if and when it becomes impossible to fulfill the marriage commitment, to keep the law of marriage. And, as we have seen, it becomes impossible when the marriage itself becomes a channel of death to the faith life of the persons involved. At that point the law of marriage cannot bind.⁹

Those who argue that the judgment of when the point of impossibility is reached belongs to the individual persons are correct, for no specification of law could adequately illumine each concrete relationship or situation. It is not accurate, however, to conclude from this that the community has no judgment or decision to make vis-à-vis the individual persons. Individuals who marry yield a claim over themselves not only to one another but to the community as well. The very assumption of the role of husband or wife or parent entails the undertaking of an obligation to a wider community.

In relation to the mutual claim between the individuals in a marriage, it is clearly not the community's prerogative to decide if and when a marriage covenant ceases to exist. The community can at most

⁸This is, of course, an oversimplified reference to classical criteria for the nonfulfillment of commitments. Impossibility of fulfillment has been a standard reason for the cessation of obligation. The identification of impossibility in this context with the impossibility of love continuing within the framework of marriage is not without precedent in, for example, the Church's allowing divorce and remarriage when a previous marriage must yield “in favor of the faith.”

⁹I am passing over, for the sake of brevity, a much needed discussion of past interpretations of the marriage bond in quasi-ontological terms.

declare that a marriage between two persons has ended; it cannot dissolve the marriage. But in relation to the claim which has been given by the individuals to the community, the community becomes a moral agent; it is the community's decision to hold or to cease to hold individuals to their commitment to the community. The criterion according to which the community decides that it should no longer hold persons to their marriage commitment is the same criterion by which individuals decide that the law of their marriage can no longer bind—that is, the sheer impossibility of individuals keeping the commitment without the destruction of their own or others' life of faith and love.¹⁰

The situation of divorce (and, by implication, also of remarriage), then, is a situation of multiple agency, of shared agency. It cannot be relegated to a purely private sphere; nor is it a purely public matter. Personal and social commitments, values, obligations, intersect in a way that demands a continuing unfolding of the relationship between the community's understanding of marriage (the doctrine of marriage), the community's experience of the moral imperatives regarding marriage (the Church's law regarding marriage), and the understanding and experience which individuals in the community have of their own marriage and its "law." To argue that such an unfolding threatens the life of the community because it threatens the stability of marriages generally is to miss the point that the stability of all institutions within a community or society depends importantly on the nature of the community precisely as a moral community. Bridging the current gap between public teaching and private pastoral practice regarding divorce and remarriage offers the possibility of enhancing the community's capacity for the faithful fulfilling of its responsibilities to its members. In a maturing community it is difficult to see how this is not for the good of individual persons and the common good of the community as a whole. It may be called for as a strict demand of justice; but it may also be called for as a necessary means for providing the moral climate in which fidelity may finally grow.

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¹⁰ Again, though it is not possible to expand upon this point in this brief paper, it is clearly necessary to connect my reference to "impossibility" to other discussions of "proportionate reason." Impossibility in this context is a matter of moral impossibility.