

## DIVORCE AND REMARRIAGE: CATHOLICS AND CREDIBILITY\*

It is the purpose of this presentation to explore in some detail the divorce-remarriage issue and to establish a framework for comments, questions, criticisms, objections and observations in the discussion to follow. The structure will be simple enough: (1) a statement about the reasonableness of the present Roman Catholic teaching, including its discipline, on divorce and remarriage; and (2) considerations on remedying what is unreasonable.

The present teaching is surely reasonable in its insistence on conjugal permanence in view of personal growth, especially in a divorce-racked society. But beyond this platitudinizing not much more, in my judgment, can be said that is positive. On the contrary, there is an abundance of theological and canonical literature which argues that the present teaching is untenable. The bibliography in my own recent book is selective but reasonably complete, I think.<sup>1</sup> More up-to-date, understandably, is the review of the periodical literature in Richard McCormick's latest "Notes"<sup>2</sup> (most of which was unavailable to me since my book was in press at the time). I shall return to his own analysis later.

To establish the framework I have in mind, I think it will be helpful to review at the start the reasons which argue that the present teaching is untenable. I do this not to rehash old matter or to ventilate complaints but, rather, to recall them for the sake of perspective. Those reasons are reducible to three; they assert that the present teaching is untenable because it is: (1) overly juridical; (2) narrowly historical, narrowly cultural, and narrowly theological; (3) relatively impersonal.

With regard to the first, with its emphasis on the inexorable logic of legalism, the following charges are made to substantiate the accusation of juridicism: (a) automatic sacramentality (the "ontological bond"), because the contract and sacrament are *eo ipso* one; (b) automatic consummation (coitus seals the contract); (c) the use of Pauline

\*ED. NOTE: This presentation was made at an informal pre-convention seminar. It is included here because of its relevance to the preceding paper.

<sup>1</sup>*Divorce & Remarriage: Resolving a Catholic Dilemma* (Indiana: Abbey Press, 1974).

<sup>2</sup>R. McCormick, "Notes on Moral Theology: April-September 1974," *Theological Studies* 36 (March, 1975), 77-129, at pp. 100-17.

and Petrine privileges to "fix up" existing second unions by dissolving first marriages; (d) the use of impediments to annul first unions ("psychic impotence" is being argued effectively these days); (e) a double standard in Roman Catholic teaching concerning marriage as a medium of grace—one for Roman Catholics, another for other Christians, notably the Orthodox (I shall return to this); (f) pastoral frustration in coping with or explaining present teaching and legislation; (g) the bewilderment of the faithful at large vis-à-vis canonical loopholes in some cases although other manifest marital injustices cannot be remedied; (h) the tribunal system and the truth of the axiom "justice delayed is justice denied"; (i) the failure of the law to incorporate the findings of sociology, psychology and psychiatry regarding the dynamics of personality growth and its stunting, including the death of a relationship; (j) the lack of exegetical support for current canonical procedures. In sum, there is an overemphasis on the legal which co-exists with, and doubtless because of, a poorly articulated speculative theology of marriage in face of the lived reality of marriage. In addition, there is outright scandal taken by many because of the legalistic maneuverings all allegedly designed to preserve the "sanctity" of marriage.

The present teaching, in the second place, is narrow historically, culturally and theologically. It is narrow historically because a solution arrived at and papally imposed (by Alexander III) in the twelfth century is still being applied today; the political overtones of the era—the *consensus* theory (of the School of Paris) vs. the *copula* theory (of the School of Bologna)—do not readily reflect today's understanding of the Gospel. It is narrow culturally because it is a product of Western thinking, of European theologizing, of Roman legislating—and presented or extended to the Church universal. Contrast this with Article 36 of *Gaudium et spes* in which is stressed "the autonomy of earthly affairs" with their own "laws and values" that are to be "regulated by men." Marriage is one such autonomous created reality. That the present teaching is narrowly theological is seen by recalling that there is not and never has been a speculative theology commensurate with legislative procedures. (Recall the standard "proof" that the Church has the power to do something: *a facto ad licere*. . . .) Moreover, at the time when our understanding of a *matrimonium ratum et consummatum* was being promulgated, theologians were still debating whether marriage

was a sacrament in the sense of a grace-giving reality; St. Thomas thought the affirmative opinion "more probable."<sup>3</sup>

Finally, because of juridicism and narrowness the present teaching is said to be relatively impersonal. Or perhaps it is the other way around; that is, because marriage has been regarded as relatively impersonal it has been treated with a legal emphasis on its contractual nature and an emphasis otherwise that is transhistorical and transcultural and, theologically, too other-worldly. In any event, the emphasis on personal love, including lovemaking, is notably lacking in theological and canonical literature in which married folks have to be told what marriage is and what it means and in which there is virtually no appreciation of the lived reality of marriage including at times the death of a marriage.

There is, in sum, a consensus that something is wrong with the present teaching and, correspondingly, a consensus that something ought to be done about it. But there is no consensus about what should be done. However, there is no dearth of suggestions. And so I turn now to that part of my framework which I have earlier referred to as "remediating what is unreasonable."

Let me first sketch—again by way of overview—the proposed remedies, then summarize Father McCormick's reflections and, finally, give a commentary of my own along with some concluding remarks.

The proposed remedies could all be discussed *longe et late*, and here again, as with the reasons adduced regarding the untenableness of the present teaching, I may presume familiarity with the literature. Authors suggest that the Church (magisterium) should: (1) leave well enough or bad enough (depending on your point of view) alone since any remedy (including this one?) is worse than the problem, especially in view of the staggering divorce rate and the charge of "selling out" to modern society; (2) acknowledge and use the power to dissolve *all* marriages—or, in other words, recognize and permit divorce; (3) simply declare that a marriage has died, once the spouses themselves have concluded this; (4) restrict (2) and (3) to certain serious instances (e.g., cases of desertion, sexual perversion, incurable insanity); (5) readmit invalidly married Catholics to the sacraments (the so-named "good faith" solutions for *de facto* situations), if only after they have demonstrated a certain stability in their present union; (6) broaden the basis

<sup>3</sup>Cf. *Summa Theol.*, *Suppl.* 42, 3 c.

for annulment; (7) redefine sacramentality (thus disengaging sacrament from contract); (8) redefine consummation (an area I originally wrote about); (9) abolish marriage tribunals; (10) respect the primacy of conscience (as in (3) above) and, hence, individual rights.

McCormick cautions that his own "personal reflections" are "highly tentative and exploratory probes."<sup>4</sup> He is speaking of true first marriages which are now broken and he offers four considerations. First, indissolubility is a moral precept or "moral ought" rather than a juridicized bond; a couple, especially a Christian couple, must not allow their union to die and they have the moral obligation to resuscitate a broken relationship. Indeed, the grace of God will "often" enable them to do so.<sup>5</sup> The judgment that a marriage is dead, beyond hope of resuscitation, is the couple's own, not the Church's. Are the former spouses then free to remarry? McCormick's "first response" is no<sup>6</sup>—unless, and this is his second consideration, it be *in favorem fidei*. The *favor fidei* is a "truly proportionate reason" for the Church to "accept the freedom to remarry after marital breakdown."<sup>7</sup> The dissolution of the first marriage, by way of a third consideration, is simply an act of declaration or notarization by the Church, a recognition of the couple's competence to decide that their marriage has truly died and of their individual convictions that there is a proportionate reason to remarry. McCormick thinks it "understandable" that "for over-all educational purposes" the Church "would refuse to witness to this second marriage."<sup>8</sup> A final consideration, and one which permeates all the others, is the social dimension of marriage which must look to the stability of marriage as an institution and it is this which the Church must strengthen. (In this regard McCormick is objecting to certain views, or at least formulations, of Charles Curran.)

Now for my commentary which, like McCormick's ideas, needs "far more attention and criticism than can be given here."<sup>9</sup> I find a

<sup>4</sup> *Art. cit.*, pp. 112, 116.

<sup>5</sup> *Ibid.*, p. 113.

<sup>6</sup> *Ibid.*, p. 114.

<sup>7</sup> *Ibid.*, p. 115.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 116.

certain amount of ambivalence—indeed, equivocation—in McCormick's tentative approach. On the one hand, he accepts the traditional structure (a "true Christian marriage"—presumably the automatic contract-sacrament construct, requisites for validity, etc.); on the other, he would view indissolubility not juridically but morally with respect for the spouses' judgment that their marriage has died. What is the understanding of ontology here? Further, his "first response" is to deny the acceptability of one's freedom to remarry because the very stability of the institution of marriage excludes this; however, the spiritual good of the individual "would justify the threat a second union would visit on the institution of marriage."<sup>10</sup> How is proportionality established? Why is marriage *itself* threatened by remarriage? Finally, the Church's response "does not call for a change in her teaching" the "integrity" of which is to remain;<sup>11</sup> at the same time, though, individuals are responsibly free to determine the merits of their own situation. What is meant by "integrity"? And which teaching ought not the Church change—and why not?

It seems to me that the Church's teaching regarding ontological permanence can and must change. Well intentioned they surely are, but McCormick and others seem to be trying to walk both sides of the street. I hold that the teaching and practice can change because it evolved in and must change because there is a consensus that calls for change, a consensus grounded both in the manifest drawbacks of the present teaching and in a legitimate appeal to the perceptive insights of married Christians. I would suggest several other reasons as well.

The present teaching is ecumenically offensive. In Vatican II's Decree on Ecumenism the bishops affirm that "the ecumenical dialogue could start with discussions concerning the application of the gospel to moral questions."<sup>12</sup> Divorce-remarriage is one such question to which other Christian denominations are sensitive. Moreover, the "spiritual heritage of the Eastern Churches" is to be venerated and preserved,<sup>13</sup> a heritage that tolerates divorce and remarriage. This is the double standard I referred to earlier, a standard endorsed by the Vatican's allowing

<sup>10</sup>*Ibid.*, p. 115.

<sup>11</sup>*Ibid.*, p. 117.

<sup>12</sup>*Unitatis redintegratio*, n. 23.

<sup>13</sup>*Ibid.*, n. 15.

Orthodox Christians and non-Catholics (granted certain conditions) to receive the Eucharist in the Roman rite;<sup>14</sup> nor is there any indication that the communicant's marital status must accord with Roman Catholic teaching. Salvation can hardly be tied to a denominational policy.

The good of souls—the *lex suprema salus animarum*—requires it. McCormick's *in favorem fidei* recalls the traditional accommodation made by the use of the Pauline and Petrine privileges. In the sixteenth century Pope Gregory XIII extended the Pauline privilege because of the danger of incontinence.<sup>15</sup> And Pius XII, who (in 1947) intervened in the first "Fresno" case, cautioned—in the context of *Sacra virginitas*—that "there are many for whom the burden of perpetual continence is without a doubt too great to be recommended."<sup>16</sup> For many divorced persons is it not possible that perpetual continence is a burden undoubtedly too great to be sustained? We cannot simply presume a natural basis for the grace of God to build on. Concretely, I would suggest that the criteria spelled out for responsible parenthood, in Article 50 of *Gaudium et spes*, are applicable here.

The death of a marriage necessitates a change in teaching. The Eastern Orthodox recognize such a death,<sup>17</sup> as does the British Council of Churches,<sup>18</sup> not to mention those who have experienced marital breakdowns as well as professionals (psychotherapists and others) who characterize the dynamics of human relationships. A few years ago on a

<sup>14</sup>Cf. *Directorium Oecumenicum*, in *AAS* 59 (1967), 574-92, esp. p. 588, n. 44 and p. 590, n. 55; and, by way of follow-up, cf. *Déclaration sur la position de l'Église Catholique en matière d'Eucharistie commune entre chrétiens de diverses confessions*, in *AAS* 62 (1970), 184-8, esp. p. 187, n. 7. See also the pastoral instruction of Paul VI, 25 May 1972, in *AAS* 64 (1972), 518-25, at pp. 522ff.

<sup>15</sup>*CIC, Documen. VIII*: "Populis ac nationibus nuper ex gentilitatis errore ad fidem catholicam conversis expedit indulgere circa libertatem contrahendi matrimonia, ne homines, continentiae servandae minime assueti, propterea minus libenter in fide persistent, et alios illorum exemplo ab eius perceptione deterreant."

<sup>16</sup>*AAS* 46 (1954), 161-91, at pp. 180f.

<sup>17</sup>Cf. A. Schmemmann, "The Indissolubility of Marriage: The Theological Tradition of the East," in *The Bond of Marriage: An Ecumenical and Interdisciplinary Study*, ed. by W. Bassett (Indiana: The University of Notre Dame Press, 1968), pp. 97-116, at p. 111.

<sup>18</sup>*Sex and Morality* (Philadelphia: Fortress Press, 1966).

TV talk show David Frye was impersonating Billy Graham: "I say let the priests marry. Let them find out the true meaning of hell!" Many married persons have found this out. But we are called to live in peace (1 Cor 7:15). Life means growth, and growth may mean divorce and remarriage.

The radical demand of Jesus, so commonly spoken of in the literature as referring to indissolubility, seems to me to be misunderstood. The radical demand is to imitate Christ. Marriage is a means to that end. But in our theology and discipline we have absolutized the means. To my knowledge, there is no conclusive proof that the indissolubility of marriage as we presently understand it is a radical demand made by Jesus. Moral theologians today speak of fundamental option, the Christocentric grounding of one's being. Remarriage may well be a means for some to live out that option. Speaking of celibacy, Cardinal Cajetan said that those things are important *quae magis consonant incarnationis fini, sive sint austera sive non*.<sup>19</sup> Per se, therefore, the asceticism of separation or divorce—or even of staying together—is incidental except as a means to that end which through his enfleshment, death and resurrection Jesus made possible for us.

To conclude, there is, first of all, a growing consensus among theologians and canonists and the faithful at large that something must be done to manifest the Christian message regarding marriage and to remedy marital injustices and legalistic abuses.

Secondly, and negatively, there is enough doubt—to my way of thinking—about the reasonableness of the present teaching to allow those impeded by divorce (those already divorced and remarried, or married to or about to marry a divorced person) to receive Holy Communion.

Thirdly, and positively, there is a recognition that, while our theology of marriage, of sacramentality, and of sexuality is still imperfect and not well articulated, the dynamic relationship which is marriage is enhanced by seeing it as a means to an end and by preservation of personal freedom (since it is not certainly clear that persons are not morally free to remarry).

Fourthly, we do need a new definition of marriage which includes a theology of death and dying (just as in the physical sphere), a theol-

<sup>19</sup>Comment. in *Summam Theol.*, In 3, 40, 2 n. II.

ogy of the witness of subsequent marriages, and of appropriate liturgical celebrations (some precedent for which already exists in the remarriage of widows and widowers).

I suggest, finally, that we get on with this work of theologizing, of attempting to articulate a positive theology of marriage, which work can be aided in part by scholarly dialogue with those whose burden and inclination it is to defend the present teaching with its blemishes and wrinkles.

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