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NATURAL LAW AND THE MARRIAGE OF CHRISTIANS

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Traditional Catholic marriage doctrine is under a good deal of pressure these days, and much of the pressure seems to come from canonists. It is not surprising that this should be the case. The ideal of Christian lovers giving themselves to one another irrevocably, and living out their commitment, with God's help, until death has lost none of its attractiveness. But as the canonists reflect on what they are doing, they become increasingly disturbed by their inability to offer a practical way out to people who have signally failed to implement the ideal in their lives.

Nevertheless, it seems to me that their pressure on the traditional teaching is misplaced. In many cases, and those the most appealing, the canonists' difficulties are of their own making, and could be resolved not by changing the church's official teaching, but by bringing a more sophisticated legal analysis to bear on it. My purpose in this article is to develop such an analysis and to consider what options it offers the canon law for dealing with the usual hardship cases without departing from traditional Catholic marriage doctrine.

I

The key concept in any analysis of marriage law is "natural" marriage—that is, marriage as it existed before the Christian revelation and as it exists still among non-Christians. We may define this as a sexual relation, intended to be lifelong, professed before and accepted by the community. By "intended to be lifelong" I do not mean "intended to be indissoluble;" I simply mean "not intended to be temporary." The definition would not call for the parties to rule out the possibility of divorce, but it would require that any divorce represent a change of plan. It has always been Catholic teaching that sexual acts are morally acceptable only within a relation of the kind I have defined. This teaching, and the marriage relation it envisages, are attributed to "natural law" and hence are considered morally

binding on all human beings, whether or not they embrace Christianity.

Conventional canonical analysis goes beyond these moral imperatives of Catholic teaching and treats the natural marriage as a juridical relation, existing by virtue of natural law, and indissoluble except in certain cases where the Church can interject a higher law in the interest of faith. This analysis rests on an understanding of natural law as a legal system in its own right—an understanding that is generally discredited today, even among serious proponents of natural law. To see why this is the case, we will have to look briefly at the history of natural law doctrine.

When medieval scholars first turned their attention to legal theory, the main literature available to them was that of the late Roman Empire, in which the root principle was that the word of the emperor was law. Law was therefore conceived as a body of rules (do this, don't do that) set forth by a ruler for the guidance of his subjects. This was not a very accurate picture of what was going on in eleventh-century feudalism, but it was a fair enough approach to the literature. When the canonists took up the same approach, they found it reinforced by the growing place of papal authority in their own system.

When these scholars looked from human law to divine, it was all too easy for them to pass from an emperor who gave orders like a god to a God who gave orders like an emperor. They combined natural law (the requirements of human nature written by God in men's hearts) and divine positive law (revealed standards of behavior) with the commands of popes, emperors, and other human lawgivers into a unitary legal system. In this system, natural law, as part of God's commands, was to human law what the emperor's decree was to a prefect's, or the pope's to a bishop's. The subordinate official was expected to implement or clarify the mandates of his superior, but those mandates did not require his intervention for their legal force.

Since the breakup of the medieval intellectual synthesis, legal theory has gone off along two main lines, both inconsistent with assigning inherent legal force to natural law. One line tends to see law in terms of its effect on the lives of individuals (when they will be put in jail, when they will have to pay money, when they will lose their land, etc.), or its impact on society (how it can prevent strikes, unemployment, race discrimination, etc.). On this theory, natural

law cannot be said to have inherent legal force, because it has, by itself, no effects of the kind envisaged. It has such effects only through the acts of legislators, administrators, or judges who choose to implement or to follow it.

The other line looks at law in terms of its conformity to some standard of authenticity (enactment by a legislature, promulgation by a court, or the like) that is generally accepted in the community. Natural law does not have within it any such standard of authenticity; hence, on this theory, its dispositions cannot have inherent legal force. A disposition of natural law that happens to conform to such a standard (e.g., by appearing in the statute book) has legal force because it does so conform, and not because it is part of the natural law.

So modern proponents of natural law tend to see it not as having legal force in and of itself, but as providing a guide to making, applying, criticising, or even resisting the dispositions of a given legal system. The guide is rooted in human nature, and those who make laws without regard to it are doomed to frustration in the same way as people who make six-fingered mittens or hats with square crowns. But the guide is not self-implementing. It tells us what laws we need, not necessarily what laws we have.

Taking natural law as a guide to what laws there should be, we can formulate as follows the principle that the institution of marriage is part of the natural law. (Beginning here, I am going to number consecutively the propositions I examine, so I can refer to them later.)

1. People have a natural tendency to enter into sexual relations of lifelong intent, to profess these relations before the community, and to seek community acceptance for them. To the extent that a legal system fails to give adequate scope to this tendency, it will fail in its purpose of serving the community in which it operates.

This, of course, is a juridical formulation. As such, it does not exhaust the bearing of natural law on the institution of marriage. Natural law as originally conceived was a guide to the conduct of individuals, as well as a guide to the content of law. That is, it had a moral, as well as a juridical, aspect. The medieval synthesis tended to blur the distinction between the two aspects. If we restate the juridical aspect in isolation, as we have just done, we will have to restate the moral aspect as well. Let us see how this can be done.

Natural law as a moral doctrine asserts that human nature is such that people are more apt to be happy and fulfilled if they act in certain ways and forbear to act in certain other ways. Accordingly, it is possible to derive from an understanding of human nature rules of conduct (sometimes called moral "laws") which it is right (i.e., conducive to happiness and fulfillment) to follow, wrong (i.e., conducive to unhappiness and frustration) to violate. Along these lines, we can formulate as follows the teaching about sex in marriage:

2. *Human nature is such that people are more apt to be happy and fulfilled if they confine their sexual acts to relations intended to be lifelong, professed before and accepted by the community.* These two propositions, the juridical (1) and the moral (2) constitute between them a complete formulation of the traditional doctrine that marriage is an institution of the natural law.

With these two aspects of natural law in mind, let us turn to the question whether natural marriage is "indissoluble." (Note that the fact that marriage is, by definition, *intended* to be lifelong does not necessarily make it so—many things are less durable than they are intended to be.)

The statement that marriage is indissoluble by natural law must also be broken down into its juridical and moral components. The juridical component looks something like this:

3. *A legal system will fail one of its purposes if it permits marriages, once entered into, to be dissolved.* In other words, permitting divorce—not just easy divorce, but any divorce at all—is bad for society, human nature being what it is.

This proposition will not stand up in the light of experience. Family and sexual stability are less damaged by limited provision for divorce than they are by the irregular liaisons and other abuses that tend to develop where divorce is not permitted. For this reason, many people whose personal convictions are opposed to divorce have found it necessary to support legislation permitting it. Perhaps some societies would be better off if their laws did not permit divorce, but if the proposition under consideration were true, we would have to say that *all* societies would be better off if their laws did not permit divorce. This is surely not the case.

The moral component of the statement that marriage is indissoluble by natural law is somewhat difficult to formulate. It is not simply an assertion that it is wrong to dissolve a marriage. That

being true would not make the marriage indissoluble, any more than its being wrong to shoot your mother would make her unshootable. On the other hand, an assertion that it is always wrong to cease fulfilling the obligations of a marriage once entered into would be too broad. Even if a marriage were indissoluble, fulfilling most of its obligations could become impossible (say your spouse is in jail), dangerous (he has homicidal impulses), irresponsible (he abuses the children), or incongruous (he has left you and moved in with someone else).

How about an assertion that it is wrong to enter into a second marriage during the lifetime of the other party to the first? This is on the right track, but it is not sufficient by itself to make the marriage indissoluble. It leaves open the possibility that the obligations of the second marriage, even if wrongfully entered into, could eventually supersede the obligations of the first marriage. To make a complete statement of indissolubility, we must add a provision excluding that possibility.

So it seems that an assertion of indissolubility as a moral doctrine of natural law would have to take this form:

4. *It is wrong (i.e., counter to what human beings require for happiness and fulfillment) for a person to enter into a second marriage while the other party to the first marriage lives or to persevere in such a second marriage if he does enter into it.* The question is whether, on account of the nature of human beings, this proposition is always and under all circumstances true. Note that its status as a principle of natural law will not be sufficiently established by showing that it is sometimes or even usually the case; it must always be the case. Say (I will number hypothetical cases consecutively also; this is *Case I*) seventeen years ago, John, at the age of eighteen, married Julia, who proved to be both depraved and a harridan; she made his life miserable for three years before she ran off with another man. Some time later, John married Susan, who is virtuous, lovely, and devoted. They have been living together for ten years and have four children. John must leave Susan. To remain with her would be wrong, i.e., conducive to unhappiness and frustration.

Generally, anyone who accepts such a view as this does so because he considers John's union with Julia indissoluble and therefore considers the union with Susan adulterous. But in the present context that analysis would be a *petitio principii*. The proposition

under consideration (4) is a formulation of the principle of indissolubility; that principle cannot be used to prove it.

Then is it true at all? It is hard to see why it should be. There is, to my mind, a strong intuition behind the moral judgment that sexual acts are legitimate only within a union that is intended to be permanent, and certainly such an intention, once formed and acted upon, should not lightly be abandoned. But to say that no circumstances, however compelling, can justify a change in this intention seems to go a good deal beyond the intuitive support.

It also goes beyond both the teaching of Scripture and the practice of the Church. It is well known that the Old Testament permits divorce and remarriage, that Saint Paul (or the prevailing Catholic interpretation of him) allows a Christian to remarry if his non-Christian spouse is unwilling to live with him, and that the Church in this century has claimed a broad power to dissolve natural marriages in the interest of the faith, not always the faith of one of the parties to the marriage. (In a famous case from Indonesia, the Church dissolved a marriage between two Chinese pagans so that an Indonesian Catholic could regularize her marriage with one of them.)

Catholic natural law theorists have had trouble explaining these cases (along with other apparent departures from natural law, such as God's commanding Abraham to slay Isaac or telling the Hebrews to steal things from the Egyptians). It will not do to say simply that God or the Church in his behalf can in appropriate circumstances override the natural law. If human nature inexorably requires certain behavior, we cannot suppose that God occasionally makes it right for human beings to behave otherwise, any more than we can suppose that he occasionally makes square circles.

Various explanations have been offered. The most persuasive is that of the authors who distinguish between "primary" principles of natural law, which bind always and everywhere, and "secondary" principles, which bind generally, but not unfailingly. Primary principles bind universally because things will go better if people in general abide by them. Authors of this persuasion hold that the indissolubility of natural marriage is not a primary principle, because it is not invariably the case that a particular human being will be most happy and fulfilled if he returns to his original spouse or else remains celibate. Rather, they hold that indissolubility is a secondary principle in that the availability of divorce will under-

mine the institution of marriage, which human nature requires us to maintain in full vigor. It would seem, therefore, that they would reject the proposition (4) that we are now considering.

To be sure, they would, for the most part, impose the same moral obligation, not in the interest of personal happiness and fulfillment, but in the interest of society and of the institution of marriage. Here, I think, we can part company with them. In the first place, I have defined the moral component of natural law in terms of acts conducive to happiness and fulfillment. If I am right, natural law cannot impose a moral obligation to sacrifice one's own happiness and fulfillment to something else. Furthermore, as I tried to show in rejecting Proposition 3, an absolute prohibition of divorce is not necessarily the best way to strengthen the institution of marriage in society.

What I have tried to do so far is resolve the proposition that marriage is indissoluble by natural law into two component propositions (3 and 4) and to show that neither of these is true. If I have succeeded, it follows that marriage is not indissoluble by natural law. There remains the question whether natural marriage is indissoluble for some other reason. The only possibility we need consider is that Christ's teaching on the subject applies to all mankind, rather than only to Christians.

There is a good deal in the Gospel texts to support an application to all mankind. Our Lord says that indissolubility represents God's original purpose and that the Old Testament permission of divorce was a temporary expedient adopted because of the hardness of people's hearts. It seems to me, however, that the original purpose referred to here can go no farther than the natural law, which, as we have seen, calls for an intention that marriages be lifelong, but admits of the possibility that that intention can be frustrated on occasion. If Christ asks more of people than their nature requires, he asks it of those who accept the new life he offers and live in the community he gathers.

The conclusion that the divorce and remarriage of non-Christians is not forbidden by the Gospel seems to accord with the practice of the popes. It appears that in their capacity as temporal sovereigns of the Papal States they gave full recognition to divorces and remarriages of Jews in accordance with Jewish law.

Natural marriage, then, although it is intended as a lifelong union, is not under all circumstances indissoluble. It follows that

the fact that A was once involved in a natural marriage with B, who is still alive, is not necessarily an obstacle to either the civil community or the Church accepting a present marriage between A and C.

II

It is against this background that we should look at Christian marriage, which, by Christ's teaching as interpreted by the Catholic Church, is indissoluble (once it is consummated) except by the death of one of the parties. Scripture and doctrine tell us a number of things about this indissoluble union. It is a sign of the union between Christ and the Church. It is a sacrament; hence, it has a spiritual effect *ex opere operato*. The Christian couple are "one flesh." God has joined them together. The relation envisaged by these doctrines is a "great mystery."

At the same time, it is a natural marriage, modified to an indeterminate extent by the interest of the Church and the religious commitment of the parties. Thus, like any other marriage, it is a threefold nexus. It is first an observable personal and social nexus, affecting how the parties think and act and how other people treat them. Then, it is a juridical nexus, one which the law (including the Church's law) recognizes and visits with important consequences. Finally, it is a moral nexus, a matrix of obligations which it is right to fulfill and wrong to violate.

The mystery envisaged by Catholic doctrine (or the belief in it) may profoundly effect the observable, the juridical, and the moral nexus, but it cannot be placed within any of them. Obviously, it is no part of the observable nexus. Married people have no experience of being "one flesh" except on particular occasions. Nor can you tell to look at them whether it is God or someone else who has joined them together, or what spiritual effects they have undergone.

As for the juridical nexus, modern legal theory will insist that nothing can have legal force until someone chooses to embody it in a legal system. It follows that being one flesh cannot be a juridical state, that the spiritual effect of the sacrament cannot be a product of any juridical relation, and that if God joins people together he does not do so juridically.

Nor can the mystery we are considering be placed within the moral nexus. It may give rise to moral obligations, but it is not

derived from moral obligations, nor is it a formula or metaphor for expressing moral obligations. Reflecting on my wife being one flesh with me may teach me something about my moral obligations (see Ephesians 5:22-33), but reflecting on my moral obligations will not teach me that we are one flesh. From the fact that God has joined us together, I may conclude that man should not put us asunder, but from the fact that man should not put us asunder I can scarcely conclude that God has joined us together. A spiritual effect may create a moral obligation, but a moral obligation cannot create a spiritual effect until I either fulfill it or fail to fulfill it.

Where the mystery belongs, I suggest, is within a fourth nexus, one which we might call ontological. It seems that what the Catholic Church is trying to teach us is that Christian marriage unites the being of the parties in a way that other relations—including natural marriage—do not. The effect is analogous to those of the three sacraments (baptism, confirmation, and order) that theologians speak of as imparting a “character.” The ontological nexus in which this effect resides is real—i.e., not a mere category of someone’s thought—but not observable, and not moral or juridical.

I suggest that this ontological nexus is the only one that is inherently indissoluble. That the observable nexus is dissoluble is apparent to anyone who looks. The indissolubility of the juridical nexus (church law will not recognize the dissolution of a consummated sacramental marriage) or the moral nexus (other moral obligations can be dissolved, but the obligation not to commit adultery cannot) seems to depend on the existence of the ontological nexus, and to extent no farther. Both canon law and common moral theology illustrate this dependence in their treatment of particular cases. They are extremely, if not excessively, liberal in allowing one of the parties to abandon a marriage when no ontological union can be discerned. For example:

Case 2: The pastor who presided at the wedding of A and B was *non compos mentis* at the time. Either party may leave the other when he or she pleases, and marry someone else.

Conversely, they seem to impose marital obligations in cases where there can be no conceivable moral or legal purpose in doing so, unless it be the implementation of the ontological union. For example:

Case 3: Same as Case 1, except John and Julia were baptized Catholics, married in church. John must leave Susan.

My point is not that these cases make no sense (although that is a tenable position), but that whatever sense they do make is made in the light of an ontological union to which the law must give effect and which the individual Christian ought to respect in his own person. If the conditions for that ontological union are met, a man can no more break up with his wife than with his mother. If they are not met, then he and the authorities can implement whatever other moral and legal considerations seem to apply. I believe this is the authentic teaching of the Church, and the best explanation for the Church's practice.

III

We should not make the mistake of treating the obvious arguments against easy divorce as if they were arguments against any divorce at all. As I tried to show in dealing with natural marriage, there will be cases where, if a marriage is not indissoluble, there are strong moral and legal considerations in favor of dissolving it. In such cases, the ontological bond of sacramental marriage, where it does exist, will hold a couple together even though all other considerations favor letting them be free of each other.

I am not objecting to the ontological bond on this ground; quite the opposite. As a Catholic, I believe in it, and as a married person I desire it. But current canonical doctrine imposes it on people who do not believe in it or do not desire it. Some of these are people who, by any discernible criterion, would be better off without it. It would be useful therefore to examine the basis for the current doctrine, the basis for determining what marriages are sacramental.

What canonists suppose in this regard is that a natural (i.e., non-sacramental) marriage is possible between two persons only one of whom is baptized (a sacramental marriage is impossible because no one is eligible for any other sacrament until he is baptized and one party cannot be sacramentally married without the other), but a union between two baptized persons is either a sacramental marriage or no marriage at all:

Can. 1012. § 1. *Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos.*

§ 2. *Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.*

The canon seems to go farther than the theological tradition on which it rests. That tradition asserts that sacramentality is an inherent, rather than a superadded, quality of Christian marriage. It does not address itself to the question whether baptized persons can be so far removed from the Christian life as to marry on the same terms as non-Christians. In fact, until the development of secularism in the nineteenth century, cases of baptized people marrying outside any Christian context can hardly have occurred often enough to engage the serious attention of theologians. So I do not believe we will be questioning any very venerable theological doctrine if we ask whether the principle enunciated in Can 1012, § 2, is true.

The principle in question breaks down into two propositions. (continuing the original numbering of propositions):

5. *When two baptized persons enter into a marriage that is not forbidden by the laws or teachings of the Church, that marriage is necessarily sacramental.*

6. *When two baptized persons enter into a union that is forbidden by the laws of the Church (prescinding from cases forbidden by church teaching, e.g., incest), that union is not a natural marriage; it is no marriage at all.*

Both these propositions rest on the view that marriage has the juridical form of a contract, that the sacramental and juridical aspects are inseparable, and that the only relevant law on the marriage of Christians is that of the Church. Thus a marriage can have no juridical status unless church law sanctions it (Proposition 6), and if church law sanctions it, it must needs be sacramental (Proposition 5). It seems to me that line of approach cannot be reconciled with an adequate understanding of the nature of law.

The term "contract" has no necessary referent in the real world. It is a label that particular legal systems put on particular transactions, the better to analyze them and to do justice between the parties who make them. If marriage is a contract, it is so only within the framework of some legal system whose practitioners choose to call it by that name. Nor is the choice a very felicitous one, as terminological choices go. Marriage has some similarities to horse trades, the hire of laborers, and arrangements to build buildings, but the differences outweigh the similarities, and we generally feel these days that legal scholars will understand the marriage relation better if they treat it as *sui generis*.

What is it, then, to which the sacramental character attaches? The definition of marriage which we have been using has these elements: (1) a sexual relation, (2) lifelong intention, (3) profession before the community, and (4) acceptance by the community. The first two elements are, of course, internal or private. They would be the same for any given couple whether their marriage was natural or sacramental. It is this sexual commitment that is perfected through the action of Christ when the parties marry in him.

But marriage in Christ is marriage in the Christian community. It is here that the third and fourth elements of the definition come into play. Sacramental marriage must be professed before and accepted by the Christian community, whereas natural marriage is professed before and accepted by the natural—i.e., the secular—community.

Before elaborating this point, I have a preliminary objection to meet. It has long been accepted in the Catholic Church that absent ecclesiastical legislation on the subject two Christians could enter into a valid sacramental marriage by a private exchange of vows, without professing their relation before the Christian community, or before anyone else for that matter. How, then, can profession before the Christian community be an element in the definition of Christian marriage?

No doubt many cases of informal marriage did not really raise the problem: The parties professed their relation before the community by living together publicly, even though they did not follow the prescribed ceremonies. Indeed, it is hard to see how a relation entirely devoid of social significance can fit anyone's definition of a marriage. Still, some medieval couples may well have exchanged marriage vows merely in order to escape the guilt of fornication, without wanting anyone at all to find out what they were doing. It is quite likely that medieval churchmen, if they had adequate evidence of such a case, would have held the marriage valid. I suspect the reason is that medieval churchmen were more impressed than we are with the supernatural dimension of the Christian community. If the Church is in some way present when a monk is saying Mass in the privacy of his cell, it can presumably be present in the same way when a couple are exchanging marriage vows in the privacy of their bedroom. Such a view is consonant with the more recent teaching that the parties administer the sacrament of matrimony to one another, and, in doing so, act on behalf of the Church.

In one way or another, then, marriage must be entered into with reference to some community in which the parties are to live out their commitment to one another. What I am arguing here is that a Christian marriage must be entered into with reference to the Christian community. Christ has made of his followers “a people,” and it is within the life of that people that the sacraments are given and received. Even if a couple are baptized, they cannot be sacramentally married if they have no intention of participating in that life. To my mind, this is the principle behind both the canonical rule (always a requirement for liceity, now a requirement for validity) that the marriage must be solemnized *in facie ecclesiae* and the theological rule that the parties must intend to do what the Church does.

It is possible for a relation to be professed before the secular community, but not before the Church. It is also possible for it to be accepted by one community but not the other. It is acceptance, the fourth element in the definition, that is affected by the laws imposing impediments. A community has authority, subject to the same requirements of justice that govern other laws, to determine what marriages it will and will not accept. If a marriage is subject to a canonical impediment justly imposed, it may be said not to be accepted by the Church. But if it is in accordance with secular law, it is still accepted by the secular community. This suggests, by the way, that the popular Catholic formulation that so-and-so is married, but not “in the eyes of the Church,” expresses the real state of affairs better than most canonists or moral theologians have supposed.

The foregoing argument indicates that a relation can fulfill the conditions for being a natural marriage and still not fulfill those for being a sacramental marriage, even if the parties are baptized. Thus, Proposition 5 above is false. What about Proposition 6 then: can a relation between two baptized persons be a natural marriage when it is expressly forbidden by church law? The medieval churchmen said no because they thought that law was one thing, so that church law within its proper sphere—a sphere that included the marriages of all the baptized—overrode secular law as imperial decrees overrode the praetor’s edict, or as federal law overrides state law today. This conception was overly naive even in medieval times. The legal systems of Church and state have always served different purposes, and can sometimes serve them better without insisting on complete

conceptual harmony—hence the famous decision in 1235 that English secular law would not follow the canonical rule on legitimation. In modern times, the prevailing view (and since Vatican II the official view) is that church law overrides secular law only where the latter prevents the Church from performing its proper function or prevents Christians from living in accordance with their religion.

Let us apply this standard to a case. Say a priest abandons the Catholic faith, becomes an agnostic, and marries an ex-nun. Here are two baptized people whose marriage is invalid by the law of the Church. The question is whether the acceptance of their marriage by the secular community is contrary to the criterion just stated, i.e., whether it prevents the Church from performing its proper function or prevents Christians from living in accordance with their religion. It is arguable, I suppose, that the proper function of the Church will be interfered with if a priest who has left his calling can live in the secular community as a married man. But I would not accept the argument. The alternatives—imposing on him by force a celibacy he no longer believes in or requiring him to live in a state of meretricious cohabitation—do not seem very well calculated to further the Church's work, at least in a society like ours. As for leading a Christian life, it hardly seems he would be hindered by having some legal obligation to the woman who shared his bed and board. Even if he ought to stop living with her, it would be an odd interpretation of the Gospel that called on him to abandon any further responsibility for her.

I believe it follows from all this that the secular community may properly accept a marriage for its own purposes even though that marriage is between baptized persons and is forbidden by church law. Hence, such a marriage may fulfill the conditions for being a natural marriage, and Proposition 6 is false.

Note that in arguing that a natural marriage between the baptized need not be a sacramental marriage, I am not following in the footsteps of those Gallicanists who separated the "contract" of marriage from the sacrament, and were condemned (rightly in my opinion) by the ecclesiastical authorities for so doing. I am not separating the juridical from the sacramental aspects of a marriage. Rather I am saying that it can have two juridical aspects, because it is scrutinized by two systems of law—that of the Church and that of the secular community—only one of which makes a sacrament of it.

IV

This analysis does not support the proposal made from time to time that the Church offer practicing Christians an option of entering a nonsacramental marriage if they are unwilling to assume the obligations of an indissoluble bond. I believe I have established that a natural marriage is possible between two baptized persons, but what keeps such a marriage from being sacramental is the fact that it is not professed before and accepted by the Christian community. This would be the situation of a baptized couple at least one of whom had ceased to practice the Christian religion. But once a couple are allowed to participate, and do participate, in the life of the Christian community as married people, their relation is, by my analysis, necessarily sacramental.

Note also that by this analysis the typical divorced and remarried Catholic is sacramentally married to his first wife and naturally married to his second. The natural marriage is morally significant from a standpoint of natural morality, but I cannot see that it offers him an option of living as a Catholic with his second wife. In sacramental marriage, the exclusive sexual commitment is inseparable from the ontological union to which it gives rise and of which it is the sign. One can be a good human being without accepting the binding force of this commitment, but I cannot see that he can be a serious follower of the Catholic sacramental system. We cannot escape the effect of this teaching by characterizing the second union as a marriage. Christ stigmatizes as an adulterer the man who divorces his wife and *marries* (not attempts or purports to marry) another.

It may be possible, however, to offer the divorced and remarried Catholic a more sympathetic approach to the question whether his first marriage was in fact sacramental. Canonical treatment of this question is governed by a presumption which seems to depend on juridical views whose inadequacy I have attempted to point out. Here is how the conventional approach goes: Marriage is a contract to which a sacramental character attaches. A marriage contract between two Christians must needs be a sacrament. Whatever fulfills the legal conditions of a contract must needs be one. Whatever has the external forms of a contract should be presumed to fulfill the legal conditions. *Ergo*, when two Christians go through the external

forms of a marriage, we must presume they are sacramentally married.

These are good enough principles of contract law, but as marriage doctrine they will not do. Fulfilling the legal conditions is one, but only one, of the requirements for being a marriage. It establishes acceptance by the community, but it leaves open the question of a sexual relation lifelong in intent—a matter within the private understanding of the parties—and the question of profession before the Christian community—a matter that is not all that clear in a pluralistic society where a church wedding can serve a variety of purposes. Instead of presuming every ceremonial marriage to be valid, as we now do, we might be closer to reality if we presumed that a couple who broke up shortly after they came together did not seriously intend a lifelong union. Or we might presume that a couple who did not assume a place in some Christian congregation did not seriously mean to profess their relation before the Christian community, but chose a church wedding for the sake of some secular community, family, social class, business, or whatever.

Where my analysis, if it is correct, will be most useful is in arranging the matrimonial affairs of people who have married outside the Catholic church, and now wish to begin or resume the practice of the Catholic religion, or to enter new marriages with Catholics. The usual cases that come up are familiar enough. The following are typical:

Case 4: A and B, baptized Protestants, marry, either in their own church or before a civil official. A wishes to become a Catholic and continue living with B.

From the Council of Trent until 1908, the marriage between A and B would have been considered a nullity if contracted in any place where the decree *Tametsi*, which required all marriages to be contracted before a priest, was promulgated (Catholic Europe and those parts of America settled by the French and the Spanish), a sacrament if contracted anywhere else. If the marriage was a sacrament, A could go on living with B after becoming a Catholic. If it was a nullity, a new marriage would have to be contracted. If the original matrimonial consent persisted, a process called *sanatio in radice* (healing in the root) was available, whereby the ecclesiastical authorities could validate the marriage at A's request without saying anything to B. The marriage would then become sacramental.

Since 1908, Protestants have not been expected to use the Catholic form of marriage, or any other form for that matter. Hence, the marriage of A and B would always be sacramental. This rule was evidently adopted to avoid the conceptual necessity of accusing all Protestants of living in sin.

My analysis would call for treating the marriage as sacramental only if A and B had professed it—either ceremonially or by their manner of living—before some Christian body that accepted them as a married couple. The teaching of the body in question, and the relation of A and B to it, could both be considered in determining whether the body represented the overall Christian community in this regard and whether the relation was professed before and accepted by that body.

If the marriage was not sacramental (as would probably be the case, for instance, if the parties were not serious members of any particular church), it would still be a natural marriage and would permit A to be a Catholic and still live with B. If B subsequently chose either to become a Catholic or to enter more fully into the life of some other Christian body as a married person, the marriage would then become sacramental through profession before and acceptance by the Christian community.

Case 5: C and D, baptized Protestants, marry, and are divorced. D then marries E. D wishes to become a Catholic and go on living with E.

Under present rules, this cannot be allowed unless some ground of nullity of the C-D marriage can be found. If C and D were ever validly married, their marriage is sacramental, and the relation between D and E is adulterous.

My analysis would lead to the same result if the marriage between C and D was actually sacramental. But, as in Case 4, I would not find it sacramental unless it had been professed before and accepted by some body of Christians. I would not find it necessary to impose the burden of indissolubility on people, whether or not they were baptized, unless they were serious about Christian marriage during the time they were man and wife. If the C-D marriage was merely natural, I would accept it as dissolved.

Case 6: Same as Case 5, except that D is not baptized.

Under current practice, a discretionary act of ecclesiastical authority can be invoked to dissolve the natural marriage between C

and D, and thus free D to marry E. The C-D marriage is regarded as continuing to exist until the church authorities dissolve it. They are usually willing to do this, although they are in no way required to. The preparation of the case for their consideration involves extensive investigation of D's ecclesiastical past to make sure he was really not baptized. This causes a few raised eyebrows among, say, the clergy of the Free-Will Baptist church whose Sunday school he attended when he was seven years old. When the dissolution comes through, D and E must marry all over again, unless the church authorities, in another exercise of discretion, allow a *sanatio in radice*, in deference to E's unwillingness to admit that they are not married already.

I would treat this case the same as Case 5. Thus, I would not have to investigate whether D was baptized, but only whether C and D had participated as a married couple in the life of some Christian congregation. If they had not, I would not have to make D and E marry over again; I could treat their marriage as already in effect.

Case 7: F and G, both Catholic, marry outside the Church. They wish to return to the sacraments.

Under present practice, either is free to leave the other. If they wish to live together as Catholics, they must marry over again. The *sanatio in radice* would be available instead of a new ceremony, but it is not customarily allowed. It seems to be felt that if they are serious about returning to the Church, they should accept the Church's judgment that they have thus far been living in sin.

I would treat their relation as a natural marriage, since it was professed before and accepted by the civil community. This would mean that neither party was free to ignore his obligations to the other or to break up the marriage without some good reason for doing so. Whatever sin they have been living in is attached not to their marital cohabitation but to their general departure from the requirements of their religion. On returning to the Church, they should be considered sacramentally married not through either a new marriage or a *sanatio in radice* of the old, but through some form of profession before and acceptance by the Church of their existing marriage.

Case 8: H leaves the Catholic Church and becomes an Episcopalian (or a member of some other Christian body whose marriage doctrine is approximately the same as ours). In due course, he marries I, a fellow Episcopalian. The wedding is celebrated in

church, and they continue to be active in their church for some years. H now wishes to divorce I and marry J, a Catholic.

Under present practice, he will be permitted, and even encouraged, to do so. Ecclesiastical legislation makes his marriage to I null, so what he proposes is an abandonment of illicit cohabitation in favor of Christian marriage. It is not surprising that Episcopalians consider this result scandalous.

Under my analysis, the marriage between H and I is at least a natural marriage, like the one between F and G in Case 7. What keeps it from being sacramental is the canonical legislation that requires everyone who has ever been a Catholic to marry under the Catholic form. I am not ready to insist that this legislation is beyond the power of the ecclesiastical authorities to enact. Acceptance by the Christian community is a juridical matter, and the juridical supremacy of the Roman See is a tenet of the Catholic religion. The application of the canon in this case might well be regarded as unjust, but whether a transaction can be considered invalid on the ground that the law invalidating it is unjust is a complicated question. In any event, if the rule is effective as it stands, it should be changed. If Christians who accept the Catholic understanding of marriage wish to enter into that relation in a congregation that accepts it also, it is not for the Catholic Church to stand in their way.

V

The question of polygamous marriages requires special treatment. Current practice is to regard the polygamist's first marriage as a valid natural marriage, the others as nugatory. Thus, a polygamist who wishes to become a Catholic must get rid of all wives but the first, or else petition the Roman authorities to dissolve his marriage to the first and let him marry one of the others. Presumably, a first wife who wishes to become a Catholic may do so without leaving her husband, but the others may not. Obviously, a Catholic man who has a wife may not marry another, and a Catholic woman may not marry a man who already has one or more wives.

These rules are founded on the view that polygamy is irreconcilably opposed to the natural law. If the relation between the polygamist and each of his wives were to be regarded as natural marriage, it might still be considered unseemly for Christians to embark on such a relation, but we might not object, as we now do, to their fulfilling

as Christians the marital obligations they had incurred as pagans. The important question, then, is whether we are right to consider polygamy violative of natural law.

I take it as given that sexual love cannot realize its full potential for human happiness and fulfillment unless it is exclusive and that a community accepts an inferior and often an exploited status for its women when it accepts polygamous marriages. To this extent, we can say that natural law, whether taken morally or taken juridically, opposes polygamy. On the other hand, the polygamist can certainly have with each of his wives a relation lifelong in intent, one which is professed before and accepted by the community in which they live. Such relations do not seem to be deteriorative of the human personality or of the social fabric in the way casual or unacknowledged relations are.

If this is the case, it might be possible to say that, even though polygamy in general is undesirable, a particular polygamous marriage can be accepted as preferable to the available alternatives. This view would seem to accord with the doctrine of the traditional Catholic moralists (who had to deal with Old Testament polygamy just as they did with Old Testament divorce) that it is a secondary, rather than a primary, principle of natural law that forbids polygamy. I cannot see that such a view would justify anyone in becoming a polygamist or a plural wife who was not one already, but it might offer a solution to some of the hard cases the missionaries tell us about, cases where the polygamist and his plural wives form a stable and harmonious family unit, are personally attached to one another, and have within their culture no good way of sorting out their lives if they break up. To say that the natural law forbids the parties to remain together in a case of this kind, we must accept one or the other of the following propositions:

7. *A person with two or more wives will in every case be happier and more fulfilled (as will the wives) if he turns all but one of them out, regardless of what will then happen to them, than if he does not.*

8. *A legal system will be more conducive to everyone's happiness and fulfillment if it invariably requires the polygamist to turn out all but one of his wives than if it sometimes lets him keep them all.*

These propositions are out of keeping with both moral and legal experience in polygamous societies, and they do not follow from a

judgment that the polygamous relation should not have been entered into in the first place.

In fact, the only really cogent reason for making the polygamist get rid of his plural wives would be that he was not and could not in the nature of things be married to them. But this argument would be circular. If the women are not his wives, it is because we must ignore the laws and customs that purport to make them so. If we must ignore those laws and customs it is because the natural law condemns them. If the natural law condemns them, it is because one of the other of the above propositions (7 or 8) is true.

From all this, I conclude that there is no reason (unless it be a pastoral reason—as to that, I am in no position to say) why polygamists and plural wives should not be permitted to become Christians and continue to fulfill the marital obligations they incurred before their conversion, if the secular community takes these obligations seriously and offers no way converts can get out of them without seriously disrupting their own or other people's lives. At least, I cannot see that natural law stands in the way. The relation between the polygamist and each of his wives should be regarded, it seems, as an inferior but tolerable form of natural marriage. Of course, no such relation could become sacramental while the other persisted, even if both parties became Christians—an exclusive sexual commitment is of the essence of the sacrament. Nor should a Christian be allowed to contract additional relations of the same kind. The natural law as I have interpreted it tolerates such relations only when they have already come into existence and there is no acceptable way of getting out of them.

VI

I promised at the beginning of this article not to depart from the traditional Catholic marriage doctrine. Although the upholders of that doctrine may find some of my conclusions innovative, I believe I have kept my promise. The theological and moral premises from which I have reasoned are traditional to the point of triviality: sacramental marriage is indissoluble; sexual relations outside marriage are immoral; Church and state are two distinct communities, etc. To these I have added two premises out of legal theory: that legal concepts have meanings only within the framework of a legal system that uses them and that natural law has juridical effect only when

someone uses it as a standard against which to measure the dispositions of a particular legal system. These would perhaps not command universal assent among legal theorists, but they would certainly cause no surprise.

What I want to suggest in closing is not so much that the conclusions I have drawn from these premises be accepted and implemented as that more and better work be done in applying principles of legal theory to canon law. At a time when canonists are drawing on secular legal learning for constitutions, bills of rights, and all manner of other things, it is unfortunate that they should not be drawing on it for an understanding of what law is and what part it plays in the life of a community. The very name "jurisprudence," which most Anglo-American legal theorists apply to what they are doing, constitutes a barrier to canonists, who use the same term for something quite different (what we would call "case law"). Whether for that reason or for some other, a great deal of canonical study seems to go forward in complete disregard of modern developments in legal theory. I hope this particular work has given some indication of how the canon law might be enriched through a closer attention to these developments.