CHRISTIAN MARRIAGE: CONTRACT OR COVENANT?

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IN AN evaluation of a series of papers dealing with "Intolerable Marriage Situations," Ladislas Orsy, S.J., observed: "If I am permitted an aside here, let me say that I think the effort of historians and theologians in investigating the indissolubility of marriage or the possibility of divorce and remarriage can be misdirected. The main effort should be in investigating *positively* what a Christian marriage is."[1] More recently, under the banner headline "Time to Change Teaching on Divorce," the editors of the *National Catholic Reporter* gave space to the complaint of Raymond Goedert, president of the Canon Law Society of America: "We are being criticized because of poor law. But law can only follow good theology. My quarrel is that theologians have not done their homework on what constitutes a sacramental marriage."[2]

For the past thirty years I have been engaged in research and teaching in the field of marriage. I have done my share of homework, much of it from secondary and contemporary material, but enough from primary sources to conclude that what we need is an altogether new approach to the theology of marriage. The newness should respect the traditional teaching of the Church, but it should recapture and reflect a dimension of Christian marriage which has been lost or obscured in much of contemporary theological writing, a dimension that alone can justify the Church's teaching on the indissolubility of Christian marriage and shed some needed light on the way "intolerable marriage situations" can be handled best in the external as well as the internal forum.

Today, and for the last six centuries, Christian marriage has been discussed almost exclusively in terms of contract. In the first millennium of the Church's history, all marriage, pagan as well as Christian, was discussed almost wholly in terms of covenant. The contextual difference is basic, since it is only in terms of covenant that we can "investigate positively what a Christian marriage is."

FROM COVENANT TO CONTRACT

It may come as a surprise that the fathers of Vatican II never use the word "contract" in discussing Christian marriage. Instead, Christian

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[1] "Intolerable Marriage Situations: Conflict between External and Internal Forum," *Jurist* 30 (1970) 8.

[2] *National Catholic Reporter*, Feb. 4, 1972, p. 18.

marriage is "rooted in the conjugal covenant of irrevocable personal consent"; it is "a reflection of the loving covenant uniting Christ with the Church, and a participation in that covenant"; it is likened to "the covenant of love and fidelity through which God of old made Himself present to His people."[3] Admittedly, the term "covenant" is more biblical than the term "contract," and this may explain why the fathers of Vatican II in their more pastoral approach to the "Church in the Modern World" avoided the legal expression "contract" in favor of "covenant." But the word "covenant" is not only biblical; it is the preferred word to express the reality of marriage in those societies where marriage is monogamous, where the union of husband and wife is exclusive and stable.

The term "covenant" transliterates the Latin *conventio* or *conventus*, and is derived from the verb *convenire*, which simply means to come together or to convene, and, in the present context, to form a covenant (*foedus*) or an alliance (*societas*) or a pact (*pactum*), words which refer to covenant. A covenant itself is a solemn agreement between nations, peoples, or individuals, effecting a relationship that is binding and inviolable.

Among ancient peoples the binding and inviolable character of covenants derived from the divine sanctions attached to the covenant agreement. Contracts have people as witness, and human or civil society as guarantor. Covenants have God or the gods as witness, but not in the sense that the gods or God simply vouch for the correctness of the agreement; they act as guarantors that the terms of the treaty, alliance, or covenant will be carried out. To borrow a phrase from the Akkadian treaties of the eighth century B.C., the gods are "lords of the oaths," favoring those who live up to the stipulations of the agreement and cursing or "pursuing relentlessly" all who violate their oaths.[4]

In Roman society the solemnity of the agreement was expressed by the word "oath" (*juramentum*) or by *sacramentum* in the classical meaning of vow or sacred commitment made by a soldier to the emperor.[5] Oath, vow, sacred commitment are covenant words. They do not belong to the vocabulary of contracts. And the basic reason appears from the etymology and usage of the two words "contract" and "covenant."

If we consult the Latin from which covenant (*foedus*) and contract

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[3] The Church in the Modern World (*Gaudium et spes*), no. 48; tr. Abbott-Gallagher, pp. 250–51.

[4] Cf. Klaus Baltzer, *The Covenant Formulary in Old Testament, Jewish and Early Christian Writings* (Oxford, 1971) pp. 14–15.

[5] Cf. *Pour l'histoire du mot "Sacramentum,"* ed. J. de Ghellinck (Louvain, 1924) pp. 66–71.

(*contractus*) are derived, it becomes apparent why the latter was never used in classical Latin even for pagan marriage, and why until the High Scholastic period the preferred word for Christian marriage was *foedus* or covenant. Contract in its verbal form (*contrahere*) means to draw together, to restrict, to diminish, to limit, for example, the terms of the contractual agreement. Contract is used of things, of property or of personal belongings. When persons are involved, it is not the person who is hired or contracted for, but his services. A man is hired to do something. Only in a slave economy can we speak of buying or selling people. Thus, in the *Digests* of Justinian, *contractus* is used of buying and selling, lending and leasing, of hiring and engaging the services of another. Occasionally *contractus* is applied to people, to a *societas*, but the society in question is a group of business associates engaged in trade.[6]

Covenant (*foedus*) is as expansive and as all-embracing as contract is restrictive and limiting. From the root word *fidus* and the verb form *fidere*, which means to trust, to have faith in, to entrust oneself to another, a covenant is seen as a relationship of mutual trust and fidelity (*fides*). Hence, to speak of a covenant of fidelity is redundant. Fidelity is of the essence of covenant. Contracts can be broken by mutual agreement, by failure to live up to the terms of the contract, by civil intervention. Covenants are not broken; they are violated when there is a breach of faith on the part of either or both of the covenanters.

Covenant Marriage in the Old Testament

The Sinai covenant is patterned on the Hittite covenants of the fourteenth century B.C. Common to both covenants is the basic note of fidelity. In the Hittite covenants the relationship between the covenanters is that of king to subject, lord to vassal. In the Sinai covenant the relationship is that of maker to creature, lord to servant, redeemer to redeemed.

As the history of Israel develops, a new dimension is added to covenant in the prophetic literature, and a new relationship established. The covenant is still one of fidelity, but it is expressed now in terms of marriage: a covenant of steadfast love, of love and fidelity. Yahweh is husband to Israel, His chosen bride. "For your Maker is your husband, the Lord of Hosts is His name, and the Holy One is your Redeemer . . . says the Lord your Redeemer" (Is 54:5). Time and again Israel will

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[6] See *contractus* and *societas* in Harper's edition of *Latin Dictionary* by Lewis and Short. *The New Oxford Latin Dictionary* in its published fascicles includes such covenant entries as *conventus, conventio, foedus, fides,* etc.

prove faithless to the terms of the covenant, but Yahweh will remain faithful: "For the Lord has called you, like a wife forsaken and grieved in spirit, like a wife when she is cast off, says your God. For a brief moment I forsook you, but with great compassion I will gather you. In overflowing wrath for a moment I hid my face from you, but with everlasting love I will have compassion on you, says the Lord, your Redeemer" (Is 54:6-8).

The first to draw the daring analogy of the husband-wife relationship between Yahweh and Israel is the prophet Hosea. Yahweh is portrayed as the jealous husband, Israel as the faithless wife; but Yahweh is ready to set aside His righteous anger, to offer pardon on repentance, and through a new covenant more perfect than the first to accept Israel once again. "And in that day, you will call me husband.... And I will betroth you to me in righteousness and in justice, in steadfast love, and in mercy. I will betroth you to me in faithfulness; and you shall know the Lord" (Hos 2:17-20).

It may be objected that the divine forebearance exemplified in Yahweh's dealings with Israel is too demanding an ideal for human marriage, and that the ideal was not in fact demanded of the people for whom the prophets wrote. True, the prophets did not base their analogy between marriage and the Yahweh-Israel covenant on marriage as it was understood or practiced at the time, or even legislated in Deuteronomy. The law of Deuteronomy forbade a man who had divorced his wife to take her back if she had been defiled by another man (cf. Dt 24:1-4). Jeremiah is quite aware of this when he has God say: "You have played the harlot with many lovers; and would you return to me?" (3:1-3). But Yahweh's reply is quite different from that proposed by the Mosaic law: "Return, faithless Israel, says the Lord. I will not look on you in anger, for I am merciful, says the Lord. I will not be angry forever. Only acknowledge your guilt, that you rebelled against the Lord your God and scattered your favors among strangers under every green tree, and that you have not obeyed my voice, says the Lord" (3:12-13).[7]

It is not until the time of the prophet Malachi (500–450 B.C.), some three hundred years after Hosea described Yahweh's covenant with Israel in terms of human marriage, that the word "covenant" is applied directly to marriage among the Israelites. Malachi not only describes Yahweh's marriage with Israel on the cultic level, a marriage in which Israel is faithless; he finds in the infidelity of the individual Israelite towards his wife the reason for Yahweh's refusal to accept the sacrifices which are offered to Him. "It is because Yahweh stands as witness be-

[7] Cf. Pierre Grelot, in *Man and Wife in Scripture* (New York, 1964) pp. 57–67; Paul F. Palmer, "Rethinking the Marriage Bond," *America*, Jan. 17, 1970, pp. 40–41.

tween you and your wife, the wife with whom you have broken faith, even though she is your wife by covenant.... For I hate divorce, says Yahweh, the God of Israel" (2:14-15).[8]

Apparently, Malachi did not succeed in converting his readers to an acceptance of Yahweh's covenant, nor to the realization that their own marriages were meant to be covenants of steadfast love. The Israelites had need of further education before they could conceive of human marriage as a covenant, and as a covenant modeled on Yahweh's covenant with faithless Israel. In a society where polygamy and divorce were sanctioned by the Mosaic law, where the wife was regarded as the property of the husband and adultery a violation of the rights of the Hebrew male, where fecundity was still the overriding concern, it would be unreal to speak of Jewish marriage as a covenant either of love or of fidelity. Hence the importance of the wisdom literature, which deals more specifically with marriage on the social and human level than on the more transcendent and cultic level.

The husband had to be educated to appreciate in the wife those personal qualities and values which are essential to covenant marriage on the human level. He had to see his wife as a companion, a support and a confidant, to whom he can entrust his heart (Prv 31:11). The ideal wife will be a fountain of joy, unshared by strangers. But the husband will drink water flowing only from his own fountain, a fountain blessed, in the wife of his youth. Her affection will fill him at all times with delight and he will be infatuated always with her love (Prv 5:15-20). The love of husband and wife is described, particularly in the Song of Solomon, in imagery which is frankly sexual, even erotic. But the love is definitely covenant love, exclusive and permanent. Thus the bride of the Canticle can triumphantly exclaim: "My beloved is mine and I am his" (2:15), a claim no wife can make who must share her husband with other wives and maidservants, as in the days of the patriarchs, when fecundity was the principal virtue prized in the wife.[9] Not that fecundity was

[8] Bruce Vawter, *Proceedings of the Catholic Theological Society of America* 22 (1967) 232, is of the view that the divorce which Yahweh hates is not divorce on the human level, but the cultic crime of repudiating "the covenant of our fathers" (v. 10), expressed symbolically as the "wife of your youth" (v. 14). Actually, there would be no symbolism unless two covenants are here discussed, Yahweh's covenant with Israel violated by Israel and the marriage covenant violated by the individual Israelite's infidelity to the "wife of his youth." Granted that the passage is "the most difficult section of the Book of Malachi," Grelot's judgment is more in accord with text and context: "There is, however, no doubt that the fidelity of Jahweh towards Israel, whom he has joined with himself in a *berith*, is implicitly put forward as a model for husband and wife" (*op. cit.*, p. 71).

[9] Cf. Paul F. Palmer, "Christian Breakthrough in Women's Lib," *America*, Jan. 19, 1971, pp. 634-37.

not regarded in the wisdom literature as a gift of God and desirable in the woman; but more desirable was virtue in the woman as wife. "Children and the building of a city establish a man's name, but a blameless wife is accounted better than both" (Sir 40:19).

It is difficult to classify the Book of Tobit. In Protestant Bibles it is either omitted entirely or listed among the Apocryphal or noncanonical books. This is unfortunate, since it is in this book, belonging to the inter-Testamental period, that we find the only description of a Jewish marriage. The marriage between Tobias and Sarah is a home ceremony, not unlike that which we shall describe in early Roman society. The couple is blessed by Raguel, who gives his daughter to Tobias; the dowry agreement is signed by Raguel and Tobias, and the agreement is celebrated by a feast (cf. Tob 7:11-15). The Oxford edition of the Revised Standard translates agreement by "contract."[10] In Roman society the marriage covenant is distinguished from the dowry agreement and/or the religious service, by which proof is given that a covenant marriage has taken place. Accordingly, I would prefer to see the marriage agreement not in the signed "contract," but in the prayer of Tobias, which is said in the privacy of the bridal chamber, and to which Sarah responds "Amen."

> Blessed art thou, O God of our Fathers. . . .
> Thou madest Adam and gavest him Eve his wife
> as a helper and support.
> From them the race of mankind has sprung.
> Thou didst say, "It is not good that the man should be alone;
> let us make a helper for him like himself."
> And now, O Lord, I am not taking this sister of mine
> because of lust, but with sincerity. Grant that I may find
> mercy and may grow old together with her.
> And she said with him "Amen."
> Then they both went to sleep for the night. (Tob 8:5-9)

Covenant fidelity may be expressed in many words: "for better or for worse," "until death does us part." But there is a poignant beauty and simplicity in the prayer "Grant . . . that I may grow old together with her."

Covenant Marriage in the New Testament

The covenant prayer of Tobias draws its inspiration not from Yahweh's covenant of fidelity with Israel, but from the account of the marriage of the first human couple. And it is to marriage as it was "from the

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[10] The Oxford Revised Standard translates v. 14: "Next he called his wife Edna, and took a scroll and wrote out the contract; and they set their seals to it."

beginning" that Christ appeals in overriding the permissive law of Moses respecting divorce. His own commentary on the significance of the two-in-one-flesh relationship of the first human couple is unqualified: "What therefore God has joined together, let no man put asunder" (Mt 19:6). God is not only the witness or guarantor of marriage, He is its ultimate author. Jesus does not use the term "covenant" of marriage, but in ruling out all divorce and remarriage[11] He makes obligatory, at least for His followers, the archetypal ideal of Yahweh's covenant with Israel in which Yahweh is faithful to His covenant even when Israel is faithless. The ideal is admittedly demanding, so much so that the disciples of Jesus equate Christ's teaching with enforced celibacy, an equation valid only if Jesus demands more than the disciples of Shammai, who allowed divorce and remarriage for adultery on the part of the wife.[12]

Underlying Christ's repudiation of divorce and remarriage is the recognition of the basic right of the woman to the permanent and undivided affection of her husband, a right essential to covenant marriage. In Roman society, where marriage was monogamous and regarded as a covenant, marriage was defined as "a union between a man and a woman, a partnership for the whole of life (*consortium omnis vitae*)" and "a sharing in the same rights, divine and human (*divini et humani iuris communicatio*)." Before Christ could restore marriage to covenant status, he had to restore to woman the marital rights which had been denied her. Hence the revolutionary character, at least for Jewish society, of Jesus' statement as recorded by Mark: "Whoever divorces his wife and marries another commits adultery against her" (10:11). Adultery against a woman is a concept foreign to any polygamous code of law.[13]

Paul does not use "covenant" of marriage. But like his Master, he

[11] The seeming exception in Mt 19:9, "except for immorality," is made after the scribes and the Pharisees have left (cf. par., Mk 10:10). Thus, if Jesus softened or accommodated His teaching, His critics were unaware of it, a point not always stressed by exegetes.

[12] Cf. the rather convincing article of Quentin Quesnell, "Made Themselves Eunuchs for the Kingdom of Heaven," *Catholic Biblical Quarterly* 30 (1968) 335–58. He brilliantly defends the thesis of Jacques Dupont that the saying on eunuchs of Mt 19:12 refers to "those who, having put away their wives for *porneia*, would not be able to marry another woman without committing adultery." The thesis itself is expounded by Dupont in the third part of his *Mariage et divorce dans l'evangile, Matthieu 19, 3–12 et parallèles* (1959) pp. 161–222.

[13] So foreign to Jewish thinking is the concept of adultery against a woman that Louis Epstein questions the authenticity of Jesus' words or, accepting them, complains that such teaching is tantamount to regarding a husband's relations with a prostitute as adultery (*Marriage Laws in the Bible and the Talmud* [Cambridge, Mass., 1942] p. 15).

stresses the indissoluble character of the marriage of believers and the equality of husband and wife in what concerns their marital rights. A wife separated from her husband is to remain unmarried, and a husband is not to divorce his wife (1 Cor 7:10–11). And lest some see in Paul's failure to rule out expressly remarriage for the husband, Paul enunciates a principle which clearly rejects a double standard of morality by stressing the parity of marital rights: "The wife has no authority over her own body, but the husband has; likewise, the husband has no authority over his own body, but the wife has" (7:4).[14]

In the classical passage Eph 5:21–32, Paul develops the theme of Christ's redemptive love for His bride the Church, and the loving obedience of the bride, as the exemplar for the Christian husband and wife. He then appeals to the two-in-one relationship of the first human couple and refers to it (*touto*) as "a great mystery; by that I mean, in reference to (*eis*) Christ and the Church" (5:32). Luther and Calvin, adopting the Vulgate version *in Christo et ecclesia*, find the mystery of which Paul speaks not in marriage on the human level, but in the "spiritual marriage" of Christ and the Church.[15] Actually Paul is speaking of two mysteries: the mystery or hidden significance of marriage from the beginning, and the mystery of Christ's covenant with His Church. Paul presents the marriage of two believers as a reflection of Christ's covenant of redemptive love and fidelity with the Church, and as a sign or sacrament of that covenant. Thus marriage is a sign or symbol of Christ's

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[14] Victor Pospishil makes the gratuitous statement that "the sources of tradition prohibit in numerous instances the remarriage of wives divorced for whatever reason, but they say generally nothing concerning husbands, implying that this was considered lawful" ("Divorce and the Power of the Keys," *Ecumenist* 5 [1967] 66). According to Pospishil, "such writers as Augustine" righted the balance by ruling out remarriage for husbands, while the "Eastern Church ... went the other way" by allowing remarriage to the wife as well as the husband (*ibid.*). In his treatise *On Faith and Works* (ca. 400), Augustine admits that there is enough obscurity in vv. 10–11 that "one could pardonably err on the question" (chap. 19). Some twenty years later, in his treatise on *Adulterous Marriages*, he resolves the ambiguity in the context of 7:4: "In fact, Paul shows that the status of man and woman in this matter is equal—a fact which must be recalled frequently" (1, 1, 8).

[15] After denying the Romanist view that *mystērion* applies to matrimony, Luther concludes: "Paul says that he is speaking of the great sacrament in Christ and the Church: they, however, preach it in terms of male and female" (*The Babylonian Captivity* 1, 293; tr. B. L. Woolf). Calvin is equally explicit in denying that "mystery" applies to human marriage. "'This is a great mystery'; and lest anyone should be misled by ambiguity, he says that he is not speaking of the connection between husband and wife, but of the spiritual marriage of Christ and Church" (*Institutes* 4, 19, 35; tr. H. Beveridge). This reluctance to find the mystery-sacrament or covenant in marriage on the human level and the tendency to transfer the covenant idea to the more transcendent level of Christ and the Church will be seen in the many poor and inaccurate translations of the Church's nuptial blessing by Catholic and non-Catholic liturgists.

covenant precisely because marriage is itself a covenant mystery if seen in relation to Christ's covenant with His Church.

Christian reflection on the mystery-sacrament of Ephesians would eventually lead to the explicit belief that marriage is not only a symbol or sign of Christ's covenant with the Church, but a sacramentally graced covenant for those who share in Christ's covenant through baptism.[16]

Covenant Marriage in the Roman Empire

Among the many words used for marriage in Roman society, there are many Latin words used by pagans and Christians to describe marriage. Students of Catholic theology are familiar with the following list: *matrimonium*, which stresses the function (*munus*) of the mother (*matris*); *connubium*, which describes marriage in terms of the nuptial veiling (*velatio nuptialis*); *conjugium*, which expresses the partnership in which they are yoked together (*conjunguntur*), etc. There is, however, another set of words which are less known, words which express the covenant character of the marriage agreement or consent: *conventio*, *conventus* (covenant), *societas* (alliance), *sacramenta* (marriage vows), and the preferred expression in the language of the Latin poets and ecclesiastical writers, *foedus*, *foedera nuptialia*, or *foedus nuptiarum*. *Pactum* is sometimes used, either of the written agreement or engagement or of the covenant itself, a word that is used interchangeably in the Vulgate for *foedus* in translating the Hebrew *bᵉrith* or the Septuagint *diathēkē*.

[16] Latin writers of the ante-Nicene period who translate the *mystērion* of Paul as *sacramentum* see more in the word "mystery" than a set of religious truths revealed only to the initiates, or a religious rite which is the symbol or sacrament of a transcendent and eschatological reality. Building on the basic meaning of *sacramentum* as a military oath made to the emperor, sacrament was applied to the sacred commitment or vow made by the initiates to the god of the mysteries whose cult was celebrated and to the baptismal vows of Christian neophytes (cf. de Ghellinck, *op. cit.*, pp. 66-76). Among the "goods" of marriage, Augustine lists sacrament (*sacramentum*) along with offspring (*proles*) and fidelity (*fides*). The sacrament refers not to marriage as symbol or sign but to the stability of marriage, which results from the sacred commitment (*sacramentum*) made by husband and wife. A similar commitment is made in the rites of Christian initiation (*sacramenta*) and in the sacrament of orders. Accordingly Augustine can liken the permanence of marriage, even though no children result, to the permanent character or *sacramentum* of orders, even though no community is assigned to the ordained cleric (cf. *On the Good of Marriage* 28 [*CSEL* 41, 227]; *On Marriage and Concupiscence* 17 [*CSEL* 42, 232]). Without denying that the mystery-sacrament of Paul refers to marriage as sign or symbol, I suggest that a more rewarding approach to the idea of marriage as a sacrament or graced covenant would result from a study of marriage as sacred commitment (*sacramentum*) by which the baptized are initiated into a new state of life, which not only reflects and symbolizes Christ's covenant with the Church but a further "participation in that covenant" (see below).

A highly descriptive passage from the Christian convert and rhetorician Arnobius, writing at the turn of the fourth century, will serve as an introduction to the terminology used by pagans and Christians of marriage, and as a point of departure for the various ways in which proof of a marriage covenant could be established in Roman law. In his treatise *Against the Nations*, Arnobius takes occasion to lampoon the pagan gods whose mores or life styles are presumably no different than that of mortals:

Do the gods then have wives, and do they enter marriage covenants (*coniugalia foedera*) on terms previously arranged? Do they swear to each other the oaths (*sacramenta*) of the marriage couch by cohabitation (*usu*), by the wedding cake (*farreo*), or by the purchase price (*emptione*)? Do they have girl friends whom they hope to marry (*speratas*), or to whom they are engaged (*pactas*), or to whom they are espoused (*sponsatas*)?[17]

The use of *sacramenta* will seem less strange if we recall that *sacramentum* in its earliest classical meaning refers to the military oath sworn to the emperor. *Sacramentum* is used as well of the vows made to the god or gods of mystery religions, not unlike the profession of faith and the baptismal vows made by Christians. Although Tertullian, the father of ecclesiastical Latin, does not use *sacramentum* of the vows of Christian marriage, he is probably responsible for the translation of Paul's *mystērion* (Eph 5:31) as *sacramentum* in Jerome's Vulgate.[18]

The first to use *foedera nuptialia* and *sacramenta* of the Christian marriage covenant and the marriage vows is Lactantius, a near contemporary of Arnobius and the lay tutor to the son of Constantine the Great:

He who has a wife ... should keep the vows (*sacramenta*) of the marriage couch chaste and undefiled. ... And so He has commanded that a wife is not to be sent away, unless she has been left on account of the crime of adultery, in order that the bond of the nuptial covenant (*vinculum coniugalis foederis*) never be dissolved, unless it be severed by infidelity.[19]

[17] *Adversus nationes* 4, 20 (*CSEL* 4, 157, 16).

[18] De Ghellinck, *op. cit.*, "Conclusion" of E. de Backer, pp. 143 ff.

[19] Some see in Lactantius' expression "severed by infidelity" an implicit admission that marriage is dissolved by infidelity, thus freeing the innocent party for a new marriage. And yet the conclusion is not drawn either by Lactantius or by any known writer of the first five centuries. For this and other reasons it would seem an anachronism to interpret a "severance of the bond" as meaning more than a forfeiting of one's marital rights and the termination of the marriage. Commenting on Christ's teaching in the Gospel, Hilary of Poitiers (ca. 350) concludes: "it prescribes no other reason for discontinuing wedded life (*desinendi a coniugio*) than the defilement of a husband by the society of a wife who has prostituted herself" (*Commentary on Matthew* 4, 22 [*PL* 9, 939]). Chrysostom (*Homilies on*

Covenant Marriage among Pagans

The passage from Arnobius will serve as an outline of the various ways in which proof, real or presumptive, was given of covenant marriage in pagan Roman society: *usus, farreum, emptio.* The more common form of marriage, particularly for the lower classes of society, was probably marriage by cohabitation or by living together and sharing a common manner of life (*usu*). Marriage by cohabitation is distinguished in law from concubinage (*contubernium*) by marital intent on the part of the husband to honor the woman as a wife and not simply as a sleeping companion (*concubina*). Marital intent will be called *affectio maritalis* in the Code of Justinian, a term that comes closer to the idea of marriage as a covenant of love as well as fidelity. The perceptive scholar of Byzantine law, E. Herman, S.J., is correct, I believe, when he states that marriage among the Romans was a social rather than a juridical affair, and that the sharing of life together (*vitae individua consuetudo*) along with marital intent was deemed sufficient to constitute marriage. Herman regards *affectio maritalis* as the spiritual element which distinguishes marriage from all other unions such as concubinage. Actually, *affectio maritalis* is the covenant element in all marriage, whether formally expressed in a covenant agreement or implicit in the "honorable esteem with which they mutually regard their marriage—*invicem honorem matrimonii habeant.*"[20]

A second way of proving the intention of forming a covenant marriage is *emptio*, marriage by fictitious purchase. The purchase price or dowry (*dos*) was originally paid by the groom to the father or guardian of the bride, a price which was later given to the bride to serve as her own dowry. The money or property arrangement was usually made in writing and would come to be known as the *instrumenta dotalia.* The term *pactum* is at times used for this property arrangement, and could well be translated as contract. But we would stress that the written agreement, in which the bride had no active part, is proof of the husband's intent but not the actual covenant agreement between bride and groom.

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1 Corinthians 19) speaks of a marriage as "already dissolved" by adultery on the part of the wife, making the husband a partner to her crime if he continues relations with her. And yet Chrysostom does not draw the conclusion that the injured husband may marry again. The concern of the early Church was not with reasons for remarriage but for separation. The Fathers of the East generally agreed that a marriage could and should be terminated if the wife proved faithless, but that a wife should put up with the infidelity of the husband—the only instance I find of a "double standard" of morality (cf. Basil, *Canonical Epistles to Amphilochius* 118, can. 9).

[20] "De benedictione nuptiali quid statuerit ius byzantinum," *Orientalia christiana periodica* 4 (1938) 200–201.

A third way of giving proof of covenant marriage is *farreum* or *con-farreatio*, a word derived from the ceremony of offering a wheaten cake (*farreum*) to the household gods and sharing the offering between bride and groom. The ceremony formed part of a home or hearth liturgy. The bride, wearing the nuptial veil of red and orange (*flammeum*), is escorted to the home of the groom, handed over to the groom by the father or guardian (*traductio in manus*), and initiated into the worship of the household gods of the groom's family (*lares et penates*). The initiation rite is both purificatory and dedicative, and is called by Lactantius the sacrament of fire and water: "And thus it was established by the ancients that the marriage covenant (*nuptiarum foedera*) be consecrated (*sanctiantur*) by the sacrament (*sacramento*) of fire and water": an initiation for the bride, but actually an initiation or beginning of a community of life and worship for husband and wife.

In the period of the Empire, the marriage of the well-to-do was publicly solemnized by the offering of an animal at one of the many temples. The animal was slain and the skin used as a covering for the love seat, symbolizing the communion of bride and groom with the life of the god to whom the sacrifice was made.

E. Schillebeeckx willingly admits that the Greeks and the Romans regarded marriage as "a religious act, an initiation of the woman into a different religion, etc."[21] What he fails to see is that marriage was a covenant, a word he never uses of marriage in the course of his volume. Marriage is a sacred reality not because it is an external, public, and cultic act. Hence, if we were to divest marriage, pagan or Christian, of all religious ceremony, it would still be a solemn engagement which has the gods or God as witness and guarantor.

The main thrust of Schillebeeckx' work is to remove marriage from the religious sphere, to demythologize marriage, to secularize it, to remove it from "clerical intervention." "In the case of marriages between two Christians, clerical intervention was regarded as superfluous. All this goes to show that marriage was above all seen to be a secular reality which had to be experienced 'in the Lord.'"[22] To advance his thesis that marriage is basically a civil, family, or secular affair, Schillebeeckx tends to regard every early reference to the sacral character of marriage as an exception to his own notion of what marriage should be. His conception of marriage, which he reads into the documents of the ante-Nicene period, allows him to conclude: "At this stage 'church marriage' was still a valid *contract* of marriage made *civilly* and in the

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[21] *Marriage: Human Reality and Saving Mystery* 2 (New York, 1962) 236.
[22] *Ibid.*, p. 245.

family between two baptized persons and relating to the *secular* sphere."[23]

If marriage is seen in the context of covenant rather than in terms of contract, it can, strictly speaking, be freed of all intervention, family, civil, ecclesial, clerical, and episcopal, without ever becoming a secular reality or a sheerly civil contract. The Church admits this in her practice of recognizing marriage as a graced covenant or sacrament where circumstances preclude ecclesial involvement. Because, however, Christian marriage is a social reality and a sacred covenant, the Church has from the beginning invested it with ceremonies which reflect the customs of the peoples, and has replaced the home and temple liturgy of the Empire with a liturgy of her own.

Covenant Marriage among Christians

The prophets had extolled Yahweh's love for Israel in terms of covenant love which is redemptive. Yahweh is husband and redeemer to Israel. Paul had upheld Christ's redemptive love as the exemplar of the Christian husband's love for his wife. In this context it is not surprising that the early Christian community should come to realize that covenant love among Christians would make greater demands of them than of their pagan countrymen. Without using the word "covenant," Hermas, the earliest noncanonical writer to treat of marriage and divorce among Christians, imposes an ideal of steadfast love that is to be found only in the archetypal love of Yahweh towards Israel, of Christ towards His Church, and of God towards every individual who has broken covenant with Him.

In the *Shepherd*, a work extensively read in the churches of the second century, Hermas takes up the case of a Christian who is married to a wife "who believes in the Lord" and who is an adulteress.

Sir, said I [Hermas], if a man has a wife who believes in the Lord and he finds her in adultery, does the husband sin if he continues to live with her? So long as he is unaware of it, said he, he does not sin. But if the husband knows of her sin, and the wife will not repent, but continues in her immorality (*porneia*) and the husband continues to live with her, he becomes one with her in sin and a partner of her adultery.

What then, said I, is the husband to do, if the wife continues in this passionate attachment? Let him divorce her, said he, and let the husband live by himself. But if, after divorcing his wife, he marries another, he himself commits adultery.

If then, Sir, said I, a woman should do penance and desire to return to her husband, after he has put her away, is she not to be taken back? By all means,

[23] *Ibid.*, p. 255 (emphasis added).

said he. For if the husband does not take her back, he sins and draws down upon himself a great sin. Rather, he must take back the one who sins and does penance, but not many times. Out of regard for such penance, the man ought not to marry. This course of action is incumbent on wife and husband.[24]

The implications of covenant marriage for the Christian as spelled out by Hermas of Rome represent the teaching of the Roman Church today and the teaching of the Church of the East as well as the West for the first five centuries. This seemingly harsh teaching was more acceptable to an age that looked upon marriage as a covenant of fidelity and redemptive love. It is less acceptable when marriage is presented as a contract which is made indissoluble by the law of God or the law of the Church. Hence the importance of establishing the covenant idea of Christian marriage as it was actually celebrated by Christians in the normative and formative years of the Church's history.

Liturgy of Christian Marriage

As noted above, a covenant marriage does not need a religious or liturgical setting to express its inherent sacral character, in so far as God is both witness and guarantor of the covenant agreement. Hence it is not unlikely that the Church allowed, even though she discouraged, marriage by cohabitation with marital intent (*usu*). The reason for discouraging "clandestine marriage" was the same as that which prompted Tertullian in his Montanist period to write: "And so, among us secret unions, that is to say, those which are not professed before the Church, run the risk of being the next thing to adultery and fornication."[25]

The marriage of Christian slaves—and there were many of this class in the early Christian community—posed a problem. Roman law recognized marriage only between the freeborn (*eugeni*) and the freedman or emancipated slave. Marriage between a citizen and a slave was called *impares nuptiae* or marriage between those of unequal status, a form of concubinage (*contubernium*) but not covenant marriage. In the early third century, Hippolytus of Rome had accused Pope Callistus, his successful rival to the papacy, of recognizing a marriage between a Christian and his or her slave.[26] If the charge is true, and there is no reason to doubt it, Callistus, mindful of Paul's teaching that there is no difference

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[24] *The Shepherd, Commandment* 4, 1, 4 (Funk 1, 394 ff.). Pospishil, who believes that a double standard of morality prevailed in the early centuries, dismisses the import of the passage by stating: "Rather than a legal norm, it is more an advice to people who aim at higher ideals, in conformity with the contents of the entire book" (*Divorce and Remarriage: Towards a New Catholic Teaching* [1967] p. 142).

[25] *On Monogamy* 11, 1, 9 (*PL* 2, 943).

[26] *Philosophoumena* 9, 12, 24 (*GCS* 3, 225).

between slave and freeman in Christ, recognized such marriages. It is likely that the marriage in question would be a secret marriage with little formality.

A few centuries later, Leo the Great will respect the law of the Empire and rule that a Christian who marries his servant girl (*ancilla*) does not enter a covenant alliance (*societas*), giving as his reason: "Accordingly, since marriage from the beginning was instituted in such a way that, over and above the union of sexes, it should represent the symbol of Christ and His Church, it is clear that the woman is not married on whose behalf, we are informed, the nuptial mystery (*misterium*) has never taken place."[27] Leo is dealing with an actual case. We suspect that his answer would have been different if the Christian master had emancipated the slave girl before marrying her, thus giving her equality of status in the covenant alliance.

The earliest description of the religious ceremony in which the nuptial mystery is celebrated or solemnized is from the pen of Tertullian in his Catholic period. He too is opposed to a marriage between those of unequal status, but the status in question is religious, not civil or social. Exhorting his wife, should he die before her, to marry, if she must, "in the Lord," Tertullian describes the Christian ceremonies which guarantee the happiness of a marriage between two believers: "How shall we describe adequately the happiness of that marriage which the Church arranges (*ecclesia conciliat*), the oblation strengthens (*confirmat oblatio*), upon which the blessing sets a seal (*obsignat benedictio*), in which the angels are present as witnesses, and to which the Father gives His consent?"[28]

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[27] *To Rusticus of Narbonne* (*PL* 54, 1204). The nuptial mystery (*nuptiale mysterium*) was corrupted in copying to read *ministerium*, which would imply consummation by sexual intercourse. The corrupted text led Gratian to conclude: "There is no doubt that that woman is not married with whom, we are informed, sexual intercourse has not taken place" (*Decretals* 2, 17, 27, 2).

[28] *To His Wife* 2, 8 (*ACW* 13, 35). William Le Saint (*ibid.*, p. 133, n. 144) gives important etymological background. After briefly describing a pagan marriage, usually arranged by a friend or friends of the bridegroom (the technical meaning of *conciliare*) and celebrated by an animal sacrifice, he concludes: "For Christians this ceremony was replaced by the offering of the Eucharistic sacrifice. Some authorities have denied that *oblatio* has reference to the Mass, but in the present context it is difficult to see what other natural meaning the word can have." Schillebeeckx does not deny that *oblatio* has reference to the Eucharistic sacrifice. His quarrel is its application to a "nuptial mass." After a torturous paraphrase in lieu of a translation of Tertullian's text, he categorically asserts: "The conclusion, then, is obvious. Tertullian says nothing at all about an ecclesiastical liturgy of marriage, with a nuptial mass and a priestly solemnization of marriage, but is referring to the Christian experience of marriage which is brought about by both partners sharing the same faith, by their joint participation in the eucharist, by their practice of

Nuptial Blessing

Tertullian does not use "covenant" in describing the liturgy of Christian marriage, but he has the hearth and temple liturgy in mind when he refers to the oblation as strengthening marriage, lesser divinities or angels as witnesses, and the blessing as sealing the marriage.

The meaning of "sealing" or ratifying the marriage is seen in the effect attributed to the priest's blessing in a passage from Pope Siricius (ca. 390). Whether the nuptial veiling and blessing were part of the espousals, which immediately preceded marriage, or part of the nuptial Mass, as in the passage from Tertullian, is not clear.[29] The effect is to make marriage inviolable, and if violated by marriage to another, a kind of sacrilege.

With reference to the nuptial veiling, you asked whether a man may take in marriage one espoused to another. We altogether forbid this to be done, since the blessing which the priest has bestowed on the girl to be married (*nupturae*), if violated by any breach of faith, is regarded by the faithful as a kind of sacrilege.[30]

The covenant character of the nuptial blessing is expressly stated in the formula of the blessing found in the *Gregorian Sacramentary*, which places the blessing in the context of the nuptial Mass. It has become the fixed formula or prayer of the Roman rite to this day and is found in the early medieval rite of Sarum, the preferred rite of the English churches prior to the Reformation.[31] Since the text is often badly translated into English, obscuring its covenant character, we shall include the operative Latin words of the first two invocations.

Christian charity, and by their praying together at home" (*op. cit.*, p. 254). More obvious is the extreme to which S. goes in obscuring the clearly obvious meaning of Tertullian's description of the early liturgy of Christian marriage. But he must prove at any price that Christian marriage, like pagan marriage, was a secular reality, a family or civil affair, free of all "clerical" and "episcopal" intervention—the basic thesis of Vol. 2 of his trilogy.

[29] In the total ceremony described by Nicholas (see below), the nuptial covenant followed immediately upon or soon after the betrothal or covenant promise. Hence there was no need to distinguish between the promise to marry at some later or indefinite time and the actual marriage agreement (*consensus de futuro, consensus de praesenti*).

[30] *To Himerus* 4 (*PL* 13, 1136).

[31] For the provenance and influence of the Sarum rite of the Cathedral of Salisbury, cf. Archdale King, *Liturgies of the Past*, pp. 280–330. Unfortunately, King does not discuss the Sarum marriage rite, which is appended to some editions of the Sarum Missal. *The Sarum Missal*, edited from three early manuscripts by J. Wicham Legg for the Bradshaw Society (Oxford, 1916), has the *Ordo ad facienda sponsalia*, but not the actual exchange of marital consent. The essential marriage rite itself can be found in *The Sarum Missal in English* 2 (tr. Frederick E. Warren; London, 1911). We shall transcribe Warren's text in its proper place.

O God, you consecrated the union of marriage by a mystery so profound as to prefigure in the marriage covenant the sacrament of Christ and the Church (*ut Christi et ecclesiae sacramentum praesignares in foedere nuptiarum*).
O God, you join woman to man and give to their alliance (*societas*), the first to be established by you, that blessing which enriches it, and which alone was not forfeited in punishment for original sin of by the curse of the Deluge.[32]

We said earlier, in commenting on the mystery-sacrament of Paul, that marriage is a sign or sacrament of Christ's covenant with the Church, precisely because marriage is itself a graced covenant. This is expressly stated in the Gregorian formula.

Covenant Marriage in Nicholas I

The classic description of the total ceremony of marriage, including the *sponsalia* or betrothal, is given by Nicholas I (886) in a reply to a series of questions posed by the Bulgarians, a people evangelized by the Greek Church. Surprisingly, Nicholas uses "covenant" not only of the nuptials (*nuptialia foedera*) but of the betrothal or espousals, "which are a covenant promise (*promissa foedera*) of the marriage to come."

The betrothal (*sponsalia*) includes the ceremony of the ring, which is placed on the finger of the bride as a pledge of fidelity, and the signing of the dowry document, which Nicholas notes is "agreeable to both" bride and groom. He continues: "Soon after or at an appropriate time ... both are led to the nuptial covenant (*nuptialia foedera*). They first take their place in the church of God, bearing their oblations which they are to offer through the hands of the priest. Finally they receive the blessing and the veil. . . . After all these ceremonies, they leave the church wearing on their heads crowns which by custom are always kept in the church itself."[33]

[32] Some examples of imperfect and even bad translations of the nuptial blessing follow. Warren (see n. 31 above) translates the first invocation: "O God, who hast consecrated the state of matrimony to such an excellent mystery, that in it is signified the sacramental and nuptial union between Christ and his Church" (p. 155). Not only is *foedus* translated by the colorless word "union," but the nuptial covenant is not that of the bride and groom but of Christ and His Church. The same mistake is made in the *New Rite of Marriage*, prepared by the International Committee on English in the Liturgy: "Father, you have made the union of man and wife so holy a mystery that it symbolizes the marriage of Christ and His Church." Schillebeeckx sees "in the bond of marriage the sign of the mysterious union of Christ and His Church." Covenant is not translated, and the mystery is not in human marriage but in the "mysterious" union of Christ and His Church. Even worse, S. translates *societas* in the second invocation as "contract," to which a blessing is added: "God, through whom ... the contract, ordered by thee from the very beginning, has been endowed with a blessing" (*op. cit.*, pp. 306–7). Fortunately, the *New Roman Missal*, already old, translates the blessing of the nuptial Mass adequately and accurately.

[33] *Epistula ad consulta Bulgariorum* 3 (*PL* 119, 979–80).

Earlier in the document Nicholas informs the Bulgarians that "our people, both men and women, do not wear the gold or silver crown . . . when they are celebrating the nuptial covenant (*quando nuptialia foedera contrahunt*)," seemingly the only difference in the solemnization of marriage in the Church of the East and that of the West. The major difference between the two Churches is disciplinary rather than liturgical. In the East the solemnization of marriage was regarded as binding under sin. In the West there was no such ruling, "principally because it often happened that some were too financially pressed to enlist the aid of others in making the necessary preparations." This leads Nicholas to conclude: "According to law, their consent alone is enough. . . . In fact, if this consent is alone missing from marriage, all the other ceremonies, even though celebrated with coition itself, are useless and in vain. . . ."[34]

Four years later, Emperor Leo the Philosopher was to decree that marriage celebrated without a church wedding or the nuptial veiling and blessing is not only sinful but invalid, a decision respected by the Orthodox Church of the East to this day. The Code of Canon Law drawn up for Eastern Catholics admits the necessity of the priestly blessing for validity, just as the Church of the West demands for validity the presence of a priest as witness for baptized Catholics. The Roman Church, however, does not regard the blessing as an essential constitutive element of the marriage covenant, and dispenses from the blessing, as well as the presence of the priest as witness, where there is need.[35]

Marriage Rite of Sarum

Until quite recently the Roman ritual used the following simple formula for the essential exchange of consent: "Do you N. take N. here present to be your lawful wife (husband) according to the laws of Holy Mother Church?" To which the groom (bride) answered: "I do." In English-speaking countries the essential marriage rite was usually supplemented by a series of questions and replies which spell out the covenant character of the nuptial agreement. The supplement is found in the ancient rite of Sarum (13th century), a rite used in the diocese of Salisbury and adopted by other dioceses of England.[36] The rite is used

[34] Schillebeeckx cites the letter of Nicholas I on five different occasions to prove that marriage is a "secular reality." But he does not include in any of his citations Nicholas' classic description of the nuptial covenant (*nuptialia foedera*).

[35] For the history and the canonical problems raised by the divergent practice in the Churches of the East and West, see Herman, *art. cit.*, and the more recent article of Petrus Tocanel, "De novellae 89 Leonis philosophi canonizatione," *Apollinaris* 42 (1969) 21–36.

[36] See above, p. 632.

by Anglicans and by English-speaking Protestants as well as Roman Catholics. Many of the optional texts approved for the New Rite of Marriage are based on the Sarum Rite. Since the text of Sarum is well known from its inclusion in the *Book of Common Prayer* and in English versions of the Roman rite of marriage, I shall transcribe the rite in its old English spelling. The rubric informs us that the exchange of vows takes place before the nuptial Mass, as is done today.

After this, the priest shall say to the man, in the audience of all, in the vulgar tongue,
N. wilt thou have this woman to thy wedded wife, wilt thou love her, and honour her, keep her and guard her, in health and sickness, as a husband should a wife, and forsaking all others on account of her, keep thee only unto her, so long as ye both shall live?
[The same question, with the addition of "obey," is asked of the woman]
And so let the man give his troth to the woman by word of mouth, presently, after the priest, saying thus:
I N. take te N. to my weddyd wyf to have et to holde fro this day wafurt bettur for wurs for richere, for porer; in sikenis se and helte tyll deth doth us departe, if holi chyrche wol it ordeyne; and ther to I plycht the my trouth.
Then shall the woman say, after the priest,
I N. take te N. to my weddyd husbonde, tho have et to holde for ths day for bettur, for wurs, for richere, for porer, in sykenesse and in helthe, to be bonowre et buxom (of good reputation or honor and compliant) in bed et atbord, tyll vs departe, if holy chirche wol it ordeyne: et ther to I plycht the my throute.[37]

The wording of the ring ceremony is unusual. The ceremony occurs after the Collect, which echoes the prayer of Tobias, in which the priest prays to the Lord that the woman who wears the ring "may abide in thy peace, and continue in thy will, and live, and increase, and grow old in thy love. ...."

The man . . . shall say after the priest,
With thys ryng I the wedde and tys gold and silver I the geue; and wyth my body I te worscype, and wyth all my worldly catell I the honore.[38]

Marriage as Contract

I leave to others the less rewarding task of discovering when "contract" was introduced into the lexicon of Christian marriage. The obvious place for searching out the theological villain would seem to be the *Decretals* of Gratian, the twelfth-century father of canon law. From a cursory reading of the section on marriage, I find that the verb form *contrahere* is used of marriage, but the hallowed expression "cove-

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[37] *The Sarum Missal in English,* pp. 145–46.   [38] *Ibid.,* p. 147.

nant" is applied even to the unholy covenant of a man and a nun "consecrated by the sacred veil and after she has taken her vows."[39] Although Schillebeeckx repeatedly refers to marriage as a "contract" in discussing marriage in the period of the Empire, he dates the use of the term from "the twelfth century canonists of the School of Bologna."

I am indebted to Schillebeeckx for pointing out the use of "contract" by Albert the Great, Thomas Aquinas, and Duns Scotus. He perceptively observes that both Dominican doctors display "considerable reserve in this connection."[40] Albert refers to marriage as "a contract of sorts," which Schillebeeckx' translator calls "a certain contract," while Thomas speaks of marriage taking place "after the manner in which obligations are assumed in material contracts" (*In 4 Sent.* d. 27, q. 1, a. 2, ad 2). According to Scotus, "marriage was a contract, and the object of this contract was furthermore limited to the *jus ad corpus* (the right to each other's body) as a function of the foundation of the family (procreation and education) (*Opus Oxoniense*, d. 6, q. un., n. 8; d. 26, q. 1, 17)."[41] But we should not be too hard on Scotus. Marriage at the time was being discussed almost exclusively in terms of its primary purpose, procreation. Mutual help (*mutuum adiutorium*), the secondary purpose of marriage, was realized principally in the help or service rendered by the woman in servicing the human race. Again, the sacramental sign of marriage should, according to Aristotelian terminology, exhibit a material as well as a formal element (*materia et forma*). What better than find the material element in the bodies of the contracting parties, and the formal element in their consent?

Whatever the provenance of "contract" as applied to marriage, the present Code of Canon Law reflects perfectly the teaching of Scotus. The essential object of marriage consent is "the permanent and exclusive right to the body (*jus in corpus*), with a view to those acts which are of themselves (*de se*) fitting for procreation" (can. 1081, §2). The phrasing is completely impersonal. The sole object of the contract is the right to a thing (*corpus*), and even though persons are engaged, there is no engagement on the level of person. We shall return to this canon and its "official" interpretation by the Holy Roman Rota when we ask whether the right to love (*jus ad amorem*) or "openness to love" belongs essentially to the terms of the marriage covenant.[42]

George Haywood Joyce, who enjoyed something of the acclaim that Schillebeeckx has today for his historico-doctrinal treatment of Chris-

[39] *Decretals* 2, 27, 1, 17.
[40] *Op. cit.*, p. 302.
[41] *Ibid.*
[42] See below, pp. 645–48.

tián marriage, admits that "marriage is not termed a contract in Roman law," but adds: "its contractual aspect is extremely prominent in the treatment accorded to it." Like so many authors, Joyce does not tell us that in Roman as well as Christian society marriage was called a covenant.

Joyce gives two reasons why marriage for all practical purposes was treated as a contract in Roman law. (1) "Just as with contracts, marriage is constituted by the consent of those concerned." To this we would answer that the covenant quality of the consent clearly distinguished marriage from other contracts based on consent. (2) "The union was strictly monogamous, but easily dissolved. Either party might terminate it: nor was it necessary to specify reasons for the step. Divorce was freely practiced."[43]

It is true that in the period of the Empire, even after the time of Constantine, the laws governing divorce and remarriage were considerably relaxed from what they had been in the time of the Republic, when covenant marriage was dissolved as a rule only when it was discovered that a woman could not bear children. Since the word "matrimony" (*matrimonium*) is derived from the woman's function or office (*munus*) of being a mother (*matris*), it is more likely that sterility would simply be regarded as an impediment to a covenant marriage, just as it is today among many primitive peoples.[44]

But Joyce makes a point that is crucial to the need for restoring the covenant idea of marriage and eliminating the term "contract." When covenant marriage was divested of all religious ceremony, when marriage by cohabitation or by written agreement was recognized as legal and freely practiced by those who no longer worshiped at the family hearth or at the local temple, marriage became in fact a sheerly secular affair to be regulated by the civil laws governing other contracts. This is but another way of saying that when the covenant dimension of marriage was lost—and this applies to Christian as well as pagan marriage—the door was opened to easy divorce. In the East after Justinian,

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[43] *Christian Marriage: An Historical and Doctrinal Study* (London, 1933) p. 42.

[44] It is remarkable that the traditional stress on procreation as primary in marriage did not lead to the conclusion that there could be no marriage where this purpose could not be achieved. Instead the Church from earliest times recognized the virginal marriage of Mary and Joseph as a true marriage and in doing so stressed, perhaps overmuch, that marriage is more a union of souls than of bodies. Augustine is interesting: "Because of this [the *sacramentum*] it is wrong for a woman, even though she leaves with a bill of divorce, to marry another while her husband lives, even if she does so for the purpose of having children. For even though this is the sole reason for marriage, and even though this purpose is not realized in marriage, yet the marriage bond is not dissolved except by the death of the husband" (*On the Good of Marriage* 28 [*CSEL* 41, 227]).

Church legislation went hand in hand not only with the formalities prescribed for the marriage ceremony, but with the more permissive laws governing divorce and remarriage.[45] In the Frankish kingdoms of the West, and in those periods when the influence of the papacy was minimal, Christian marriage was regulated by ecclesiastical courts set up by their respective monarchs. Legislation was often modeled on the Code of Justinian, imported to the West by Theodore of Canterbury, an Eastern bishop, and disseminated on the Continent through the widespread use of his *Penitential*.[46]

At the risk of oversimplying the causes that led to the breakdown of Christian marriage at the time of the Protestant reform (loss of the celibate ideal and of the sacredness of the celibate's commitment was one reason), I would say that a contributing factor was the contextual change created by regarding marriage as contract rather than covenant. Not that the Reformers easily dispensed their followers from a church wedding (they were more opposed to clandestine marriage than the Church herself), but by rejecting the sacramental character of marriage, they were more prone to regard marriage as a secular affair to be regulated by civil magistrates. Thus, Martin Luther, who along with Calvin saw no "mystery" in marriage but only in Christ and the Church, and was anxious to free himself of involvement in marriage affairs, could state: "No one can deny that marriage is an external, secular affair, such as clothing and food, home and real property, subject to secular supervision."[47]

Despite Trent's rejection of Luther's secular view of marriage, the idea that marriage was a contract subject to civil legislation and adjudication proved congenial to the Catholic rulers of France and Austria, who were anxious to wrest from the Church jurisdiction over marriage, leaving to the Church the supervision of the sacramental liturgy of marriage. If the Church or her theologians had simply insisted that

[45] With the fall of the Roman Empire in the West (476), the general agreement between the churches of the East and of the West on the subject of divorce and remarriage gradually came to an end. The Anglican scholar O. D. Watkins, in his documented study of Christian marriage in both churches, gives the reason: "In Constantinople, the Emperors and the Imperial court overshadowed the Patriarchal throne; in old Rome itself the Patriarch of the West was neither overshadowed nor overawed by any" (*Holy Matrimony*, p. 209).

[46] For the fears expressed in the appointment of Theodore of Tarsus to the See of Canterbury, and the realization of these fears in the sections of his *Penitential* dealing with marriage and divorce, cf. *Sources of Christian Theology* 2: *Sacraments and Worship* (Westminster, Md., 1959) 147. The canons of the *Penitential* which reflect the legislation of Justinian may be found in *Medieval Handbooks of Penance*, ed. McNeill and Gamer (1938).

[47] *Von Ehesachen* (*Luthers Werke*, Weimar ed. 30, 3, 205).

marriage is a graced covenant and not a contract, Catholic rulers might have been more disposed to limit their own supervision to the strictly civil effects of marriage, as was done in the early days of the Roman Empire. Marriage, if not a secular reality, is a social affair affecting society both civil and ecclesial. Hence neither society should be altogether excluded from concern and some involvement. But marriage is essentially a covenant, of which God is author, witness, and guarantor.

While canonists and theologians were discussing marriage in terms of contract, Christian people were getting married in a covenant liturgy, in which they exchanged their vows, expressed their love, and took each other for better or for worse until death should separate them. As often happens, the mind of the faithful (*sensus fidelium*) is reflected more in the way the Church has taught her people to pray than in the speculations of her theologians and canonists, thus actuating the ancient dictum of Augustine *Lex orandi est lex credendi*: "The rule of prayer is (supports) the rule of faith."

CHRISTIAN MARRIAGE IN TERMS OF COVENANT

Before developing a theology of Christian marriage in terms of covenant, it will be well to summarize by way of contrasting statements the difference between covenant and contract as revealed in the documents already discussed and in the estimation and expectation of most people.

Contracts deal with things, covenants with people. Contracts engage the services of people; covenants engage persons. Contracts are made for a stipulated period of time; covenants are forever. Contracts can be broken, with material loss to the contracting parties; covenants cannot be broken, but if violated, they result in personal loss and broken hearts. Contracts are secular affairs and belong to the market place; covenants are sacral affairs and belong to the hearth, the temple, or the Church. Contracts are best understood by lawyers, civil and ecclesiastical; covenants are appreciated better by poets and theologians. Contracts are witnessed by people with the state as guarantor; covenants are witnessed by God with God as guarantor. Contracts can be made by children who know the value of a penny; covenants can be made only by adults who are mentally, emotionally, and spiritually mature.

If Christian marriage is to be defined in terms of contract, the present Code of Canon Law would have us say that Christian marriage is a valid contract between two baptized people, in which the formal object of their consent is the permanent and exclusive right to the other's body and to those acts which service the race. If Christian marriage is

to be defined in terms of covenant, Scripture, early Christian termi-
nology, the liturgy of the Church, and the conciliar statements of Trent
and Vatican II would have us say that Christian marriage is a graced
covenant of love and fidelity between two baptized believers which,
when ratified or sealed in the flesh, has God as author, witness, and
guarantor of the indissoluble bond. Both definitions tell us what is
unique in Christian marriage, its indissoluble character, but only the
second tells why Christian marriage is unique and distinguished from
other marriages. Since there are elements in the covenant definition
of marriage that are questioned by theologians today, some elucidation
is needed.

Christian Marriage: A Graced Covenant

It is not enough to say that Christian marriage is a covenant of love
and fidelity. In pagan Roman society marriage was called a covenant,
presumably of love and fidelity. Fidelity was guaranteed by the very
word *foedus*, which in its root meaning implies trust or fidelity *(fides)*;
love was implied in the expression *affectio maritalis*, marital affec-
tion, which distinguished covenant marriage from concubinage and
other less stable relationships. Nor is it enough to say that Christian
marriage is unique because it is a symbol or sign of Christ's covenant
with His Church. Paul finds in the two-in-one-flesh relationship of the
first human couple the "great mystery," which is the symbol or sacra-
ment of Christ and Church. Again, the Gregorian formula of the nuptial
blessing invokes God who "consecrated marriage by a mystery so pro-
found as to *prefigure* in the marriage covenant the sacrament of Christ
and the Church."

The fathers of Vatican II add the distinctive element when they say
that Christian marriage is not only "a reflection of the loving covenant
uniting Christ with the Church," but "a participation in that covenant."
This may seem only another way of saying that Christian marriage is a
sacrament of the New Law. But more is implied. The grace of marriage
is specified as a covenant grace, a sharing in the grace that unites
Christ and His Church, a grace that has particular application to those
who "marry in the Lord." The grace in question is described by the
fathers of Trent as the grace of Christ which "perfects natural love,
strengthens the indissoluble unity, and sanctifies the spouses," a grace
that is covenant-orientated.

To "participate" in Christ's covenant means to be initiated into that
covenant by baptism and to share more fully in that covenant through
the sacrament of marriage. And this brings us to the first problem,
seemingly unresolved at the present time. Who are the covenanters in

Christian marriage? Who can share sacramentally in Christ's covenant grace through marriage?

Who Are the Covenanters?

In a recent article, "Rethinking the Marriage Bond," I proposed the view that baptism alone is not enough to found a Christian marriage, that bride and groom had to be believers at the time of their marriage, and concluded: "Not every marriage between Christians is a Christian marriage."[48] It seemed enough to say that the Christian sacraments are not magic, and that a baptized Christian who no longer believed in God, in Christ, or in the Church could not receive the sacrament of marriage. If faith is the beginning of salvation, and if faith is required of an adult for the valid reception of a sacrament, it seemed to follow that a baptized Christian who no longer believed in God could not receive the sacrament of marriage even validly.

The published article was submitted to higher censorship. One censor insisted that a baptized Christian, though an apostate and an atheist at the time of marriage, could receive a valid sacrament and, if he were in good faith, a fruitful sacrament. The second censor maintained that the atheist or nonbeliever could receive the sacrament validly but not fruitfully; he graciously conceded that the question needed further exploration. What follows may respond to the need expressed by him and sensed by others.

The Code of Canon Law says: "There can be no valid marriage between the baptized without it being by that very fact a sacrament." Nothing is said of the necessity of faith; baptism alone is seemingly sufficient to found a sacramental marriage, provided the marriage is otherwise valid. The conclusion reached by my censors and by many theologians in the past, is based, I believe, on a misunderstanding of the point at issue in two controversies, one ancient, the other more recent.

Against the Donatists of the fourth century, who denied the validity of sacraments administered by schismatics, Augustine insisted that the sacraments of Christ did not depend for their validity on Catholic adherence on the part of those who administered them or of those who received them. The question at issue was not whether faith was required of the minister or recipient of a sacrament, but whether faith had to be professed in Catholic communion. Schismatics believed in God, in Christ, in His sacraments. To administer a sacrament to an adult who had no faith at all would be as preposterous for Augustine

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[48] *America*, Jan. 17, 1970, p. 39.

as it should be for any sacramental theologian today.[49]

Against the Regalists of France and the Josephinists of Austria in the nineteenth century, the question at issue was simply whether the sacrament of marriage could be separated from the marriage "contract." Anxious to entrust jurisdiction over all marriage to the state, the Regalist and Josephinist theologians distinguished between the sacrament of marriage and the marriage contract, giving to the civil authorities jurisdiction over marriage as a contract, and to the Church supervision of the sacramental rite. Pius IX rejected the ultramontane views which had spread to Italy by asserting "there can be no marriage between the *faithful* without it being at the same time a sacrament."[50] Leo XIII expressed it with more precision: "Every true marriage between *Christians* is in and by itself a sacrament; and nothing is more at variance with truth than to say that the sacrament is an added adornment of sorts, or a property that is extrinsic or accessory to the contract."[51] The emphasized words refer to marriage among the faithful, to a marriage between Christians. We might grant that apostates who no longer believe are still Christians, but we generally add "fallen away" or "no longer" when we speak of such. But we never refer to apostates, atheists, agnostics, freethinkers, or nonbelievers as "faithful." But even if Pius and Leo had used the language of the Code "marriage among the baptized," there would be no warrant for concluding that the Code intended more than what was intended by the pontiffs directly involved in the controversy.

In biblical and patristic literature the covenanters to a Christian marriage are simply called believers, those who believe in the Lord, and their marriage is clearly distinguished from the marriage of unbelievers, or of a believer and one who is not a believer. The question of these latter marriages will be discussed separately.[52]

[49] Cf. excerpts from Optatus of Milevis and Augustine in *Sources of Christian Theology* 1, 79-84. Catholics at the time distinguished clearly between schismatics and heretics. Schismatics were orthodox in their belief, not so heretics. Accordingly, schismatics could receive the sacrament of baptism validly, but not to their profit, i.e., fruitfully. To conclude that either Optatus or Augustine would recognize the baptism of an adult without any faith in God, in Christ, or in His sacraments would be a serious error. Today the Church recognizes the validity of baptism among Protestants, but only of those "separated brethren" who are baptized in the Trinity, an index of their orthodox faith. Admittedly, this is an area of sacramental theology rarely discussed because insufficiently explored. The question is complicated by a private instruction (Aug. 1860) of the Holy Office which ruled that faith was not required for the valid reception on the part of an adult for baptism, but that the willingness to receive the sacrament was required for both validity and liceity (cf. *DS* 2837). The decision should not be normative or definitive for theologians today.

[50] *DS* 2991.   [51] *Ibid.* 3145.   [52] See below, pp. 650 ff.

The Terms of Christian Covenant Marriage

Just as we can speak of the essential object of a contract, so we can speak of the terms of a covenant marriage. "If you keep all my commandments, you will be my people and I shall be your God" expresses in brief the terms of the Old Covenant. The covenant engages the people and God, but on the part of the people fidelity to God's commandments is pledged. "If you love me, you will keep my commandments" expresses the terms of the New Covenant, where love is pledged to Christ by the covenanters. The fathers of Vatican II mention two words which express the terms of the marriage covenant between Christians, love and fidelity, both pledged by the covenanters to each other.

No one questions that fidelity is an essential term of the covenant. In contractual language "the permanent and exclusive right to the body" is the essential object of the marriage contract. Again Trent states that the grace of marriage strengthens the "indissoluble unity" of the marriage bond. But what of the right to love, of openness to love, the promise to love? Is love an essential element of marriage?

A Covenant of Love

No Christian writer has questioned the need of love in marriage, but until comparatively recent times the love in question was regarded as a particular manifestation of Christian charity, a love that must be shown to all men, including our enemies. But what of marital love, the love that is distinctive of marriage? It must be admitted that marital love, with its affective overtones and sexual involvement, has rarely been discussed by the Fathers of the Church or by the Church's theologians.

Until quite recently Christian writers regarded the sexual expression of human love as an obstacle to spiritual love, to the love that "unites souls rather than bodies." Thus, Augustine praises continence in marriage, "since the love that binds them in soul will be more sincere, more secure, more tranquil, the more chastely it is preserved."[53] For Augustine, marital love is an obstacle even to the perfection of human love. Thus, the "good Christian" is the man who loves in his wife that which makes her human (*quod homo est*), but hates in her that which makes her a wife (*quod uxor est*).[54] This false dichotomy between human love on the spiritual level and human love on the carnal level dominated the thinking of theologians of the Scholastic age.

In answer to the perennial question, "whether a man ought to love his wife more than his parents," Aquinas replies "to the contrary," arguing

[53] *De bono coniugali* 3 (*CSEL* 41, 191).   [54] *De sermone in monte* 1, 15, 4 (*PL* 38, 121).

that the love of the wife as one's body must yield to the love of one's neighbor, and that among his neighbors the parents come first. In explaining his position further, Thomas argues that the parents, the principles of his being, are "a more exalted good," while the wife is loved "principally because of their carnal union." Consequently, "a man loves his wife with greater intensity, but his parents with greater reverence."[54a]

The basic difficulty in such passages is not only the failure to harmonize human love with its sexual expression, but a failure to appreciate what is distinctive of marital love even on the spiritual level. Marital love is not Christian charity (caritas), although the law of charity demands that the love of husband and wife be marital or conjugal. Nor is marital love to be confused with the love of one's neighbor, and even of one's enemy. Married love is as exclusive as charity is inclusive, for the simple reason that marital love is covenant love.

Covenant love is exclusive because it is based on a choice, an election. Hence the Latin word dilectio, from the verb eligere, to choose. Israel is not only the bride of Yahweh; she is Yahweh's chosen bride. The Church is not only the bride of Christ; she is Christ's chosen bride. Christians are a "chosen people," the object of God's selective love.[55] So too the wife should be the "chosen bride" of the husband. And because she is his chosen one, his love for her has to be exclusive, and her love for him must exclude all rivals. In the Sarum marriage rite the priest asks the groom: "Wilt thou love her . . . forsaking all others on account of her, keep thee only unto her, so long as ye both shall live?" And the same question is put to the bride.[55a]

When the fathers of Vatican II speak of marriage as a covenant of love and fidelity, they are speaking of marital or conjugal love, of a love that is human, embracing the total person, body and soul, mind and heart. Nor is marital love an obstacle to a love that is spiritual; nor is it lessened by being expressed carnally.

[54a] Sum. theol. 2/2, q. 26, a. 11.

[55] "But to love, diligere, means to choose, selecting this woman or man, and no other. The man who thinks it possible and permissible to love many women simultaneously or alternately has not yet begun to love. He is still in the stage of experiment and if he does not overcome his inconstancy he will always be a bungler in this sphere" (Karl Barth, Church Dogmatics 3, 4, 195). For Barth, marital love is the reflection of God's covenant love, which is elective and selective. After developing God's many covenants with individuals as well as collectives, he concludes: "As marriage is set in the light of this election and covenant, and comes under the command of the God of this election and covenant, it can only be monogamy. In this context it becomes exclusive" (ibid., p. 198).

[55a] See above, section on "Marriage Rite of Sarum."

This love is eminently human, since it is directed from one person to another through the affection of the will . . . . Such love, merging the human with the divine, leads the spouses to a free and mutual gift of themselves . . . . This love is uniquely expressed and perfected through the marital act. The actions within marriage by which the couple are united intimately and chastely are noble and worthy. Expressed in a manner which is truly human, these actions signify and promote that mutual self-giving by which spouses enrich each other with a joyful and thankful will.[56]

It has been noted that the fathers of Vatican II do not discuss marriage in the traditional terminology of primary and secondary ends. They treat of human love separately from procreation, since there can be childless marriages. But they never treat of children except in the context of married love. Thus, in the nearest approach to what appears to be the traditional assessment of the various values in marriage, they make it clear that children are the fruit of love and result from the "true practice of conjugal love."

Hence, while not making the other purposes of marriage of less account (*non posthabitis ceteris matrimonii finibus*), the true practice of conjugal love, and the whole meaning of family life which results from it, have this aim: that the couple be ready with stout hearts to co-operate with the love of the Creator and the Saviour, who through them will enlarge and enrich His own family day by day.[57]

Except for the nuptial blessing which prays for the gift of fecundity, few older documents of the Church stress procreation in discussing the marriage covenant. This is not to deny that fecundity is a gift of God, or that the purpose of marriage is to multiply the image of God to which the parents have been created. Procreation is something that cannot be pledged or promised. Husband and wife can pledge only their love, a love that will be open to life.[58] For this reason procreation should not be made the essential object of the marriage "contract," nor an essential term of the marriage covenant. The question now remains: Should the right to love, openness to love, or the promise to love be regarded as an essential element or term of the marriage covenant?

In what appears to be a fictitious case, designed to assess the relative

[56] *Gaudium et spes*, no. 49.
[57] *Ibid.*, no. 50.
[58] "Marriage as a life-partnership implies, of course, an inner readiness for children and therefore to the family to the extent that it is a full sexual communion. But as a life-partnership it is in no way conditioned by the co-existence of children. It subsists even without the founding of a family, even as the life-partnership of a possibly childless marriage. Marriage is necessarily *coniugium*, but not necessarily *matrimonium*" (Barth, *op. cit.*, p. 189). See Augustine, n. 44 above.

importance of the primary and secondary values of marriage, procreation and mutual love and support, Arthur Wynen, judge of the Holy Roman Rota, stated quite categorically: "A marriage can be contracted validly in terms of the principal right, to the positive exclusion of the secondary right."[59] He willingly granted that love is or should be a property of marriage, and an integral part of marriage; but it is not an essential part of the marriage "contract."

Admittedly, love is a difficult thing to define, and its presence even more difficult to assess in the external tribunal. This may explain why canonists in the past, including Msgr. Wynen, waive even the right to love as necessary for a valid marriage. There are many cultures in which marriages are arranged by the parents or family, in which the bride and groom meet for the first time at the altar, there to exchange their vows. In such cultures we cannot speak of the presence of human love, of a love which in our society ordinarily leads to marriage.

But even where love is not yet present, we can speak of a right to love, of an openness to love, of a promise to love and to cherish, of the right to one another's undivided affection. To ask the marriage covenanters to swear fidelity without pledging love, to ask God to give them the grace of Christ which "perfects love and strengthens the unity and the indissolubility of the marriage bond" where love is neither present nor promised, is quite unreal. If permanence and exclusiveness are the hallmarks of covenant, it is psychologically unsound to demand the properties of love without demanding its substance. Hence any definition of marriage, whether it be in terms of contract or covenant, must include the right to love, the promise to love, the pledge of one's undivided affection. Where such a pledge is not made with the "sincerity" that marked the covenant marriage of Tobias and Sarah, there is, in my judgment, no covenant, no sacrament, no title to Christ's grace which "perfects natural love," no marriage.

I am quite aware that I am differing from Wynen's judgment. But the judges of the Roman Rota change, and with them their judgments. In a recent case before the Rota (Feb. 25, 1969) dealing with a "truly inverted homosexual," whose marriage was declared null, the *In jure* section cited Roman law, other sections of the Code, Vatican II, and *Humanae vitae* to prove that the formal object of matrimonial consent "is not only the right to the body which is perpetual and exclusive for acts which are apt in themselves for the generation of children, excluding every

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[59] *AAS* 36 (1944) 190. In the early forties, John Ford advanced the thesis that the right to love was equally essential as the right to acts which further the primary purpose of marriage. He saw no reason to change his view after the appearance of Wynen's judgement (cf. Ford-Kelly, *Contemporary Moral Theology* 2, 117 ff.).

other formal essential object; but it embraces also the right to a life partnership (*consortium vitae*), that is, living together which is properly called matrimonial."[60] This is a marked advance, actually a reversal of Wynen's judgment that the essential or formal object of marriage must be limited to acts which guarantee the realization of the primary end of marriage. Unfortunately, the canonical expositor finds no place for love in the essential demands of "living together." He will admit that "love and devotion" integrate marriage, but these virtues are not essential to the marriage relationship. They are important "so that marriage be perfectly verified, but they belong rather to the existential order."[61]

Gaudium et spes states explicitly: "The intimate partnership of life and *love* has been established by the Creator and qualified by His laws. It is rooted in the conjugal covenant of irrevocable personal consent."[61a] Commenting on this passage, but omitting "love," from the life partnership, the expositor concludes: "This statement of the Second Vatican Council has a juridical significance. It does not consider the mere *fact* of the establishment of the life partnership but the right and the obligation to this intimate partnership."[61b] If the expositor would simply restore the word "love" to the "partnership of life and love," he would agree with the thesis here expounded: the right to love is of the essence of the marriage covenant, or, in his words, part of the essential, formal object of marital consent.

Less reluctant to retain the word "love" as an essential element of the life partnership which constitutes the formal object of marital consent is the Rotal decision of October 30, 1970.[61c] The *In jure* section declares: "Where conjugal love is lacking, either the consent is not free, or it is not internal, or it *excludes or limits the object which must be integral to have a valid marriage*" (no. 7; emphasis added). Appealing to the passage from *Gaudium et spes* (no. 48), the legal section concludes: "Now, after the Council, it is clear that, because of lack of true conjugal love, the object of the contract is missing, as in this case, because the mutual self-giving in marriage, by which marriage is constituted, was missing in the act of celebrating the marriage" (no. 9). The *De facto* section of the decision concludes: "As a result, lack of conjugal love is the same as lack of consent. Conjugal love has juridical force here, because the defendant despised the total communion of life which primarily and of itself consti-

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[60] "Coram L. Anné," *Ephemerides iuris canonici* 26 (1970) 430.   [61] *Ibid.*

[61a] *Gaudium et spes*, no. 48.   [61b] "Coram L. Anné," p. 429 (emphasis his).

[61c] *Coram V. Fagiolo*, Oct. 30, 1970; excerpts taken from English translation of the decision by James A. McEnerny, S.J., Research Consultant for Baltimore Tribunal, May 25, 1972.

tutes the object of the marriage contract" (no. 15).

If the judges of the Roman Rota had used the word "covenant" instead of "contract," as did the fathers of Vatican II; if they had avoided the term "juridical" in referring to an element of marriage which is of divine and not human provenance; and if they had spoken of the "refusal to love" instead of the somewhat ambiguous "lack of conjugal love," the decision would have matched in felicity of expression the brilliance of its basic insight. In covenant terms we would say, without gainsaying our highest marriage tribunal, that marriage is a covenant of love and fidelity in which the covenanters pledge or vow to love each other until death. Love and fidelity are the terms of the covenant, the formal object of their solemn promise or engagement. In the words of Vatican II, marriage is "an intimate partnership of life and love." Unless this partnership is pledged or vowed, there is no covenant, there is no marriage.

Barth's most vigorous complaint against what he calls the "traditional doctrine" of marriage (and it applies to traditional Protestant as well as Catholic teaching) is that "it despises love, with all the inevitable consequences, because in relation to the genesis of marriage it looks only outwards to the institutional character of marriage, to the actual ceremony, to the formal decision bound up with marriage. From this standpoint it necessarily regards love as an alien, easily painful, imponderable and probably a rather dangerous element."[62] Perhaps "despise" is too harsh to characterize the attitude of those who would deny that love is an essential element or object of the marriage covenant. Again, "traditional doctrine" has no long tradition. The "despisal" of love does not belong to the earliest tradition, which discussed marriage in terms of covenant rather than contract, nor to the even later tradition, which left as a heritage for English-speaking Christians an actual ceremony in which bride and groom pledge "to love and to cherish" each other until death does them part.

The problem that confronts present-day canonists is not so much that love is an alien or dangerous element in marriage, but that love is too "imponderable" to weigh or assess in the external forum. And yet, true marital love has been defined with sufficient precision by the fathers of Vatican II to warrant a prudential judgment of love's presence or absence either in the external tribunal or in the forum of conscience.

A Covenant of Fidelity

It is impossible to speak of covenant without implying the idea of fidelity. And yet, when the word is translated into permanence of the covenant commitment, covenant has not meant the same for all peoples.

[62] *Op. cit.*, pp. 225–26.

In Roman society it was generally recognized that a husband had the right, even the duty, to divorce a faithless wife and remarry if he wished. Gradually the same right was extended to the wife of an adulterous husband. By the end of Justinian's reign, divorce and remarriage was recognized on the grounds of adultery, desertion, prolonged absence, insanity or mental death, and apostasy or spiritual death. The Eastern Orthodox Churches will admit that marriage is a graced covenant, but in practice will allow divorce and remarriage for the reasons listed by the Christian Emperor Justinian.[63]

And yet there is no recognizable Christian Church of the East or the West which does not uphold absolute indissolubility as the Christian ideal.[64] Divorce and remarriage is regarded as a failure to live up to the covenant ideal of Yahweh's redemptive love for Israel, of Christ's sacrificial love for His bride the Church. Hence there is no reason to presume that our separated brethren are incapable of entering a covenant marriage or that all share the secular view that marriage is a contract terminable at the will of the contracting parties or by civil intervention.

The Roman Church differs from other churches in her belief and practice that the covenant ideal is more than an ideal, that it reflects the "law" of the gospel. The position has been and will be challenged. In fact, it is becoming progressively challenged by more "progressive" Catholics, who feel that the Church's position is not only unreal, but an obstacle to the ecumenical movement.[64] I have spent little time in justifying the Church's position, either from Scripture or from history, for the good reason that I do not see how the Church can change either her teaching or her practice. Whether we regard the teaching of Trent as a dogma or not, canon 7 of Session 24 is more than a disciplinary decree. Trent does not solemnly define that marriage cannot be dissolved on the grounds of adultery, but the fathers of Trent solemnly declare that the Church has not erred, nor is she in error, in teaching "according to evangelical and apostolic doctrine that the marriage bond cannot be dissolved on the grounds of adultery."[65] And since my purpose is to arrive

[63] Cf. Joyce, op. cit., pp. 364–65.

[64] Symptomatic of this trend or malaise is Theology Digest 19, 1 (Spring 1971), devoted wholly to annulment, divorce, and remarriage. The digested articles and excerpts used as fillers are for the most part negative, overly critical of the Church's position and simplistic from the point of view of history. With the exception of John Noonan's article on "Indissolubility and Natural Law," the contributors tend to confuse the Church's authentic tradition with bad theologizing on that tradition. The editors are to be commended, however, for exemplifying, though unwittingly, the desperate need for a new approach to the theology of Christian marriage.

[65] DB 1807. Overly simplistic is the conclusion of William Bassett, under the title "A Careful Distinction" excerpted from his "Divorce and Remarriage—The Catholic

at a Catholic theology of Christian marriage, I have directed my efforts to discovering the reason why Christian marriage is different from other marriages which are not so indissoluble. And this brings us to a discussion of non-Christian marriage, including the marriage of a believer and a nonbeliever.

Are All Marriages from God?

Catholic theologians, supported by the more recent pronouncements of the magisterium, generally agree that God is the author of all marriages which reflect the exclusiveness and the stability of the marriage of the first human couple. But even where marriage is monogamous, is it true to say that God is the author in the same way that He is author, witness, and guarantor of a consummated covenant marriage between two Christian believers? Does God join together all married couples in such a way that "no man" can sever the union?

The question is complicated by the Church's practice of dissolving non-Christian marriages. Most theologians say that by "no man" Jesus denied the right of the Hebrew male to divorce his wife and remarry, leaving untouched the question of dissolution by civil or ecclesiastical authority. The same theologians argue that Christ, in conferring on Peter the "power of the keys," granted the Roman pontiff the authority to loose or dissolve all marriages, a consummated Christian marriage alone excepted, with vicariously divine power, a power not given to civil authority which is wholly human.

Before evaluating this more common teaching, I would grant that all marriages in which husband and wife pledge fidelity and love have God as their ultimate source. This is but another way of saying that God is the author of marriage in so far as monogamous marriage responds to the natural drive that is in man to form a permanent and exclusive union with a woman. This is implied in the account of the marriage of the first human couple and can be validated by an analysis of the quality of love that normally leads to marriage. Love, like marriage, looks to permanence and exclusiveness.[66]

History has shown, however, that this instinctive drive of man can be thwarted, even blunted, by his surrounding culture; that human love needs support from society; that covenant love needs to be supported and guaranteed by some power that transcends human authority. Cus-

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Search for a Pastoral Reconciliation," *American Ecclesiastical Review* 162 (1970) 36: "Thus, Canon 7 of Session XXIV says simply that the Church has not erred in not allowing remarriage" (*Theology Digest* 19 [1971] 28). "Simply" is the kind of oversimplification that distorts and falsifies Trent's teaching.

[66] See n. 65 above.

toms and laws can be as arbitrary and inconstant as the couples them-selves. For this reason ancient peoples called on the gods as "lords of the oaths" to witness and guarantee their pledges, believing that the gods would be favorable to those who kept their vows and relentless in pursuing those who violated them. Covenant marriage among the Greeks and Romans called for similar guarantees from the household gods and their national gods. Malachi recognized Yahweh as witness to the covenant marriages of the Israelites.

At no time, however, in the Church's history have Christians regarded the covenant marriages of pagans as binding as their own. Without denying that these marriages were lawful and in a sense sacral, Chris-tians regarded the gods who witnessed them as false and unworthy of belief. The gods who guaranteed the fidelity of the covenanters were themselves unworthy of trust. Hence the early Christian community was not concerned about the marital status of pagans who applied for bap-tism. This lack of concern is indicated by the fathers of Elvira (305), who clearly distinguish between believers and unbelievers. "A believing wife who has left a believing but adulterous husband ... if she marries again, is not to receive communion unless the one she has left has died, unless the urgency of sickness demands that it be given."[67] This is the practice of the Church today with regard to baptized believers.

But what of unbelievers and of those who have come to believe but are as yet unbaptized? Canon 10 of Elvira states: "If a woman who has been left by a catechumen marries, she can be admitted to baptism. The same will be observed in the case of female catechumens."[68] There is no sug-gestion that the Church had to intervene to regularize the second mar-riage either of the one seeking baptism or of one already a catechumen. Again, in recognizing that divorce from a catechumen and remarriage is no obstacle to baptism, the fathers of Elvira suggest that faith is not enough to make a Christian, but in the words of Ambrose of Milan, "Now, even a catechumen believes in the cross of Christ with which he is signed; but unless he has been baptized ... he cannot receive the re-mission of sins nor the gift of spiritual grace."[69]

The early Church does not distinguish between the marriages of pagans and Jews. Many would regard Jewish marriage, as does Justin Martyr, as polygamous and hence incapable of having God as author. Others, probably, would feel that even covenant marriage among the Jews was no longer binding after the renewal of the covenant in Christ. This is implied in the distinction Paul makes between the marriage of two believers, and the marriage of a believer and an unbeliever, pre-

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[67] Mansi 2, 6.   [68] *Ibid.*   [69] *De mysteriis* 4, 20.

sumably before the conversion of the believing partner. Paul's teaching is general enough to include the marriage of two pagans or two Jews one of whom subsequently received baptism. If the "Pauline privilege" actually allows remarriage if the nonbelieving husband or wife "departs"—and Christian tradition and the Church today say that Paul does—it follows that the Church did not regard either pagan or Jewish marriage as so much from God that it could not be dissolved. Again, there is no suggestion that the Church had to intervene positively to dissolve the former marriage as though it were from God.

Ambrose of Milan is the first, to my knowledge, to direct himself explicitly to our question, whether all marriages are from God. He is evidently considering the case of disparity of cult, marriage of a Christian with a pagan. To appreciate the mentality of the Church towards such marriages and her reluctance to grant dispensations, we must return to the covenant idea of marriage, shared by pagans as well as Christians.

Marriage was held to be a sharing in the whole of life, a participation in rights divine as well as human. The hearth liturgy initiated the woman into the religion of her husband, so that a community of life and worship might result. Disparity of cult was as much an impediment to covenant marriage as disparity of civil or social status. A freeman could not marry a slave, unless the slave was first emancipated; otherwise there would be lack of parity in the marriage. In this context we can understand the Church's attitude to a marriage between a Christian and a pagan where the disparity was far more radical than that of social status. How could the God of the Christians be witness and guarantor of such a misalliance? Ambrose believes that God is not the witness because He is not the author, in the strict sense, of all marriages.

Some believe that every marriage is from God, especially since it has been written "What God has joined together, let no man put asunder." Therefore, if every marriage is from God, no marriage may be dissolved. And yet how could the Apostle have said: "But if the unbeliever departs, let him depart"? In this he clearly expresses his unwillingness that there should be grounds for divorce among Christians, and at the same time shows that not every marriage is from God.[70]

Neither Paul nor Ambrose nor the fathers of Elvira explain how a marriage which is not from God is dissolved. Seemingly the partners simply availed themselves of the "right" to separate and remarry in accord with the laws of civil society. Nor is there the slightest suggestion that civil authority actually dissolved such marriages. Even today we speak of the state granting a divorce. This simply means that a second marriage will

[70] *De instructione virginum* 8, 2.

not be regarded as bigamous. The question that is receiving attention today from some Catholic theologians and historians is whether the Church actually dissolves non-Christian marriages or whether she simply dispenses from *ligamen* or previous bond by allowing a convert or prospective convert to form a covenant marriage in the Lord.[71] I have long felt that Christ's admonition "What God has joined together, let no man put asunder" applies to all human authority, civil or ecclesiastical. But with Ambrose I would say that not every marriage is from God, that only a consummated Christian marriage, for reasons still to be seen, has God as author in the sense of witness and guarantor of the terms of the covenant.

I say I have long believed this, nor does this belief run counter to the express teaching of the magisterium. There is no need for the Church to change her practice; there is only need for theologians to explain less arbitrarily what she has been doing for centuries. The reasons presently advanced, namely, that the pope, acting with vicariously divine power, can dissolve any but a consummated Christian marriage, is a relatively new solution. It may prove congenial to some who, like Pospishil, argue that the Church can extend her power of the keys by "loosing" all bonds, even of a consummated Christian marriage, an exercise of the power of the keys which the Church claims she does not have.[72] But the solution is without solid tradition. The power of the keys was never invoked as a principle for dissolving non-Christian marriages until the problem became more acute during the missionary expansion of the Church to pagan lands in recent centuries.[73]

Trent considered only one case of dissolution, that of a nonconsummated Christian marriage between two Christians one of whom had made solemn religious profession.[74] The solution commonly given, that such marriages are dissolved by the Roman pontiff by the general law of the Church, and with the same power that non-Christian consummated marriages are dissolved, was completely unknown to the theologians of the Scholastic age and seemingly to the fathers of Trent. The view of Aquinas that religious profession was the equivalent of death

[71] Cf. John T. Noonan, Jr., "Indissolubility of Marriage and Natural Law," *Theology Digest* 10 (1971) 9–15. I agree with Noonan that the Church does not dissolve non-Christian marriages with vicariously divine authority. I would stress, however, the indissoluble character of all covenant marriages, allowing the Church to "dispense" from the bond in favor of a "graced covenant" of the New Law.

[72] Cf. *Divorce and Remarriage*, p. 17.

[73] Cf. Constitution of Gregory XIII (1585), Appendix to Code of Canon Law, Document 8. Note that Gregory gives authority to "dispense" converts from *ligamen*, not to dissolve their previous marriages.

[74] Cf. canon 6, Session 24 (*DS* 1806).

would express the mind of the theologian; the view that marriage was binding only when ratified by consummation would express the mind of the canonist.[75] Whether the present view, which speaks of papal dissolution, is a legitimate development I leave to the Church to decide. Meanwhile I prefer the solution given by Ambrose: "Not every marriage is from God."

Ratification of Covenant Marriage

If a covenant were simply a consensual agreement, an agreement of wills, there would be no need of a second and external act, cultic or otherwise, to ratify or seal the covenant. Covenant treaties among the ancient Hittites were regarded as binding only when the terms of the agreement were etched on iron or silver or, possibly, gold.[76] The Sinai convenant of Yahweh and Israel was engraved on two stone tablets. Further ratification of the covenant may be seen in the covenant sacrifice in which the blood of the immolated victims was poured on the altar, representing Yahweh, and sprinkled on the covenanters, thus establishing a blood relationship or kinship of sorts between God and His people.[77] The new covenant of God in Christ was also sealed in the blood of sacrifice, establishing a special relationship with those who would become one body with Him through the initiation rite of baptism.

In Roman society a covenant marriage was frequently, if not necessarily, accompanied by a written agreement and sanctioned or hallowed by a hearth or temple liturgy in which a sacrifice was offered. Through the initiatory "sacrament of fire and water" the bride entered into a community of life with her husband and a community of worship with the gods or god of her husband. In Christian society the Eucharistic oblation confirmed the nuptial covenant, and the blessing of the priest sealed the marriage. The effect of the "sealing" was to make sacrilegious any violation of the covenant agreement.[78]

And yet we know that written agreements and liturgical celebrations were regarded neither by the state nor by the Church as essential to a covenant marriage. Although the Church discouraged clandestine marriages, Trent held that such marriages, "contracted by the consent of the parties," "are ratified (rata) and true marriages, so long as the Church has not made them void." Accordingly, we must look elsewhere for the act which ratifies Christian marriage in such a way as to make it wholly indissoluble.

[75] Suppl. q. 51, a. 3; Gratian's Decretals 2, 27, 2.
[76] Cf. Baltzer, op. cit., pp. 16, 18.
[77] Ex 24:4–8.
[78] See above, p. 632.

In the early Scholastic period the only Christian marriage which was regarded as dissoluble was a nonconsummated Christian marriage, and the only example agreed upon by theologians and canonists alike was the case of one partner making religious profession before the marriage was consummated, thus freeing the partner left in the world to form a new marriage. No good reason was offered by the theologians to justify the exception in favor of religious profession, but the canonists insisted that religious profession was merely one of the good reasons for dissolving a marriage that was not consummated or ratified. The view of the canonists prevailed, contributing to the more common view that the Roman pontiff alone dissolves Christian marriages which have not been consummated, and that the reason of religious profession has his approval in virtue of the general law of the Church. Whatever the merits of such reasoning—and I see none—the principle that only a consummated Christian marriage is wholly indissoluble reflects better Paul's teaching on the mystery-sacrament of Ephesians. The "great mystery" is to be found in a marriage in which husband and wife become one flesh, in which the husband in loving his wife loves his own flesh, loves himself. It is then a consummated marriage which completes the sign or symbol of Christ's covenant with the Church, a union that is more than a moral union, a union of wills, a consensual agreement. Christ's union with the Church is mystical yet real, "because we are members of His body." Similarly, it is through a "union of bodies," which should be the symbol of a "union of souls," that marriage initiated by consent is consummated, ratified, or sealed in the flesh.

INTOLERABLE MARRIAGE SITUATIONS

The direct purpose of this article has not been to find an easy solution to the problem of intolerable marriages. Rather, it has been to restore a dimension of marriage which, if presented effectively, might result in fewer intolerable situations among Christians.

For the first five centuries of the Church's history the problem of divorce and remarriage was not regarded as critical. Despite the lax marriage legislation of Constantine and later Christian emperors, Augustine could write: "Even wicked Christians seem to have been free from this particular mischief of men marrying other men's wives, or women marrying other women's husbands."[79] Seemingly, the covenant dimension of marriage, acknowledged by pagans and Christians alike, was successfully upheld as the obligatory ideal for Christians of the West. In any event, Augustine could conclude: "Up till now, remarriages

[79] *De fide et operibus* 35 (*PL*, 40, 220).

occur rarely among baptized persons, if only we do not by our careless-
ness make them frequent."[80]

With the loss of the covenant ideal in contemporary society, re-
marriages are becoming alarmingly common even among baptized per-
sons, including Catholics. An easy solution would be to have the Church
accommodate her teaching and practice to that of other churches that,
with Luther, have come to regard marriage as a secular affair to be
regulated by civil authority. This would be an exercise of the extreme
carelessness against which Augustine warned. A secondary purpose of
this article has been to propose another solution, which asks that the
Church change nothing in her teaching but simply apply principles
which are wholly compatible with past teaching and practice. If a mar-
riage is proven to be a graced covenant between two baptized believers
and to have been ratified by consummation—the quantity and quality
of consummation is not relevant—no authority, private, civil, or ec-
clesiastical, can dissolve the union. If the marriage is not certainly a
graced covenant of the New Law, or if it has not been ratified by con-
summation, the partners to an intolerable marriage should be allowed
to form a covenant marriage with a partner of a more enlightened choice.

If a graced covenant marriage becomes intolerable, there is reason
for separation, a solution long honored in the Church. Covenant love
may lose its affective overtones, may be replaced by natural disgust,
even hate. But it cannot lose its redemptive character. Husband and
wife belong to each other, for better or, in this case, for worse, until
death dissolves the covenant. It is here that the covenant ideal of
Yahweh's faithfulness to Israel and Christ's redemptive love for a sinful
member of His covenant will alone soften and make acceptable the
seeming harshness and inhumanity of the Church's teaching.

Whether a confessor or counselor can allow a partner to a Christian
covenant who has remarried to participate fully in the Eucharist is a
pastoral problem that is now dividing moralists into what might be called
traditionalists and progressives.[81] Personally, I find it difficult to see
how the law of Christian charity demands that those who have violated
their covenant by remarriage be allowed to participate fully in the
Eucharist, a sacrament which memorializes and symbolizes Christ's
covenant of fidelity and redemptive love with His bride the Church. In
the early Church the penalty for divorce and remarriage was separation
not only from Holy Communion but from the Eucharistic liturgy itself,
an excommunication that would be lifted only after years of public

[80] *Ibid.*
[81] Cf. Bernard Häring, "Internal Forum Solutions to Insoluble Marriage Cases,"
Jurist 30 (1970) 21–30.

penance. In those days the Church believed that she could not effectively preach the "law" of the gospel and at the same time number among her communicants those who failed to give witness to Christ's teaching. She took seriously the admonition of Paul that the Church must be the bride beautiful, without spot or wrinkle, until the return of the bridegroom.[82]

This said, what principles can be applied either in the external forum or in the forum of conscience to resolve intolerable marriage situations which result at least in part from the fact that the marriage in question has never been a graced covenant in the Lord? The purpose of this article was to list the necessary requirements for a Christian or sacramental marriage. By way of corollary we can discuss now the obstacles to a covenant marriage which is a sacrament, impediments which, in the case of baptized Christians, nullify the original marriage, obstacles which in the case of nonbelievers allow their marriage to be dissolved, prescinding altogether from the power or authority by which they are dissolved. We are dealing in all cases with marriages which do not have God as author in the restricted sense of witness and guarantor of the bond.

Maturity is not required to enter a contract. Contracts are made by children and minors every time they make a purchase. Children can buy and sell and deal in things. Only adults can enter a covenant relationship which engages persons. Hence maturity, physical, intellectual, emotional, psychological, and spiritual, is essential to forming a covenant marriage. Less maturity is demanded in entering a marriage contract which has the state as witness and guarantor than a covenant marriage which has God as witness and guarantor.

Hence, in demanding more for a graced covenant marriage between believers, we are not implying that other unions are not marriages or that they are unlawful. We are not interested in the legality of marriage, for the simple reason that marriage, while a social affair, is not strictly speaking a juridical reality. There are people living together with marital intent who are more "married" than those who live together only as sleeping companions but with full benefit of law. In many instances common-law marriages are covenant marriages, and were so regarded in ancient Roman and Church law. Civil law and Church law have demanded that certain legalities be followed, and rightly so, since marriage is not a sheerly private affair but affects society. But the legal formalities are not constitutive elements of marriage, nor can Church or state make them so. They can be insisted upon as necessary conditions for a valid marriage or simply waived where circumstances demand.

[82] Cf. Eph 5:26.

What cannot be waived is lack of emotional or psychological maturity necessary for any marriage, and lack of spiritual maturity necessary for a graced covenant marriage.

Psychological Maturity

When marriage was considered almost wholly in terms of procreation, when the formal object of the matrimonial contract was limited to acts which are of themselves generative, the principal concern of canonists was the physical ability of husband and wife to consummate their marriage. Physical impotence was listed among the chief diriment impediments to a valid marriage. Today no canonist would limit the formal object of matrimonial consent to the biological acts which assure the continuation of the race, or equate the ability to marry with biological potency.

The fathers of Vatican II speak of marriage as ordered to procreation, but the marriage they have in mind is a covenant of love and fidelity, a marriage in which children are the fruit of love. Again, they make it clear that there are other ends to be realized in marriage, values not of less importance than procreation,[83] values which are not simply adventitious or adornments to marriage but part of God's original plan: "Marriage to be sure is not instituted solely for procreation. Rather, its very nature as an unbreakable compact between persons, and the welfare of the children both demand that the mutual love of the spouses be embodied in a rightly ordered manner, that it grow and ripen."[84] Mutual love is singled out as demanded by the very nature of the marriage compact or covenant. Hence the ability to love should definitely be an element of the psychological or emotional maturity required to enter a covenant marriage. Since, however, the inability to establish a love relationship which is strictly marital is often based on reasons which are psychological, psychopathic, or sociopathic, canonists have been concerned more recently with discovering those basic psychic impediments which invalidate marriage, without the need of assessing the presence or absence of love.

In the past, psychopathic persons were declared incapable of marriage only if their condition precluded freedom of consent. Recent decisions of the Rota dealing with psychological impotence have centered on the person's incapacity to *assume* marital obligations.[85] There are many nymphomaniacs, and their male counterparts, who are in-

[83] *Gaudium et spes,* no. 50.
[84] *Ibid.*
[85] Cf. Walter F. Kenny, "Homosexuality and Nullity—Developing Jurisprudence," *The Tribunal Reporter,* 1971, p. 115.

capable of forming a lasting sexual relationship. There are many homosexuals and Lesbians so sexually inverted that a heterosexual marriage is revolting. There are active alcoholics, chronic drug addicts, and emotionally immature youngsters who are perfectly willing to try marriage, in the hope that marriage may straighten out their problems. Except for those who are as yet "too young to love," the problem in many cases is congenital and will not yield to the therapy of marriage. They are simply incapable of assuming at the time of marriage the responsibilities they "freely" pledge. If marriage were simply a contract easily rescindable or easily broken, we could allow everyone to try marriage at least for a time. Neurotics, psychotics, and other emotionally disturbed people are not barred from most contracts, since contracts deal with things. But marriage by its very nature, as Vatican II insists, is "an unbreakable compact between persons." Even apart from the "imponderable" element of love, which many canonists refuse to consider, some degree of psychological maturity is essential to. establish that "life partnership" which has traditionally expressed the essence of marriage as a state of life.[86]

Spiritual Maturity

Many people are physically, psychologically, and emotionally mature enough to marry, but are so spiritually impoverished or retarded that they are incapable of forming a covenant marriage, much less a graced covenant. Many believe in God or in some power that is transcendant or higher than themselves, but do not see why they should call on this power to witness and guarantee so secular an affair as marriage. Where love is present, they sense no need for further guarantee. Where love is absent, they feel that the state will see to it that justice is done in the form of alimony for the wife and visiting privileges for the husband. If they are members of a worshiping community, the guilty partner will in some churches be denied full communion. With these guarantees, few believe it necessary to invoke God as witness and guarantor of promises which should be vows.

There are many young couples, particularly college graduates, who at the time of their marriage had no faith at all. In many instances their marriage was a "church wedding," and if baptized Catholics, witnessed by a priest. In the past, these marriages were regarded, at least in practice, as sacramental and hence absolutely binding. Many of these secular or civil marriages, despite their religious setting, end in divorce and remarriage. But lost faith can, with spiritual maturity, be

[86] See above, pp. 623, 648.

recovered and one or both of the parties can become capable of entering a covenant marriage with a baptized believer.

Less extreme, therefore more common, is the case of baptized Christians who have some faith in God at the time of their marriage, but whose faith cannot be called Christian. Here we are faced with the problem of assessing the quality of faith required to call it Christian. But the problem is not the same as that which inquires into the degree of faith necessary for salvation. Christian marriage demands Christian faith, and its content is spelled out in the baptismal creed, in which and through which neophytes have been baptized from the earliest days of the Church's history. The faith demanded of one who receives a sacrament of the New Law should not be any less than the faith professed by the adult convert who is initiated into Christ's covenant by baptism. As Vatican II expresses it, Christian marriage is not only a reflection of Christ's covenant with His Church, but a "sharing in that covenant" through the sacrament of marriage. It would seem theologically sound that the faith demanded to enter the marriage covenant should be a reflection of the faith demanded of an adult to enter the larger covenant of which marriage is the symbol and efficacious sign.

This does not mean that the covenanters must recognize their marriage as a sacrament in the strict meaning of the word—many non-Catholic Christians deny that marriage is a sacrament of dominical institution—but they must regard marriage as a sacred as well as a social reality in which they vow, with God as witness, love and fidelity to each other.

There are many baptized Christians, particularly among certain ethnic groups, who have received little or no instruction in the faith into which they were baptized as children. Many have remarried, some more than once. With spiritual maturity that often comes with maturing years, some of these couples express the desire to embrace the faith which not infrequently their children have already received. The sole obstacle to their acceptance is a "bad marriage." The bad marriage in question may be far better than the past marriage or marriages which ended in divorce. But they are usually denied the privilege of entering a covenant marriage as Catholics, on the questionable and, to my mind, false supposition that baptized Christians, whatever the quality, or even the absence, of personal faith, confer and receive the sacrament of marriage at least validly.

And yet, if the marriages of baptized unbelievers are not covenant marriages of the New Law, what is to prevent their dissolution? Why should not the same reasons apply that have prompted the Church to allow Christian converts to invoke the Pauline privilege and Catholic

converts to apply for the privilege of the faith? Some may regard these privileges as a subtle, seductive form of proselytism unworthy of our ecumenical age; to extend them to baptized unbelievers would be to compound the evil. I would prefer to regard the privileges for what they are, opportunities for unbelievers, unbaptized or baptized, to form for the first time a graced covenant marriage.

During the missionary expansion of the Church in the sixteenth century, bishops, parish priests, and missionaries were authorized to dispense Christian converts from the impediment of *ligamen*, thus freeing them to form a covenant or sacramental marriage with another convert.[87] Whether the dispensation actuated a papal dissolution, or declared officially that a former natural marriage is no obstacle to a later covenant marriage, is not important. What is of importance is that the principle underlying the privilege of the faith should apply equally to the marriages of baptized unbelievers. Christian marriage is a graced covenant between two baptized *believers*, and only a Christian marriage, when consummated, is wholly indissoluble.

Since the number of marriages between baptized unbelievers is legion, I would suggest that the problem in terms of conversion is just as urgent as it was in the days of the Church's missionary expansion. The authorization given to bishops, priests, and missionaries to "dispense" from the previous bond without further recourse to Rome could well be given to all priests engaged in the pastoral ministry. Until such authorization is given, the resolution of such marriages in the internal forum will depend on the still disputed point as to the authority with which such marriages are dissolved. If the pope alone can dissolve a non-Christian marriage, prescinding from the perplexing case of the Pauline privilege, a simple priest would need explicit delegation from the pope to dissolve the marriage. If, however, the marriage of baptized unbelievers can be regarded as a legitimate extension of the Pauline privilege, the baptized unbeliever could upon conversion, or a return to the faith of his baptism, dissolve his noncovenant marriage in favor of a covenant marriage.

Lest I be quoted as encouraging priests to recognize on their own the right of baptized unbelievers upon conversion to form a covenant marriage, let me insist that I am concerned only with principles and not with the propriety of the manner in which the principles are applied. Seemingly, the propriety of handling questions of *nullity* in the internal forum is not being questioned or challenged by Rome. This would probably not be true if declarations of *dissolution* were to be made in the same forum. The question should be explored, preferably by canonists.

[87] See n. 73 above.

Doubtful Marriage Cases

Canon 1014 of the Code of Canon Law enunciates the principle that a doubtful marriage enjoys the favor of law, that is, the law of indissolubility. Hence, where there is doubt about the validity of a marriage, the validity of the marriage is to be upheld. The same canon notes that the principle does not apply to cases where the Pauline privilege and the privilege of the faith are invoked. Here, according to canon 1127, doubtful cases are resolved in favor of the convert's freedom to form or to remain in a new covenant marriage in the Lord.

Actually, the principle (*In dubio standum est pro valore matrimonii*) was first used in reference not to a first marriage, but to an existing marriage between two converts who were previously united in a non-Christian marriage. Such marriages were not to be disturbed by doubts about the previous marriage.[88] Seemingly, the Church was still uncertain of the manner in which non-Christian marriage could be dissolved and yield to a covenant marriage or sacrament. When the uncertainty was removed by the simple fact of recognizing the validity of such second marriages, the principle was retained by the framers of the Code, but applied to first marriages where there could be reasonable doubt as to their validity and their binding sacramental character.

The effect of canon 1014, which applies the principle of doubt to first marriages, has been questioned by many canonists. Woywood states that it is generally agreed that canon 1014 "makes the validity of a second marriage morally certain in the external forum."[89] The phrase "morally certain" is not well chosen. Woywood himself admits that the decision in law—what I would call a juridical or prudential judgement—leaves untouched the validity of the marriage in the eyes of God.[90] Hence, if the principle applies only in the external forum, and if there is merit in the growing practice of handling doubtful marriage cases in the only forum in which the juridical principle does not apply, there is no reason why intolerable marriage situations which arise from a doubtfully valid marriage cannot be resolved according to the older and more general principle *In dubio stat libertas*. This would mean that where there is reasonable doubt about the *validity* of a first marriage— not its Christian or sacramental character—the partners could be al-

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[88] See Bouscaren-Ellis, *Canon Law: A Text and Commentary*, p. 458. For the application of the principle "In doubt, the privilege of the faith enjoys the favor of the law," cf. two decrees of the Holy Office for Dec. 1872 and Jan. 1877, in *Collectanea S.C. Prop. Fidei* 2, nos. 1392, 1465.

[89] Woywood-Smith, *A Practical Commentary on the Code of Canon Law* (1952) p. 645.

[90] *Ibid.*

lowed to enter a second marriage which would be more certainly a valid and graced covenant of the New Law.

Among the ancient Hittites treaties were covenants with the gods as witness and "lords of the oaths." In the prophetic period the covenant alliance between Yahweh and Israel was expressed in terms of the husband and wife relationship, called by Malachi a covenant of which Yahweh is witness. In the monogamous societies of Rome and Greece the preferred expression for marriage was covenant, never contract. The term contract was introduced into the vocabulary of marriage in the Scholastic period. The change from the covenant idea of marriage, in which love and fidelity were mutually vowed or pledged, to a contractual agreement, in which rights to acts which service the race were exchanged, has contributed to the breakdown of Christian marriage and to the growing number of intolerable marriage situations today.

There is no evidence that Christians or pagans ever regarded marriages as a secular reality, a sheerly social or civil affair. The sacral character of marriage, however, did not derive from the religious setting in which marriage was usually celebrated by pagans and Christians alike. It was rooted in the exchange of vows, which were likened to the military oath sworn to the emperor, the sacred commitment made by initiates in the mystery religions, and the baptismal vows of Christian initiation.

Although early Christian writers spoke of pagan marriage as a covenant, they did not regard the marriage of unbelievers as so authorized by God or so binding that it could not yield to a covenant marriage "in the Lord." Accordingly, Paul could allow an unbeliever married to a believer to "depart," but at the same time insist on the Lord's command that believers, if separated, must remain single or be reconciled to their spouse. For the same reason the early Church, as witnessed by the canons of Elvira, was not concerned with the marital status of unbelievers who approached baptism, even though they were divorced and had remarried. On similar grounds, during the renewed missionary expansion of the Church to pagan lands in the sixteenth century, the Church readily extended the Pauline privilege to all converts to the Catholic faith, whatever the status of a previous marriage.

With theological reflection on the mystery-sacrament of Paul and the use of the expression *sacramentum* for the rites of initiation, covenant marriage between Christians came to be recognized as a graced covenant of which God is guarantor in the sense that grace is given through Christ to perfect human love, to strengthen the indissoluble unity, and

to sanctify the spouses. In the context of a graced covenant the Church could more readily demand that the marriage between Christians should reflect Yahweh's covenant with Israel, even when Israel proved faithless, and Christ's redemptive love for His bride the Church.

When the covenant idea of Christian marriage was lost in the Scholastic period, though never completely, as the Church's liturgy attests, marriage in many Protestant countries came to be regarded as a secular reality subject to civil legislation, and in Catholic countries as a sacrament-contract to be regulated by Church legislation. In defining the formal object of marital consent as the "permanent and exclusive right to the body and to those acts which of themselves are fitting for the generation of children," the present Code of Canon Law changed the basic concept of marriage from a covenant which engages the totality of two persons into a material contract which contracts for the more limited services of two people.

Thanks to Vatican II, which eschews "contract" in favor of "covenant" in speaking of Christian marriage, a more balanced assessment of other values in marriage besides procreation became necessary. Canonists have responded by extending the formal object of matrimonial consent to include the right to a life partnership in which marital love can "grow and ripen." In the light of the latest decision of the Rota which has ruled a marriage null because of lack of love (*ex defectu amoris*), canonists will be concerned even more with rethinking the properties of marital consent. It is not enough that the consent be free; it must presuppose the ability, physical, psychological, and emotional, to assume the responsibilities freely promised or vowed. This more realistic approach to consent has led canonists to explore among the reasons for an annulment not only physical impotence, which loomed so large when the formal object of marital consent was limited to acts which are generative, but the area of psychological impotence.

Considering the "poor laws" and the contractual context in which canonists had been forced to work, it is remarkable that their solutions to difficult marriage cases in the external as well as the internal forum have been so informed and enlightened. Much of the enlightenment comes from their readiness to consult professional advice in psychology, sociology, and other behavioral sciences.

There are, however, a growing number of intolerable marriage situations which result not from psychological immaturity or the inability to assume the obligations of married life, but from spiritual immaturity or lack of instruction in, or adherence to, the faith in which many couples were baptized. The Church's teaching and practice allow divorce and

remarriage to unbelievers who have not been baptized. But as yet there is no agreed teaching or established practice for handling the marriages of baptized unbelievers, of persons who either had no faith, or whose faith was basically defective, at the time of the marriage. And yet defective faith (*defectus fidei*) or, at least, the absence of all faith should be as grave an obstacle to entering a graced covenant of the New Law as defective consent is a diriment impediment to a valid marriage.

The principal task of canonists, in consultation with theologians, should be to explore the question of Christian marriage in terms not only of a valid contract but of a graced covenant or sacrament. An ongoing dialogue in this area between canonists and theologians, biblical, historical and moral, should have the double effect of diminishing the number of intolerable marriage situations between Christian believers and of extending to baptized unbelievers the same opportunity for a graced covenant marriage that is presently given to unbelievers who have not been baptized. To hasten the dialogue and to give it this twofold direction has been the primary and secondary purpose of this article.