Divorce and the Catholic Lawyer

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On January 28, 2002, Pope John Paul II focused his annual address to the officials of the Roman Rota on the topic of the indissolubility of marriage.1 At the conclusion of this theological and canonical analysis, the Holy Father made a few short statements cautioning civil lawyers about divorces cases. The following day, a story in The New York Times carried the headline “John Paul Says Catholic Bar Must Refuse Divorce Cases.” The article construed the pope’s reference as a blanket prohibition against Catholic lawyers handling divorce cases. It further questioned whether the prohibition contradicted the Pontiff’s prior emphasis on compassion and pastoral sensitivity for divorced persons.2 The reaction to the pope’s address was certain to cause some concern among Catholics who take pontifical teaching seriously, and especially among those of us who are attorneys. More careful examination, however, reveals that the pope’s statement flows from a well-developed and coherent doctrine on marriage, which belies a reductionistic approach.3 In this brief article, I provide an overview of the scriptural and historical tradition as well as contemporary theoretical underpinnings of the principle of indissolubility. My modest purpose is not to present a comprehensive study, but to attempt a fair exposition of the Holy Father’s remarks and their application to lawyers and judges.

I. Scriptural Foundation and Historical Development

The principle of indissolubility in the Catholic tradition enjoys a long and complex historical development.4 As the tradition forms the scrip-
tural and theological basis of Pope John Paul’s statement, it seems help-
ful to highlight some important features of this evolution.

A. The Teaching of Jesus About Divorce

The pope chose Sacred Scripture as the starting point of analysis. Matthew 19: 3–9 contains a somewhat unambiguous condemnation of divorce:

Some Pharisees approached him and tested him saying, “Is it law-
ful for a man to divorce his wife for any cause whatever?” He said
in reply, “Have you not read that from the beginning the Creator
‘made them male and female’ and said, for this reason a man shall
leave his father and mother and be joined to his wife, and the two
shall become one flesh? So they are no longer two, but one flesh.
Therefore, what God has joined together, no human being must
separate.” They said to him, “Then why did Moses command that
the man give the woman a bill of divorce and dismiss [her]?” He
said to them, “Because of the hardness of your hearts Moses al-
lowed you to divorce your wives, but from the beginning it was
not so. I say to you, whoever divorces his wife (unless the mar-
riage is unlawful) and marries another commits adultery.

Matthew’s account of the prohibition on divorce is a doublet to a peri-
cepe that occurs in a different form and wording in Mark’s Gospel. Exegetical analysis discloses that the fundamental dispute is over the
meaning of Deuteronomy 24, which established the conditions upon
which Moses permitted divorce. A first-century Palestinian rabbinical
dispute arose from two different interpretations of the conditions for Mo-
saic divorce. The disciple of Rabbi Shammai held that divorce could be
granted only on some grave ground such as adultery. In contrast, the
followers of Rabbi Hillel adopted a more liberal interpretation that permit-
ted divorce for a wide spectrum of conduct ranging from adultery to triv-
ial grounds such as a wife’s loud talking in the house or poor preparation

1989); John Witte, Jr., From Sacrament to Contract, Marriage, Religion, and Law in the
5 John Paul II, 2002 address to the Roman Rota. 3.
6 Mark 10: 2–12; Matthew 5: 32; Luke 6: 18; cf. I Corinthians 7: 10–11. See John P.
Meier, A Marginal Jew, Mentor, Message, and Miracles, vol. 2 (New York: Doubleday,
1994) 178.
of a meal. In Matthew’s account, the Pharisees attempt to force Jesus to accept one of the two teachings and thus alienate the adherents of either of the two rabbincical schools.

In a fashion typical of the ipsissima vox, Jesus responds by rejecting both approaches and instead proposing a radical new teaching on divorce. First, Jesus’ teaching is radical because it proposes that the maritual union remains an indissoluble relationship intended by God. The citation of Genesis reminds the hearers of the natural foundation implanted by the Creator for the “essential properties of marriage.” Second, the teaching challenges a worldview in which women were considered to have less status than men. Pursuant to Mosaic Law, only the man had the capacity to issue the bill of divorce. In rejecting this practice, Jesus calls for a deeper respect for women. Third, Jesus, the eschatological prophet, expresses the hope that in the consummation of time the Creator’s intention for marriage would be perfectly fulfilled. The reference to “hardness of hearts” conveys the eschatological shift from accepting marriage as a mere social convention to committing to a transformative life-long relationship intended by God. This radical refashioning requires a certain interiority on the part of the spouses in the here and now.

B. Historical Development

The teaching of Jesus constitutes the foundation for the historical development of the principle of indissolubility. Jesus’ citation of Genesis points to the natural law basis for indissolubility. Even more importantly, the historical development of the principle of indissolubility is in-

8 Ibid., 336–337.
9 John Paul II, 2002 Address to the Roman Rota, 2. See Meier, A Marginal Jew: Companions and Competitors, 504. 1983 code, canon 1056: “The essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a special firmness in virtue of the sacrament.”
10 See Rodney Stark, The Rise of Christianity (San Francisco: HarperCollins, 1997) 104. Stark’s sociological analysis is a helpful although not necessarily exclusive explanation for the rise of Christianity during the first several centuries of the Church’s history.
11 See Meier, A Marginal Jew: Companions and Competitors, 337.
tertwined with the formulation of marriage as a sacrament. In my view, the understanding of the Catholic doctrine that marriage is a sacrament instituted by Christ only stands to benefit through a full encounter with the historical development. Again, I emphasize that my modest purpose is to afford only a few salient aspects of this historical development as background to the papal teaching.

1. *The Patristic Era*

Neither the patristic era as a whole, nor any single voice within it, yielded a complete theory of marriage. Rather, the thought of various patristic figures was prompted in response to an array of contemporary religious, political, social, and economic realities that were shaping the future of marriage. Not the least among these were gnostic and manichean influences that held a generally negative view of materiality and preferred chastity over marriage. Perhaps the most important contribution of the patristic thinkers was that of Saint Augustine in the fifth century. Consistent with his fundamental anthropology, Augustine linked original sin and sexual concupiscence and understood marriage as a remedy for such concupiscence. In his pastoral concern to support Christian marriage, Augustine taught that fallen nature (concupiscence) was healed and elevated through Christ’s grace. Against the Manichees, Augustine attributed a threefold good to marriage: *fides, proles, sacramentum*. Fides or the natural fidelity between the spouses means that in marriage the spouses avoid all sexual activity apart from their exclusive union. Proles is the blessing of children who continue the human race and the Church. Sacramentum

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13 In his condemnation of modernism issued through the Holy Office on July 4, 1907, Saint Pius X decreed that “If anyone states that marriage is not truly and properly one of the seven sacraments of the New Law of the Gospel, or states that the sacrament was not instituted by Christ but was invented by men in the Church, or states that it does not confer grace, let him be anathema.” Denziger-Schönmetzer, *Enchiridion Symbolorum, Definitionum et Declarationum de Rebus Fidei et Morum*, 23rd ed. (Barcelona/Freiburg i. Breisgau: Herder, 1963) no. 3451, 673. Likewise, 1983 code, canon 1055 § 1 affirms the historical claim that marriage “has been raised by Christ to the dignity of a sacrament.” The doctrine that Christ instituted the sacrament of marriage does not conflict with the reality that the theology of the sacrament enjoys a rich historical development and that the development is ongoing in the life of the Church.


15 Ibid., 100–112, 211–212.


17 Ibid.
acknowledges the theology that understands marriage as a symbolic expression of Christ’s love for the Church. For Augustine, the *sacramentum* signified the indissoluble bond between the spouses that remains for as long as both live and which “neither separation or union with another can remove.” However, the meaning of the concept *sacramentum* in the writings of patristic figures such as Augustine, Ambrose and Tertulian is far from unequivocal, and has bequeathed as its legacy the perennial problem of interpretation. At the same time, the interpretation of the meaning of sacrament should not detract from the fact that all of the great patristic figures, consistent with the teaching of Jesus, understood marriage as a life-long union.

2. Medieval Canon Law and Theology

From the end of the eleventh century to the thirteenth century, the medieval canonists affirmed indissolubility as an essential property of the contractual nature of marriage. Gratian and the school at Bologna taught that the contract requires consent and consummation. In contrast, the Parisians followed the position of Peter Lombard, which held that a valid marriage contract requires consent to conjugal society (per

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18 Augustine’s understanding of marriage as sacrament was drawn from the Pauline view that the relationship of husband and wife is analogous to that between Christ and the Church. The spouses’ love for each other is indissoluble as is Christ’s love in emptying himself and giving his life for the Church. Ephesians 5: 24–25.

19 De Nuptiis et Concupiscientia ad Valerium Comitem Libri Duo, Bk. 1, Ch. 10, in *PL* 44, 420.

20 One of the earliest uses of the term *sacramentum* in relation to marriage appears in Tertullian. It seems to have had the meaning of a religious oath or promise and also of a type or image. See e.g., *Divinae Institutiones*, PL 6: 1080; *De Monogamia*, PL 1: 920–921. Ambrose employed the word *sacramentum* in a text in which he urges husbands not to engage in extra-marital intercourse with prostitutes or slaves, but it is not at all clear from the context whether the word refers to baptism or marriage. See *De Abraham*, 4, PL 14, 431. See also Mackin, *The Marital Sacrament*, 131; 164–177; 191; 196–197, 215–227.

21 The author identified as Ambrosiaster held that divorce was permitted in certain circumstances. See *In epistulas ad Corinthios prima*, 7, 11. in *Corpus Scriptorum Ecclesiasticorum Latinorum*, vol. 81–II (Vindobonae: Hoelder, Pichler, Tempsky, 1968) 75. See also Anthony J. Bevilacqua, “The History of the Indissolubility of Marriage,” *Catholic Theological Society of America Proceedings* 22 (1972) 253–308.

22 See Witte, *From Sacrament to Contract*, 25.

verba de praesenti).\textsuperscript{24} In either case, the emphasis on consent served to weaken the feudal lord’s control over vassals and serfs, and it attested to the dignity of the human person.\textsuperscript{25} Eventually, a Roman-Parisian approach held that the free consent of the spouses creates a marriage, which is consummated through sexual intercourse.\textsuperscript{26} The compromise approach led to the question as to at what point in the contractual formation of a marriage the command of Jesus about indissolubility attached.\textsuperscript{27} The response was found in the canonical practice that permitted annulment of non-consummated marriages.\textsuperscript{28} In the thirteenth century, Saint Thomas Aquinas developed a theological understanding that integrated the consent and union into the sacramental. He held that the contract and sacramental theory functioned to annul marriages entered through fear, coercion, fraud, and mistake. The theory granted equality to husbands and wives with regard to conjugal rights (debitum). It also provided for annulment in cases of consanguinity, affinity, incapacity, non-consummation, inebriation and bigamy. It granted divorce a mensa et thoro on the grounds of adultery, heresy or cruelty. It punished abortion, infanticide and child abuse as contrary to the natural law of procreation. It encouraged relations between husband and wife based on mutual respect and self-sacrificial love. See Witte, \textit{From Sacrament to Contract}, 32–36.

\textsuperscript{24} Petrus Lombardus, \textit{Libri IV sententiarum}, 2nd ed. (Florence: Collegio di San Bonaventura, 1916) bk. 4, dist. 27.2. See Thomas P. Doyle, O.P., “Title VII, Marriage,,” in James A. Coriden, Thomas J. Green and Donald E. Heintschel, \textit{The Code of Canon Law, A Text and Commentary} (New York: Paulist Press, 1985) 812; James A. Brundage, \textit{Law, Sex, and Christian Society in Medieval Europe} (Chicago: University of Chicago, 1987) 235–242, 260–278. The emphasis on the formation of marriage through the free consent of the spouses also raised the issue of clandestine marriages often between persons when the consent of their parents could not be obtained. The common opinion was that those who married secretly did so illicitly but that the marriage was nonetheless valid. See idem, \textit{Law, Sex, and Christian Society in Medieval Europe}, 187–188.

\textsuperscript{25} See Michael M. Sheehan, C.S.B., “Marriage of the Unfree and the Poor,” in James K. Farge, ed., \textit{Marriage, Family, and Law in Medieval Europe} (Toronto: University of Toronto Press, 1996) 211, 246. He concludes that by the fourteenth century, the medieval canon law had developed with the result that marriage was available to even the poorest adults at the lower socio-economic levels of society. The fully developed canonical theory functioned to annul marriages entered through fear, coercion, fraud, and mistake. The theory granted equality to husbands and wives with regard to conjugal rights (debitum). It also provided for annulment in cases of consanguinity, affinity, incapacity, non-consummation, inebriation and bigamy. It granted divorce a mensa et thoro on the grounds of adultery, heresy or cruelty. It punished abortion, infanticide and child abuse as contrary to the natural law of procreation. It encouraged relations between husband and wife based on mutual respect and self-sacrificial love. See Witte, \textit{From Sacrament to Contract}, 32–36.

\textsuperscript{26} Pope Innocent III (1189–1216) confirmed the teaching about the formation of marriage. See X 4.1.25; 4.4.5; 4.5.6.

\textsuperscript{27} See James A. Coriden, \textit{The Indissolubility Added to Christian Marriage by Consummation: An Historical Study of the Period From the End of the Patristic Age to the Death of Pope Innocent III} (Rome: Officium Libri Catholici, 1961) 49–50.

\textsuperscript{28} This practice had been approved by Gratian. See C. 27 q. 2 d.p.c. 2, d.p.c. 29, d.p.c. 45. The medieval theory also annulled marriages on the basis of the Pauline Privilege (1 Corinthians 7: 12–15), which permitted a newly converted Christian to remarry if their former, non-Christian, spouse departed. See John P. Beal, “Chapter IX, Separation of the Spouses,” in John P. Beal, James A. Coriden and Thomas J. Green, eds. \textit{New Commentary on the Code of Canon Law} (Mahwah, New Jersey: Paulist Press, 2000) 1361–1362.
ment constitute one reality characterized by a lifelong and intimate union of the spouses. Thomas distinguished three phases in the institution of the sacrament. Prior to the Fall, marriage fulfilled the natural need for procreation. Subsequent to the Fall, the lapsarian status of humanity required the natural healing through the Mosaic law. In the new law, Christ instituted the sacrament of marriage as an indissoluble relationship. Pursuant to the image of Ephesians 4: 24–25, Thomas agreed with Augustine that the sacrament reflects Christ’s relation to the Church.

However, the high contractual and sacramental theory developed by the canonists and theologians did not result in a rigid jurisprudence in the ecclesiastical courts. During the latter middle ages, the principle of indissolubility met certain legal exceptions, and it was not altogether difficult to evade the rule in a canonical tribunal.

3. Reformation and Trent

The contradiction between the principle of indissolubility and the practices of the ecclesiastical courts counted among the abuses to which the Protestant Reformers objected. Following the lead of Martin Luther, the Protestant reformers had denied that marriage was one of the seven sacraments instituted by Christ. In January of 1547, the Council

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of Trent responded to the Protestant position and declared the validity of all seven sacraments.\textsuperscript{34} In 1563, the council specifically addressed the Catholic understanding of marriage to confirm the tradition that it constitutes an indissoluble union intended by Christ.\textsuperscript{35} In the same year, the decree \textit{Tametsi} recognized that the spouses are the ministers of the sacrament, which must be witnessed by a priest and at least two other persons.\textsuperscript{36} The decree anathematized those who held that the invalidity of a marriage entered into by the spouses without the consent of their parents.\textsuperscript{37} However, the council declined to adopt proposed language in canon 7, which would have anathematized Greek Catholics who followed the Orthodox discipline that permitted divorce and remarriage for the innocent party following adultery.\textsuperscript{38} As promulgated, the anathema of canon 7 stated: “If anyone says that the Church errs when it has taught and still teaches . . . that the bond of marriage canont be dissolved because of adultery . . .”\textsuperscript{39} The actual wording thus confirmed Roman Catholic discipline and condemned Protestants who had claimed the error, even as it permitted the Greek Catholic practice to continue.\textsuperscript{40} Their concern for ecclesial unity notwithstanding, the bishops at Trent were clear that marriage is in nature and sacrament an indissoluble union.\textsuperscript{41}

4. \textit{Secularization and the Catholic Response}

While the Protestant complaint called attention to the contradiction between indissolubility and tribunal practice, it also paved the way for

\textsuperscript{35} See \textit{Doctrina de sacramento matrimonii}, in Tanner, 2:753.
\textsuperscript{36} See \textit{Canones super reformatione circa matrimonium}, Ch. 1, in Tanner, 2: 755–756.
\textsuperscript{37} Ibid.
\textsuperscript{38} See Mackin, \textit{The Marital Sacrament}, n. 70, 447–448.
\textsuperscript{39} See \textit{Canones de sacramento matrimonii}, 7, in Tanner, 754–755.
\textsuperscript{40} See Mackin, \textit{The Marital Sacrament}, n. 70, 447–448.
\textsuperscript{41} The Council of Trent did not fully resolve the question of whether the contract might be separated from the sacrament in marriage. In refutation of Melchior Cano, Saint Robert Bellarmine held that marriage enjoyed a certain degree of indissolubility (\textit{quamdam indissolubilitatem}) in contractual nature, but that through divine institution, marriage becomes the sign of the absolutely indissoluble union between Christ and the Church. See \textit{Disputationum Roberti Bellarmini, De Controversis Christianae Fidei Adversus Huius Temporis Haereticos} (Venice: apud Ioannem Malachinum, 1721) 617–619.
the process of secularization. It was Enlightenment thought, however, that required complete secularization. Eighteenth century theorists such as John Locke tended to reduce marriage to a civil contract, which could be formed and broken through the will of the parties. Although the Enlightenment was not a monolithic movement, suffice it to say that by the conclusion of the twentieth century, the Enlightenment approach had gradually eroded and supplanted religious perspectives. During the twentieth century, the preservation of the Catholic tradition was evident in canon 1013 of the 1917 code which identified the essential properties of the sacrament of marriage as unity and indissolubility. At Vatican II, Gaudium et spes expressed the concern that marriage and family life were under attack as a result of negative social, political, and legal conditions. In defense of the sacredness of marriage, the conciliar decree recognized the bond of love between the spouses and the procreation of children as the co-equal ends of marriage. This recognition opened the possibilities for a deeper and more profound understanding of the meaning of human sexuality. At the same time, the tribunals of the Church

42 Luther's attack on the sacramentality of marriage also called for the transfer of jurisdiction over marriage from the ecclesiastical to secular authorities. See Witte, From Sacrament to Contract, 53–61.


44 See Witte, From Sacrament to Contract, 202–215.

45 1917 code, canon 1013: “§ 1. The primary end of marriage is the procreation and education of children; the secondary is the mutual support and remedy for concupiscence. § 2. The essential properties of marriage are unity and indissolubility, which in Christian marriage attain a special permanency by way of the sacrament.” Father Felix Cappello, S.J., distinguished between intrinsic and extrinsic indissolubility. Intrinsic indissolubility applies to all marriages without regard to whether or not the parties are baptized, and means that the marriage may not be dissolved by the will of the spouses. Extrinsic indissolubility recognizes that the competent ecclesiastical authority has the power to dissolve marriage under certain circumstances as, for example, pursuant to the Pauline Privilege or in privilege of faith cases. See Felix M. Cappello, S.J., Tractatus Canonico-Moralis de Sacramentis, vol. V, De Matrimonio (Rome: Marietti, 1961) n. 45.


47 See Gaudium et spes, 48; Flannery, 950.

both in the particular churches and at the level of the Holy See have dis-cerned that the formation of the sacramental bond of the spouses can often be inhibited by various factors.\(^49\) The work of the tribunals properly understood constitutes an affirmation of the Catholic understanding of the indissolubility of marriage.\(^50\)

II. *The Principle of Indissolubility*

An essential aspect of the predominant secularized view of marriage and family life remains the focus of the subjective autonomy of the individual person. The modern perspective defines freedom as the absence of restraint placed on the individual through governmental and other institutional sources of authority.\(^51\) The consequences of this approach are increasingly evident in the Western world. During the last fifty years in the United States, for example, the divorce rate has rapidly accelerated with the result that almost fifty percent of all marriages end in divorce.\(^52\) Recent studies have strongly suggested that the culture of divorce has caused serious problems both for the spouses and their children. In a landmark longitudinal study, Judith Wallerstein has documented the emotional and financial damage done to women and children as a result of divorce.\(^53\) The work of Linda Waite and Maggie Gallagher further supports the conclusion that persons in intact families are generally better off financially and emotionally than their counterparts from divorced


\(^{53}\) See Judith S. Wallerstein, Julia M. Lewis and Sandra Blakeslee, *The Unexpected Legacy of Divorce, A 25 Year Landmark Study* (New York: Hyperion Press, 2000) 294–316. On the basis of a twenty-five year longitudinal study, the authors conclude that divorce has left damaging social, psychological, and financial effects on spouses and children.
families.\textsuperscript{54} During the last three decades of the twentieth century in the United States, more than thirty percent of children were born to single mothers; almost seventy percent of the young persons convicted of serious felonies were raised in single or non-parent homes; and over twenty percent of pregnancies ended in abortion.\textsuperscript{55}

Concerned about this distressing picture of contemporary Western society, Pope John Paul II has articulated a call to renew the Catholic tradition on marriage. His attention to the principle of indissolubility, which constituted the vast portion of his January 2002 address, was directed specifically to the officials of the Roman Rota, but clearly was also intended as an encouragement to Catholics and all persons of good will.\textsuperscript{56} The papal analysis contrasts positive and negative conceptions of freedom.\textsuperscript{57} Negative freedom views indissolubility as a restriction on the autonomy of individuals. It sees indissolubility as an extrinsic imposition that offends the subjective preference of the person. It denies the necessity of life long and exclusive commitments for the good of individuals and society as a whole. In contrast, positive freedom understands marriage as a fundamental good. It is a "freedom for" rather than merely a "freedom from." It testifies to the natural human capacity to consent to an indissoluble covenant. It recognizes that marriage is more than a contract based on subjective preference, but rather an objective social reality.\textsuperscript{58} The pope is suggesting that individual human fulfillment as well as a healthy social reality depends on the correct balance between negative and positive conceptions of freedom. In his analysis, true freedom cannot be in opposition to marriage thus understood.\textsuperscript{59}

An important part of a balanced perspective on freedom depends on an appreciation of the sacred nature of the marital covenant. In the Catholic understanding of marriage, the natural capacity of the person for consent to an enduring and intimate relationship is enhanced by the grace that the

\textsuperscript{54} See Linda J. Waite and Maggie Gallagher, \textit{The Case for Marriage, Why Married People Are Happier, Healthier and Better Off Financially} (New York: Doubleday, 2000) 82–83, 123. On the basis of statistical surveys, they conclude that married persons and their children in general are emotionally and financially better-off than divorced persons and their offspring.


\textsuperscript{56} See John Paul II, 2002 address to Roman Rota, 5.

\textsuperscript{57} Ibid., at 2.

\textsuperscript{58} Ibid., 9.

\textsuperscript{59} Ibid., 4.
spouses receive in a sacramental marriage. Such an appreciation is essential to understanding the Western tradition of marriage, which took root in this religious perspective. A core component of the religious perspective is the evangelical focus on self-sacrifice as essential to the individual, family and ecclesial well being. The Pauline analogy of Christ's donative love means that the spouses in marriage understand what they are undertaking and are sufficiently self-possessed so that they have the capacity to give themselves away to each other. For the Catholic spouses in a sacramental marriage, the positive freedom is not simply a natural good but a supernatural reality. From this sacramental perspective, an indissoluble commitment is not only possible but a reality in accord with the teaching and example of Christ.

III. Application to Lawyers

The affirmation of the indissolubility of marriage does not mean that the Holy Father is unaware of or unsympathetic to the unfortunate, often tragic, circumstances in which divorced persons find themselves. He has urged pastoral sensitivity and charity for persons who are divorced. The pope has also spoken forcefully about the equality and dignity of women, offenses against women, abuse of children, and abandonment of spouse and children. As mentioned at the outset, the controversy surrounding John Paul II's allocution is attributable to several brief sentences, which appear toward the conclusion of his talk. Given the significance of the indissolubility of marriage, the Pontiff cautioned that "professionals in the field of civil law should avoid being personally involved in anything that might imply cooperation with divorce." Perhaps, a literalist reading of this statement would seem to establish a rule that a Catholic lawyer can never handle a divorce case. In my opinion, a

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60 See 1983 code, Canon 1055 § 1: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized."


63 See Wojtyla, Love and Responsibility, 126–129.

64 See e.g., John Paul II, apostolic constitution, Familiaris consortio, November 22, 1981, no. 84; AAS 74 (1982) 81–191.

65 Ibid., 23–24.

66 John Paul II, 2002 address to Roman Rota, 9.
more balanced interpretation is warranted from the both the text itself and its context in the Catholic tradition.

A. Lawyers As Autonomous Agents

Let me first consider the case of lawyers as independent professionals. In order to understand exactly what the Holy Father said, it is helpful to recall his entire statement:

Lawyers, as independent professionals, should always decline the use of the profession for an end that is contrary to justice, as is divorce. They can only cooperate in this kind of activity when, in the intention of the client, it is not directed to the break-up of marriage, but to the securing of other legitimate effects that can be obtained through such a judicial process in the established legal order (cf. *Catechism of the Catholic Church*, n. 2383). In this way, with their work of assisting and reconciling persons who are going through a marital crisis, lawyers truly serve the rights of the person and avoid becoming mere technicians at the service of any interest whatever.67

To start, the quoted text contains a qualification in its application. It pertains to lawyers as “independent professionals.” Lawyers are independent to the extent that they enjoy autonomy in the selection of their clients. The recognition coincides with the classical description of the lawyer as an autonomous agent with the right to accept or decline certain cases and clients.68 Lawyers are professional in that they are to put self-interest in a secondary position to the interests of their clients.69 The professional’s counsel and advocacy intend to set the optimal conditions for the genuine human fulfillment of the client. Membership in a profession also implies that lawyers are expected to contribute to the common good.70 They are

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67 See John Paul II, 2002 address to Roman Rota, 9.
not "mere technicians" devoted to their craft without concern for the con-
sequences of the service rendered.\textsuperscript{71}

The first sentence of the quotation refers to the Catholic lawyer as an
independent professional who is not to act contrary to justice in a divorce
case. The lawyer who enables a client with an evil intention to acquire a
judicial sentence of divorce formally cooperates in evil. Divorce based
on subjective preference contradicts the principle of indissolubility. The
pope's prohibition urges the Catholic lawyer not to contribute to the cul-
ture of divorce. In this regard, Catholic lawyers, especially those who are
public officials, have an affirmative duty to work for laws that respect the
sanctity of marriage and family life.\textsuperscript{72}

The second sentence of the quotation establishes a significant excep-
tion to the prohibition. It allows that lawyers may cooperate in divorce
cases depending on the good intention of the client. According to tradi-
tional Catholic moral analysis, cooperation in the bad will of another con-
stitutes sinful formal cooperation.\textsuperscript{73} The spouse who seeks the breakup of
marriage through divorce merely as a matter of personal convenience, to
remarry another person who seems more desirable at a given moment, or
for personal financial gain as a result of the distribution of the marital as-
sets, exemplifies the bad will with which an independent professional
should decline to cooperate. In contrast, an individual may seek divorce
for a variety of morally valid reasons. The quotation cites the \textit{Catechism
of the Catholic Church}, which identifies several legitimate effects of a
civil decree of divorce:

If civil divorce remains the only possible way of ensuring certain
legal rights, the care of the children, or the protection of inheri-
tance, it can be tolerated and does not constitute a moral offense.\textsuperscript{74}

This statement helps to clarify the intention of the client. First, civil di-
vote must be the only possible option open to the client to ensure certain

\textsuperscript{71} See Coughlin, "Natural Law, Marriage, and the Thought of Karol Wojtyla," 1773.

\textsuperscript{72} See John Paul II, 2002 address to Roman Rota, 9.

\textsuperscript{73} St. Alphonsus Liguori articulated the classic statement about cooperation: "That
[cooperation] is formal which occurs in the bad will of the other, and it cannot be without

\textsuperscript{74} \textit{Catechism of the Catholic Church} (Vatican City: Liberia Editrice Vaticana, 1994)
573, n. 2383.
legal effects. Second, the three legitimate effects identified include the protection of individual rights, the well-being of the children and proper stewardship of personal wealth such as that gained through inheritance. It follows that a Catholic lawyer may represent a client who seeks a divorce when all other options have failed and the client intends a legitimate effect rather than the mere break-up of the marriage. This is not a prohibited formal cooperation because the intention of the client is not an evil one.

It must, of course, be remembered that civil divorce does not dissolve the natural and sacramental bond of marriage. As the Holy Father recalls earlier in this talk, marriage always enjoys the favor of law. Prior to granting an annulment of a marriage, the ecclesiastical tribunals of the United States require that the parties have secured a civil divorce. The main point of the Holy Father's allocution to the officials of the Roman Rota focuses on the indissolubility of marriage. He, nevertheless, recognizes that the mission of the ecclesiastical tribunals "belongs to the whole area of pastoral service" which is indispensable for "authentic charity." A married person, who has secured a civil divorce, enjoys the legal right to request that a Church tribunal consider a nullity of marriage case. The civil lawyer, who assists the right intentioned person in securing the civil divorce, serves as a necessary instrument that prepares the way for the exercise of justice and charity by the ecclesiastical tribunal.

As the Catholic lawyer's determination turns on the intentionality of the client, the issue arises of how to reach a judgment about the good will of the client. Sometimes a person's intentionality is clear and unilateral, but given the tangle of somatic, emotional, intellectual, and spiritual factors that might lead one to seek a divorce, motivations are often mixed and complicated. Appreciating the vulnerability and confusion of the client

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75 See 1983 code, canon 1141: "A marriage that is ratum et consummatum can be dissolved by no human power and by no cause, except death."
76 See 1983 code, canon 1060: "Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven."
77 See Grisez, Difficult Moral Questions, 179, who suggests that the reason for this approach is that the tribunals do not want to encourage separation of the spouses or open the diocese to suit as a result of the annulment process.
78 John Paul II, 2002 Address to the Roman Rota, 1.
79 1983 code, canon 1674, 1º, specifying that the spouses are qualified to challenge a marriage.
80 See Karol Wojtyla, The Acting Person, Andrzej Potocki, trans. (Dordrecht: D. Reidel Publishing, 1979) 54–56. He discusses the complexity of the emotions and feelings of
who seeks to initiate divorce proceedings, the conscientious Catholic lawyer must recognize the limitations of professional competencies. Referral for appropriate counseling to a priest, religious, marriage counselor and/or psychiatric professional may serve to insure that every possibility for reconciliation has been exhausted prior to a hasty or malformed decision on the client’s part. Such a practice is one means through which the Catholic attorney can assist the client in forming the right intention. For one who finds meaning in Catholic faith, it will be of enduring value to know that he or she has exhausted the human possibilities to enable reconciliation and avoid divorce. This is the peace that comes from believing that one has surrendered oneself to divine grace.

At the same time, the attorney’s legal counseling of a client almost necessarily touches upon the client’s motivations and reasons for seeking the effects of the judicial process. This affords the attorney, within the proper parameters of professional competency, the opportunity to assist the client in clarifying and evaluating motivations. In most cases, this process will result in greater clarity for the client and attorney. Undoubtedly, there will still be a few difficult cases, when even subsequent to appropriate referral and counseling, the attorney remains uncertain about a client’s decision. In such cases, the Catholic attorney should proceed only in accord with a conscientious and informed prudence. In my opinion, truly doubtful cases must be resolved in favorem matrononii.

B. Judges, Lawyers and Material Cooperation

Not all lawyers find themselves in a position of complete autonomy with regard to the legal services that they may render. Pope John Paul II acknowledges that some professionals in the field of civil law, and he expressly mentions judges, may find that it is burdensome, if not practically

the human person for the purpose of moral action. See also Lynda Robitaille, “Evaluating Proofs: Is It Becoming A Lost Art?,” The Jurist 57 (1997) 541, 548, who suggests the importance of the judge’s human qualities in evaluating the statements by parties and witnesses.

81 See Coughlin, “Natural Law, Marriage, and the Thought of Karol Wojtyla,” 1785.
82 See Kenneth Kressel, et al., “A Provisional Typology of Lawyer Attitudes Towards Divorce Practice; Gladiators, Advocates, Counselors and Journeymen,” in Frederica K. Lombard, ed., Readings in Family Law (1990) 123. This article discusses the roles of counselor and advocate of the attorney in a divorce case.
impossible, to avoid involvement in divorce cases. When an exemption is possible, legal professionals should refuse to cooperate as a sign of "conscientious objection" to an unjust legal arrangement. Nonetheless, continued employment, financial security for self and family, as well as the opportunity for legitimate advancement may depend on cooperation in divorce cases. The pope advises such judges and legal professionals to act in accord with the traditional Catholic principles of material cooperation. St. Alphonsus Liguori articulated the classic statement about material cooperation. Material cooperation in another's evil act is permissible when: (1) the cooperator's act is good or indifferent in itself; (2) the cooperator has a reason for acting that is just; and (3) the cooperator's reason is proportionate to the gravity of the wrongdoing and to the closeness of the assistance.

1. The Act and its Reason

The first and second of Alphonsus' conditions are quite similar, and I shall treat them together. In the context of divorce, the "wrongdoer" is the moving party who seeks the divorce for an illegitimate end. An illegitimate end falls outside the specific parameters identified above. When it is clear that the party seeking divorce has an illegitimate end, the motivation and object of the cooperator's action must remain distinguishable from that of the wrongdoer. The distinction may be identified in such legitimate acts and reasons as, inter alia: continued employment and the financial care of self and other dependents; service to the legal system and the provision of justice in general; and the individual and collective opportunities to bring the Catholic tradition into divorce law.

85 John Paul II, 2002 Address to Roman Rota, 9: "For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation."
86 "That [cooperation] is material which occurs only in the bad action of the other, apart from the cooperator's intention. But the latter [material cooperation] is licit when the action is good or indifferent in itself; and when one has reason for doing it that is both just and proportioned to the gravity of the other's sin and to the closeness of the assistance which is thereby given to the carrying out of that sin." St. Alphonsus Ligouri, Theologia Moralis, 1905-12, 1:357 (lib. II, §63), cited in Grisez, Difficult Moral Questions, 876.
87 See Grisez, Difficult Moral Question, 876. He observes that the first two of the conditions are similar and do not generally present difficult problems of analysis.
2. Proportionality

The third of the traditional conditions for morally permissible material cooperation raises the issue of proportionality. Since the issues surrounding proportionality almost always need to be considered in light of the facts of a particular case, I shall limit my discussion to several more generic issues in relation to material cooperation in divorce. As shall be evident, questions of proportionality do not easily admit clear answers. I shall first discuss proportionality in terms of the moral gravity of divorce, and second consider proportionality in relation to the closeness of the assistance rendered.

a. The Gravity of the Wrongdoing

When considering proportionality in relation to the “gravity of the wrongdoing,” one might recall Pope John Paul’s metaphor that divorce has “spread through the social body like a plague.” Consistent with the pontifical metaphor, in order to fulfill the third condition it would seem that material cooperation in the spreading of a plague would require a countervailing reason of a rather significant gravity. An individual stance by a prominent Catholic jurist, who is known to decline divorce cases, may make a statement about the evils associated with divorce. The impact of a significant group of Catholic judges and attorneys who refuse to cooperate in divorce could prove considerable. Given the culture of divorce, such a stance would possess prophetic meaning.

Additionally, one must consider the scandal created by the cooperation of Catholic jurists in divorce cases. Sometimes the fact that good persons cooperate in the wrong of divorce may communicate the message that divorce is not so evil after all. This is almost certainly to be the interpretation adopted by the parties to the divorce. The damage that is done to the individual and the Catholic community by such scandalous conduct could weaken many persons’ willingness to make the sacrifices

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88 See John Paul II, 2002 address to the Roman Rota, 9. See also Rodes, “Forming An Agenda-Ethics and Legal Ethics,” 984–985.
89 See Grisez, Difficult Moral Questions, 876–889.
91 Pope John Paul II, 2002 address to Roman Rota, 8, citing Gaudium et spes, n. 47.
92 See Grisez, Difficult Moral Questions, 881.
necessary to keep a marriage together. The scandal might also communicate to other judges and lawyers that cooperation in evil such as divorce is somehow morally acceptable.

Finally, one must consider the bad effects of the cooperation in proportion to the good that is to be accomplished. Children in particular are the victims of divorce. Prior to divorce, they have likely experienced significant disharmony in family life as the parents begin to manifest the stress and anxiety that inevitably accompany the decision to separate. Children in these circumstances are already in need of healing and reconciliation. To the contrary, divorce will likely only exacerbate the difficulties. The message that is communicated to them may well contradict the truth about the indissolubility of marriage and the sanctity of family life. The cooperator thus facilitates the general breakdown of that unit which is so necessary to the education of children and the stability of society.

These kinds of social and individual evils must weigh heavily against material cooperation in divorce. On the other hand, if every Catholic judge and legal professional must refrain from such material cooperation, the effect could be to diminish or even eliminate the possibility for the "wisely handled reconciliation" envisioned by the Holy Father. Both in individual instances and for society as a whole, the Catholic lawyer is in a privileged position. He or she brings the truth of Catholic faith to the situation. The Catholic lawyer serves as an instrument of truth about indissolubility as well as the compassion of Christ.

b. Closeness of Assistance

When considering proportionality in terms of the closeness of assistance, the assistance is often characterized as proximate or remote. The assistance of a professional such as a judge or attorney is almost always likely to be proximate in that their action directly facilitates the divorce. Although it is proximate, forgoing the cooperation will in all likelihood not prevent the divorce. While a Catholic judge might recuse him/herself from a divorce case, the unfortunate reality remains that there are probably at least several other judges in the jurisdiction who will be willing to hear the case and not be guided by considerations of the indissolubility.

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93 See Wallerstein, *The Unexpected Legacy of Divorce*, 296.
94 John Paul II, 2002 address to Roman Rota, 9.
95 See Sabetti and Barrett, *Compendium Theologiae Moralis*, n. 194, 190.
of marriage. To an even greater extent, it seems fair to assume that this is the situation with regard to the availability of divorce lawyers.

The interpersonal nature of a Catholic lawyer’s cooperation in divorce also raises an issue of proportionality in regard to the closeness of the assistance rendered. Continuous interaction with wrongdoers “tends to generate psychological bonds and interdependence.”\(^9^6\) The initial decision about material cooperation in a given case might be well reasoned. As continuous opportunities for cooperation present themselves, the cooperator may become less careful in reaching a moral decision about whether participation in the case is justifiable. Moreover, we tend to become what we do.\(^9^7\) The more that one cooperates in divorce cases, the more one may discover a personally diminished capacity in terms of one’s own ability to resist evil.

Alternatively, a Catholic attorney, with the correct intention, might in fact be strengthened through confrontation with the evil of “the divorce mentality.”\(^9^8\) Encountering the fallen nature of the human situation could serve to reinforce the truth of Christ’s teaching and the Church’s tradition on divorce. As St. Paul said, “Where sin abounds, grace abounds all the more.”\(^9^9\) Such a lawyer would exercise the priesthood of all the baptized in dealing with divorced persons and their family members. This is precisely the role identified for the laity at Vatican II.\(^1^0^0\)

**Conclusion**

Pope John Paul II’s advice to lawyers about divorces cases was a bit more nuanced than the media depicted. The papal position reflects the radical teaching of Jesus and its rich development through two millennia of Catholic tradition. Given the culture of divorce and its negative impact on individuals and society, the Holy Father has affirmed the principle of indissolubility to advance the sanctity of marriage and family life. In accord with the principle, Catholic lawyers should not contribute to the culture of divorce, but they should be active participants in establishing a legal order that promotes genuine human fulfillment and social well


\(^9^8\) John Paul II, 2002 address to the Roman Rota, 5.

\(^9^9\) Cf. Rom. 6: 1.

being. When divorce remains the only way to ensure certain good effects, the lawyer as an independent professional may facilitate the case consistent with the right intention of the client. For judges and lawyers who enjoy less autonomy in the selection of cases, the traditional norms of material cooperation apply. This requires a careful consideration of the issues of proportionality. The application of the norms of proportionality does not afford simple answers and must be considered on a case by case basis. The Catholic judge or attorney who handles a divorce case should guard against an unreflective and technical approach, and rather always be guided by the truth of the tradition, which respects individuals and the common good.