The Natural Law, the Marriage bond, and Divorce

Brendan F. Brown

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Brendan F. Brown, The Natural Law, the Marriage bond, and Divorce, 24 Fordham L. Rev. 83 (1955). Available at: https://ir.lawnet.fordham.edu/flr/vol24/iss1/5

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
The Natural Law, the Marriage bond, and Divorce

Cover Page Footnote
Robert E. McCormick; Francis J. Connell; Charles E. Sheedy; Louis J. Hiegel

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol24/iss1/5
THE NATURAL LAW AND THE FAMILY

I. THE NATURAL LAW DICTATES MONOGAMY

Natural law is that objective, eternal and immutable hierarchy of moral values, which are sources of obligation with regard to man because they have been so ordained by the Creator of nature. This law conforms to the essence of human nature which He has created. It is that aspect of the eternal law which directs the actions of men. Although this law is divine in the sense that it does not depend on human will, nevertheless, it is distinguishable from divine positive law, which has been communicated directly from God to men through revelation, for natural law is discoverable by reason alone. Natural law has been promulgated in the intellect. At least as regards its more fundamental principles it is knowable proximately through the conscience.

The most basic ideal of this law, namely, that every man must live in accordance with his rational nature, so that he will do good and avoid evil, is self-evident to all. No reasoning is required to reach a knowledge of this ideal. But other parts of the natural law are not perceivable with an equal degree of facility. Varying gradations and types of reasoning...
are necessary to ascertain the sub-norms of that law. Some of these are discoverable by an immediately derived deduction, which is almost obvious, such as the requirement of some form of marriage or contractual agreement before a man and a woman can lawfully have sexual relations. But other sub-norms are ascertainable only after observation, study, and experience, both individual and sociological. Examples are the secondary goal of marriage, and the precise means for the just and adequate effectuation of the primary and secondary purposes of marriage.

The necessity of some kind of marriage, either polygamous or monogamous, dissoluble or indissoluble, is obviously deducible from the basic ideal of the natural law, since without propagation and the rearing of children, the human race would become extinct. This ideal demands some form of abiding union between man and woman, even if it be only for a limited period. All men realize that there must be some fixed, definite and settled arrangement, which will enable man and woman not only to procreate, but also to protect the offspring until they are capable of looking after themselves. It is self-evident that marriage differs from the mating of animals, to the extent that will and reason are distinguishable from blind instinct. No demonstration is needed to show that marriage must uphold the unique dignity of human personality.

The study of cultural anthropology reveals the historical fact that practically all peoples have attached an inherently sacred and religious character to marriage, which they have expressed by special and symbolic rites of a public and solemn kind. These rites became part of their traditions, customs and laws, which recognized that marriage is not of human, 

7. See Petrovits, The New Church Law on Matrimony (1921). On page 1, he writes: "Marriage in General. The word matrimony is a compound derived from the two Latin words, namely, matris munium meaning the office of the mother. The burdens inherent in gestation, the pain accompanying parturition, and the numerous anxieties subsequent to childbirth, being indicative of the most intimate relationship between mother and child, are generally adduced as the reason why the word mother in preference to the word father has been embodied in the name of this Sacrament."
8. Pope Pius XI, Encyclical Letter, Christian Marriage (Casti Connubii), December 31, 1930, Translation published by the National Catholic Welfare Conference, Washington, D.C. (1931). This Encyclical elaborates and emphasizes certain points in the Encyclical Arcanum of Pope Leo XIII, published fifty years previously, namely, on February 10, 1880. The chief purpose of Casti Connubii was to reaffirm the basic thought of Arcanum in the light of conditions which adversely affected the society of the family at the beginning of the thirties. See also Pope Pius XII, Address to the Italian Catholic Union of Midwives, October 29, 1951, Translation included in Moral Questions affecting Married Life, Discussion Outline by Rev. Edgar Schmiedeler, O.S.B., Ph.D., Director, N.C.W.C. Family Life Bureau, National Catholic Welfare Conference, 18 parag. 49.
but of divine origin, in which man does not create life but only cooperates with Divinity in its transmission.  

Man is obliged in his choice of institutions to select only those which are in agreement with the natural law. This is particularly true of marriage since it is one of the most important, affecting as it does, the spiritual and temporal welfare of the whole human race by determining the status of the family which is the foundation of society. According to the natural law, there is an obligation to adopt that form of marriage which will best achieve not only the almost self-evident objective of satisfying the urge toward propagation, and care for the physical needs of children, and their moral and educational training, but also the secondary purpose, namely, the mutual assistance of the spouses, physical, mental and spiritual, and the allaying of concupiscence.

But the precise form of marriage which is commanded by the natural law is not immediately apparent and known to all, for it does not pertain directly to the primary inclination of that law. The prescribed type of marriage is not a primarily derived deduction from the basic ideal of the natural law, as are the prescriptions of the Decalogue, for example. This explains why there is more agreement that murder is against the natural law than there is that divorce is morally wrong.

The characteristics of unity and indissolubility in regard to marriage are secondary conclusions from the natural law, like the right of a worker to a living wage. They are not readily obvious because they relate to the secondary end of marriage, and to ways and means for best reaching


10. Pope Pius XI, Encyclical Letter, Christian Marriage, op. cit. supra note 8 at 3, and Pope Pius XII, Address to the National Congress of the “Family Front” and the Association of Large Families, November 26, 1951, Translation included in Moral Questions affecting Married Life, supra note 8 at 24, parag. 1.


12. It should be noted that there is another nomenclature to express the varying gradations of the natural law. Thus sometimes the basic or most universal principle is called the primary precept, while an immediate deduction is referred to as a secondary precept rather than as a primary deduction. According to this nomenclature, a more remote conclusion would be called a tertiary precept of the natural law rather than a secondary conclusion. See Connell, Outlines of Moral Theology 29, 30 (1953); Sheedy, The Christian Virtues 33-35 (1951), and Letter, October 10, 1954, to Brendan F. Brown. The marriage bond is the formal cause of marriage; man and woman, the material cause; the wills of the parties, the proximate efficient cause, the natural appetites, the remote efficient cause; and the procreation and education of children and the natural aid of spouses are the final cause. See Ryan, Philosophy of Marriage and the Family, in Marriage and Family Relationships (edited by Clemens) 42 at 49-54 (1950).
the primary and secondary goals.  
Reasoning and study are required to distinguish between perfect and imperfect means, and to recognize the secondary objective of marriage, but not in regard to the abnegation of means altogether. Lifelong monogamy is morally necessary for the attainment of man’s ethical life, and the aims and functions of marriage. This becomes clearer when it is contrasted with the only other type of marital relationship, namely, polygamy.

It is manifest that polyandry, i.e., that type of polygamy found in history in which one woman has two or more husbands at the same time, is the worst possible matrimonial arrangement, for if it does not entirely suppress the primary end of marriage, at best it places obstacles to its realization. Polyandry contravenes the most important purpose of marriage, for it curtails generation, casts doubt on paternity, and interferes with the proper upbringing of children. It is not necessary to have recourse to the rational faculty of deduction and induction, to any considerable extent, to know that polyandry, like murder, may never be reconciled with any part of the natural law under any circumstances.

Neither polygyny, i.e. that form of polygamy, where one man has more than one wife at the same time, nor successive polygamy, which results from the exercise of the right of remarriage after divorce, when the former spouse, either husband or wife, is still alive, entirely suppresses or prevents the attainment of the primary end. But neither perfectly achieves the primary goal, and both are directly opposed to the secondary. Both attain the secondary goal better than polyandry, and, strictly speaking, may be reconciled with the essential demands of nature, in those exceptional situations which are sanctioned by supernatural law. But only indestructible monogamy will adequately make possible the complete fulfillment of all the duties which have been imposed on

14. 4 Davis, Moral and Pastoral Theology 49 (1936): “Marriage is the lawful contract between man and woman by which is given and accepted the exclusive and perpetual right to those mutual bodily functions which are naturally apt to generate offspring.” Ryan, Philosophy of Marriage and the Family in Marriage and Family Relationships, op. cit. supra, note 12 at 54: “The matrimonial bond is indissoluble because it is ordained to a function which is not arbitrary or temporary, but durable and permanent.” Vermeersch, A Catechism arranged according to the Encyclical “Casti Connubii” of Pope Plus XI (trans. by Bouscaren), under title What is Marriage (1950) and following. See Canon 1110.  
15. Individual Ethics and Social Ethics, a Digest of Lectures for Students of Fordham University, 59, 60.  
16. Bouscaren and Ellis, op. cit. supra note 9 at 457.  
17. Individual Ethics and Social Ethics, a Digest of Lectures for Students of Fordham University, 60, 61.  
19. Id. at 26-31.
husband and wife by the natural law. Hence, marriage under the natural law may be defined as a lawful, exclusive, and lifelong contract between a man and a woman, by which is mutually given and accepted a right to those physical functions for the performance of acts which are mutually apt for the generation of children, resulting in a status primarily intended for the care and education of children, and secondarily for the mutual help of the spouses and the allaying of concupiscence.

II. IT IS PARADOXICAL TO REJECT ONE KIND OF POLYGAMY AND TO ADOPT ANOTHER

Today in this country, there is no problem of simultaneous polygamy. The peoples of the Western World of Christendom have always rejected the institution of simultaneous polygamy, both temporary and permanent, whether it assumed the form of polyandry or polygyny. Indeed all civilized peoples have repudiated the practice of polyandry and only a few have sanctioned polygyny. But it is paradoxical for those nations which refuse to accept simultaneous polygamy to legalize successive polygamy, in the way of easy divorce with the right of remarriage. The same reasons which prompt the rejection of the former, even though it is for the life of the spouses, are applicable to the latter.

Why do the American people reject the doctrine of simultaneous polygamy? It is because they are aware that the natural law requirement of a maximum contribution on the part of the parent is diluted, that unreasonable and unnecessary opportunity is afforded for generative activity, so that the physical aspect of marriage tends to obscure the rational, and that even if a plural marriage was indissoluble, there never could be that complete surrender and cooperation of the spouses which are required for the adequate fulfillment of the primary and secondary purposes of marriage.\(^20\) The total needs of the spouses are never fully satisfied.\(^21\)

But most of these reasons apply with equal vigor in essence to a system of divorce, which results in successive polygamy. There is the same lack of mutual aid and concentration of effort on the part of the parents though on a different level with consequential harm to the children.\(^22\) There is a similar inability of the parents to fulfill the duties which they have undertaken toward their offspring and themselves. There is an analogous deficiency in the matter of conjugal faith, honor, and love, accompanied by inherent jealousies and discords engendered by the always present possibility of divorce which is greatly increased if the right


\(^21\) Joyce, op. cit. supra note 6 at 19, 20.

\(^22\) Bouscaren and Ellis, op. cit. supra note 9 at p. 457.
of remarriage is available, for a person will not be inclined to continue cohabitation in case of a somewhat unhappy marriage, if the choice is between that marriage and a new marriage, rather than between that marriage and no marriage. Indeed a permanent plural marriage might have certain advantages over the present system of dissoluble monogamy for at best it would insure the continuing united efforts of the natural parents in favor of the child in a stable marital arrangement. The indissolubility of marriage is at least as important as its unity.

By allowing divorce with remarriage, monogamy is destroyed in principle, as well as in practice. Attempts to preserve the ideal of monogamy, which has become part of the tradition of civilized man, become fictional once an exception is made in favor of divorce for any reason on the natural level. An unbreakable marriage bond is an indispensable condition for true monogamy which has for its purpose the subordination of man's lower nature to the demands of his rational self. If an exception is made, his rational nature will be constantly urged to find some justification to bring the marriage in question within the exception, and if this is not possible to induce the legislator to allow more and more exceptions. One ground of divorce begets others under the powerful urge of two great forces, namely, the example of others in indulging their inordinate desire for pleasure and the satisfaction of sex, which perhaps creates the greatest emotional drive next to self-survival itself.

All attempted justifications of divorce, as distinguished from separation, relate to the secondary object of marriage, never to the primary. They exalt the quest of the spouses for happiness, or the avoiding of hardship, at the expense of the welfare of the children. But according to the natural law, the essence of true monogamy is derived from the social interest in the stability of the family, which must always and necessarily outweigh the social interest in the personal improvement, desires and claims of husband and wife. Monogamy loses its true character and significance unless the individual interest of the spouse is completely subordinated to the primary end, the benefit of mankind. Actually the perfection of the spouses in the family is impossible unless they pursue the essential ends of marriage as recognized from the direction of the marital act toward procreation and the resulting duties to children. Perfection can not come from acting contrary to one's nature and the directives of the natural law.

24. Id. at 36. See Lachance, Peace and the Family, 9 The Thomist 138-139 (1946) cited by Ryan, Philosophy of Marriage and the Family, in Marriage and Family Relationships, op. cit. supra note 12 at 52. See Sheedy, op. cit. supra note 5 at 11.
26. Pope Pius XII, Address to the Italian Catholic Union of Midwives, op. cit. supra
That monogamy works personal hardships in particular cases is no valid reason for rejecting it. Every beneficial law necessitates sacrifices on the part of some individuals. Numerous examples may here be cited, such as the laws providing for compulsory military service, the quarantining of persons afflicted with highly contagious diseases, and the imposition of taxes.

True monogamy does not exclude the possibility of separation, in certain exceptional situations, but only the right of remarriage. This right destroys monogamy and substitutes successive polygamy. Separation does not impair the marriage bond, which is manifestly not physical, but merely the fact of cohabitation. This is not identical with the bond, but simply the natural and usual result of it. Although cohabitation is required for the attainment of the primary and secondary aims of marriage, separation is allowable, indeed it may become imperative, if continued cohabitation in a particular marriage should become a cause or occasion of the frustration of these ends. Separation will eliminate those evils which advocates of divorce advance as justification for the breaking of the marriage bond. It is certain that dissolution of this bond is not necessary for the removal of such evils. Under the natural law, however, the right of separation is only temporary, lasting only as long as the conditions which originally justified it.

See Ryan, op. cit. supra note 12 at 51, 52: "In appraising this problem of the ends or purposes of marriage, it is necessary, first of all, to distinguish between an objective and a subjective purpose. An objective purpose is that to which something is directed by the very nature or its form (finis operis). A subjective purpose is the personal motive, the intention of the agent (finis operantis). As far as subjective purposes in marriage are concerned, they may be multiple, such as economic security, good name, friendship between nations, sharing intellectual labors, love satisfaction, etc. In the matter of objective purposes (and it is these with which we are concerned here), they must be judged by the very nature of the marital act, not by some extrinsic motivation, however grand and noble it may be."

See Id. at 42-54, for a scholastic critique of the "adjustment" theory of marriage as advocated by Prof. Henry A. Bowman, Prof. Joseph Kirk Folsom, and Prof. Willard Waller, of the "companionship" theory as favored by Dr. Ernest W. Burgess and Locke, and of the "perfection" theory which endeavors to bridge the gap between the "companionship" and "procreation-education" theories, as explained by A. L. Ostheimer.

27. Scott, Divorce is a Disease which destroys Marriage 10-12 (1942).
28. Id. at 14. The individual who assists in the creation of the society of the family by marriage exists for the maintenance of the marriage bond, analogous to a citizen who exists for the stability of the State, or politically organized society, when it is threatened, for example, by unjust war. But in each case, this is so because in sacrificing himself for the marriage bond, or for the State, the individual preserves that which is required for his own private good in ultimate analysis.
29. Canon 1128.
A large majority of the American people have accepted values concerning the marriage bond, which do not conform to those of the natural law. Their sincerity in holding these opinions, however, may be respected. They may be invincibly ignorant in this respect, and hence morally blameless in seeking divorces and remarrying. This may be explained by the fact that the obligation to accept the ideal of true monogamy and to conform to it in practice is a conclusion remotely derived from the natural law, and not an obvious and proximate deduction therefrom. But so likewise is the obligation to refrain from simultaneous polygamy, which has always been well perceived. The intricate task of explaining the historical, psychological and ethical reasons for this paradox would indeed be challenging.

The grave sociological evil of divorce may be observed in the growing number of delinquent children in this country, who are the victims of broken homes. Neither the school nor any other public agency can adequately replace the parents in the formation of the character of the child. When the parents fail in the performance of duties arising from the natural law, the child becomes the waif of society.

III. There is a Supernatural Law of Marriage

Of course, reason applied to the natural law has its limitations in making known the complete will of the Author of nature to man in regard to the permanence of the bond of marriage. Thus by the light of reason alone, man could never have discerned that Christian marriage, i.e., the marriage of two baptized persons, is a sacrament, that marriage was restored by Christ to its original condition of divorceless monogamy, and that all of its spiritual discipline was entrusted to His spouse, the Church. Natural law could never lead man to the knowledge that God has never granted and will not grant a dispensation for the breaking of the bond, under any circumstances, where it has resulted from sacramental marriage between two baptized persons after physical consummation. Natural law is silent as to whether its Author provided for a dispensation by a supernatural law so as to dissolve the natural bond
in exceptional situations, both past and present, or even the sacramental bond of a non-consummated marriage.

But once man by faith and grace comprehends the truth that God is the Author of a supernatural, as well as a natural, law, he perceives that there is nothing unreasonable and even impossible in God's making the bond of natural marriage dissoluble, if supernatural objectives so necessitate. It would be unreasonable for God to dispense, for example, from the duty to refrain from blasphemy, because that duty springs from that part of the natural law which directly relates to the final end of man's moral life. But the unity and indissolubility of marriage do not have a direct bearing on this end. They rather relate to morally necessary means towards that end. Hence there is nothing unreasonable in the dispensation from the means which God gave under the Mosaic law in the Old Testament. It is significant, however, that while God dispensed from the unity of natural law marriage by permitting polygyny at one time, polyandry remained forbidden as contrary to the primary precepts of the natural law. Nor is it unreasonable that God continues to grant dispensations from the indissolubility of natural law marriage in the New Testament under the Pauline Privilege and the Privilege of the Faith.

These two Privileges are supernatural means for the termination of the natural marriage bond. Their rationale is that a person should not be penalized by the natural law because of his or her conversion to Christianity. Sometimes the reason for the dissolution of the bond by the Privilege of the Faith is the conversion of the baptized non-Catholic to the Catholic faith. According to these Privileges, the natural bond of marriage, between two unbaptized persons, or one baptized and the other unbaptized, must yield under certain circumstances and allow for the institution of the bond of a new marriage, contracted on the supernatural level, because the unbaptized spouse has received baptism and wishes to marry a baptized person.

According to Canon 1120 § 1 of the Code of Canon Law of the Catholic Church, "legitimate marriage between unbaptized persons, even if consummated, is dissolved in favor of the Faith by virtue of the Pauline Privilege." This Privilege was promulgated by St. Paul. It provides that if one of two unbaptized parties to the marriage receives baptism, and the other party departs physically or morally, as a result thereof, as determined by interpellations, i.e., an examination of the attitude of the unbaptized spouse toward Christianity, the marriage is dissoluble. Canon 1121 § 1 states that the converted party must ask the unbaptized party

---

38. Ayrinhac, op. cit. supra note 9 at 300-327.
39. Canon 1126.
40. Bouscaren and Ellis, op. cit. supra note 9 at 607-611.
whether he or she is also willing to be converted and to receive baptism, or, at least, to cohabit peaceably without blaspheming the Creator. These two questions must be asked “unless the Apostolic See directs otherwise.” The Pauline Privilege applies if the second question is answered negatively, and it may apply if the first question is answered negatively. The negative answer may be express or implied.

The Privilege of the Faith results from “the ministerial power of the Roman Pontiff to dissolve non-sacramental marriages under certain conditions when the Pauline Privilege, in the proper sense, is not at all applicable, etc.” Both parties to the marriage must have been unbaptized for the application of the Pauline Privilege, but the Privilege of the Faith may be applicable, even though one of the two parties is baptized. There must be a departure of the unbaptized person for the granting of the Pauline Privilege, but not for that of the Privilege of the Faith. Interpellations are normally required in the former, but not in the latter.

Divorce is also possible if the marriage has not been consummated. Thus Canon 1119 of the Code states, “Marriage non-consummated between two baptized parties, or between one baptized and one unbaptized, is dissolved by the very fact of solemn religious profession, and also by dispensation of the Holy See, granted for a just cause at the request of the two parties or even of one of them, against the wish of the other.”

IV. THE STATE HAS A LIMITED JURISDICTION OVER MARRIAGE

But while reason does not positively enable man to discover the supernatural law in regard to the marriage bond, it will make known that marriage is a social institution, so that civil authority, exercised by the State, has some jurisdiction over the natural bond in the case of the unbaptized. The State is the only social authority available for the unbaptized.

41. Canon 1121 parag. 3.
42. Ayrinhac, op. cit. supra note 9 at 325, 326. A sharp distinction may be drawn between the Pauline Privilege, the extension of the same by the Papal Constitutions (Canon 1125), and the direct dissolution of the natural bond by the Holy See in favorem fidel, which really is a ratum et non-consummatum case, if the convert was unbaptized and had married a baptized non-Catholic. Where the convert becomes baptized, there exists a ratified marriage of two baptized persons, but not consummated after the second baptism. This marriage may then be dissolved by the Holy See as ratum et non-consummatum; see Letter of May 11, 1954, to Brendan F. Brown from Rt. Rev. Msgr. Robert E. McCormick, former Officials, Archdiocese of New York, Metropolitan Tribunal, citing Bouscaren and Ellis, Canon Law, A Text and Commentary 603, 619, 620 (2nd ed. 1953).
43. Bouscaren and Ellis, op. cit. supra note 9 at 529-530: The State may temporarily restrain the exercise of the right of marriage when one is afflicted with a contagious disease, provided it puts “itself in agreement with the competent authority, which, in the case of baptized persons, is the Church.” But the laws “enacted in several states requiring health certification as a condition for the issuance of the marriage license” fail to “recognize this limitation upon the power of the state.”
They are not under the authority of the Church. Hence, the competence of the State may extend not only to the material aspects of their marriage, such as property rights, but also into the field of morals and natural religion with certain limitations. Natural law sets the minimum requirements of a juridical institution, authorizing Church and State to establish additional reasonable requirements in the light of specific social conditions of the time and place.

The State has the right and duty to create a juridical institution of marriage for the unbaptized, and also for the baptized insofar as the purely civil effects are concerned. Manifestly the State has authority over the strictly temporal effects of marriage. These are separable from the essence of marriage. Examples would be the determination of property rights, such as dower or testamentary succession.

The State is competent to establish reasonable diriment impediments, and to grant separation from bed and board, provided it follows the principles of the natural law. But it has no power to dissolve the marriage bond, which is never civil, but either natural or supernatural. Every positive law which purports to confer authority to grant divorce, except in cases coming within the operation of the supernatural law, is contrary to the natural law, and therefore lacks the element of juridicity. This does not mean, of course, that those who avail themselves of such laws are subjectively culpable, if they act in ignorance and good faith.

According to the natural law, all marriages are either valid or invalid from the beginning, on the objective plane, with no human discretion

44. Id. at 462-463: “All persons have the right to marry from the natural law, but not the duty. This right precedes the State. But the State may reasonably regulate the exercise of this right or even suspend it for a while for a private or a common good. The State may establish reasonable impediments with regard to the marriages of citizens who are not baptized, but not such as will in effect alienate the right itself. Of course the State has no authority over the sacramental bond resulting from marriages between two baptized persons.” See Madden, Handbook of the Law of Persons and Domestic Relations 38, 39 (1931) and Brown, Brendan F., The Canon and Civil Law of The Family, in Marriage and Family Relationships (edited by Clemens) 57 at 64 (1950). Some of the American states have created impediments which are not in accord with the natural law, such as the miscegenation statutes prohibiting marriages between whites and negroes, or between whites and Indians or Orientals. But observance of these laws is dictated by prudence grounded on the natural law in the interest of the public peace since they violate the natural law by limiting a person’s right to marry, rather than by commanding “a person to do something prohibited by the natural law.” See Brown, Brendan F., Foreword xvi, in Del Vecchio, Giorgio, Philosophy of Law (trans. by Martin) 1953.

45. Vermeersch, op. cit. supra note 14 at 12.

46. Canon 1016.


48. Sheedy, op. cit. supra note 5 at 78.
capable of declaring void what was once a valid marriage. Natural law does not admit of a voidable contract of marriage, as does the law of New York, for example, which distinguishes between a voidable marriage, as where one of the parties is under the age of eighteen, and a void marriage, as where a brother and sister have endeavored to marry. In the first case, the voidable marriage may be declared void, or annulled, at the suit of the party under the proper age, in the discretion of the court. In the second instance, the marriage is void and the court must declare it a nullity. The New York statutes have blurred the concept of annulment as understood by the natural law, by referring to the annulment of a voidable marriage which was originally valid, because annulment according to the natural law declares that a marriage never existed. The concept of voidable marriage attaches, to an objectively valid marriage, a divesting condition subsequent in the form of a discretion, on a subjective and psychological level, and accordingly deviates from the standard of the natural law which knows only conditions precedent completely invalidating a marriage.

These conditions precedent relate to deficiencies in the matter of the internal factors of will and reason, and the external element of form. The State is under an obligation to construct a juridical institution of marriage, applicable to the unbaptized, which will incorporate these conditions precedent into its positive law. Only in this way will the correct line be drawn between valid and void marriage, and consequently between the relevance of divorce or annulment in a particular case.

The contract of marriage is created by an act of the mutual wills of the parties, who actually intend to enter into marriage. Only the parties themselves can supply this act of will. Neither the will of the parent, nor of the State, nor of the Church, may be substituted.

Voluntary assumption of reciprocal rights and duties, mutuality in their exercise, and equality in giving over to each other and receiving in

---

50. See N.Y. Domestic Relations Law § 7; N.Y. Civil Practice Act, §§ 1132-1133, 1136-1139, 1141; and Rules of Civil Practice, § 275ff; N.Y. Domestic Relations Law, § 5.
51. See Gellhorn, op. cit. supra note 34 at 270-271.
52. Voidability implies dissolubility. See Brown, op. cit. supra note 44 at 65; Sheedy, op. cit. supra note 5 at 77.
53. Pope Pius XI, Encyclical Letter, Christian Marriage, op. cit. supra note 8 at 5. See Petrovits, op. cit. supra note 7 at 2: "Marriage as a Mere Natural Contract. Marriage may be taken in a two-fold sense, viz., marriage in fere and marriage in facto esse. The former is a contract in which a qualified man and woman mutually oblige themselves to an indissoluble union in which by mutual consent each becomes a partial co-principle in the procreation of offspring. The indissoluble union, or the marriage bond thus arising, is called marriage in facto esse."
54. Canon 1031 parag. 1.
return those rights which are proper to the state of marriage, for the per-
formance of acts suitable of themselves for the procreation of children,
are characteristics of the contract.55 The nature of the contract is su
i generis, however, and may not be exactly fitted into the category of com-
mon law contract, based on consideration, or that of civil law contract,
founded on causa.56 Its uniqueness as a contract is further apparent from
the fact that consent may not alter the nature of the contract, nor the
essential laws that govern it, nor the resulting status from which arise
duties imposed by law.57

The consent of each party must be sufficient for the creation of the
contract of marriage. In the first place, the sufficiency of consent may be
destroyed by factors which directly militate against such consent. These
may be produced either by the act of the party or parties in question, for
example, by a simulated consent, or by attaching one or more invalidating
conditions to the matrimonial consent, or by the tort or crime of some one
else, who induces consent by force or fear.

The consent must not be simulated. This occurs when no consent
existed in the mind but a sufficient consent has been manifested.58 The

55. Canon 1111. See Ayrinhac, op. cit. supra note 9 at 190-192 citing Canon 1031
parag. 2.
56. Madden, op. cit. supra, note 44 at 5-7.
57. Petrovits, op. cit. supra note 7 at 2-4: "The leading modern theologians, as well as
those of the past, are practically unanimous in teaching that marriage is a real bilat-
eral contract imposing an obligation on the contracting parties by virtue of commutative justice.
This needs no proof. It is obvious that the parties concerned form the material object of the
contract, while its formal object is the particular mode of life arising therefrom. In this mode
of life the contracting parties mutually oblige themselves not only to render those things and
to perform those duties which are essential to the very nature of such special contract, but
also to abstain from everything incompatible with its nature . . . Other contracts may be
valid by virtue of unilateral obligation, arising on the part of only one of the contracting
parties. The distinctive characteristic of the matrimonial contract is that it binds either both
parties or neither of them . . . Finally, the duration and firmness of the matrimonial con-
tract do not depend upon the contracting parties, for, even in the case of only a ratified
marriage, the contract is not rescindable at their will . . . Since marriage is a real bilateral
contract, in order that it may be valid, it must possess all the essential characteristics requi-
site for a binding contract, viz. it must be entered into with true, free, mutual, simultaneous
and externally expressed consent by two qualified individuals. This qualification presupposes
a physical aptitude for the act of procreation, freedom from all impediments, . . . " (Note—i.e.
of the natural law in our particular treatment). "The essence of marriage in fieri consists in
the manifestation of mutual consent to the matrimonial bond. This implies an exclusive and
perpetual right which each of the contracting parties acquires over the body of the other for
the purpose of procreation and education of children. The essence of marriage in facta esse
consists in the conjugal union (ligamen). The actual consummation of marriage, and com-
munity of shelter, of table and bed, pertain only to the integrity of the matrimonial contract,
not to its essence."

58. Canon 1051 parag. 2. See Ayrinhac, op. cit. supra note 9 at 201-204; Canon 1056,
parag. 2.
consent must not depend on a condition which is "inconsistent with the essential object of the marriage contract or destructive of one of its essential properties, as unity or indissolubility." If all right to the proper conjugal act were excluded, for example, by either or both of the parties, their act of will would not constitute a marriage. The same would be true if a primary attribute of marriage, such as the right to the conception of children, were denied and excluded. But exclusion of one or more of the essential attributes of marriage, such as unity or indissolubility, would not invalidate the marriage unless this were done by a positive act of the will so that this exclusion would become the primary object of the will rather than the intention to marry.

Besides, the consent must not have been caused by unjust force or fear, whether it be that which prevents all freedom by physical compulsion, or that which only diminishes freedom of choice by moral coercion without entirely destroying such freedom. It is plain that the former kind of force and fear is invalidating, but reasonable men may differ as to the precise amount of the latter type, namely moral, which is required by the natural law in a particular case to invalidate a marriage. They would agree, however, that the force and fear must be caused unjustly by an external human agent, so that such grave fear results as to compel the victim to choose marriage in order to avoid the evil which is presently threatening and imminent. It must be so overpowering as to justify the resultant fear on the part of a reasonable person. Such is the determination of the Catholic Church regarding the marriages of the baptized.

Secondly, the matrimonial consent may be rendered insufficient by causes which only indirectly affect the will by directly preventing the intellect from adequately presenting the true facts of the situation to the will. These causes may be either physical, as insanity and/or lack of adequate consciousness, or intellectual, such as substantial error and ignorance in regard to the obligations of the marriage contract.

Marriage would be possible, though not prudent, if the insane person actually had lucid intervals, during one of which marriage was contracted. But obviously adequate matrimonial consent would be impossible if all reasoning capacity was permanently absent, as in certain types

59. Ayrinhac, op. cit. supra note 9 at 226.
60. Canon 1086 parag. 2.
61. Ayrinhac, op. cit. supra note 9 at 199, 203.
62. Id. at 205.
63. Id. at 205, 206. See 5 Cappello, 5 De Sacramentis, De Matrimonio, Articulus V, De vi et metu, pp. 586-597 (1949).
64. Canon 1087, paragraphs 1 and 2.
65. Ayrinhac, op. cit. supra note 9 at 207.
66. Id. at 192, 193.
of mental disease, and in cases where alcohol, or a narcotic, or illness has temporarily but substantially impaired reason or limited consciousness.

Again there would be no marriage if either or both of the parties did not know that marriage was a permanent union of man and woman for the purpose of begetting offspring. But if the simple error related only to the essential properties of marriage, the bond would be created. This is so even where such error is the cause of the contract, as long as the primary intention is to contract marriage in the accepted sense of the word.

Error as to the person renders a marriage invalid, as where A, intending to marry B, marries C instead. But mistake concerning the quality of the person would not invalidate a marriage except where such error "amounts to an error about the person." If A married B under the mistake that B was rich, the marriage would be valid, even though B were poor. Here it is assumed, however, that A has not actually made the condition of wealth a condition sine qua non for his matrimonial consent, for that would render the marriage conditional.

The reason element in the natural law institution of marriage is given effect by recognizing that there are certain obstacles or impediments, in the way of lack of fitness, which will prevent certain persons from entering upon valid marriage. All the impediments of the natural law are invalidating, since the attribute of legality, associated with the positive law, is irrelevant. Some of these obstacles arise from physical deficiency, as impotence and lack of understanding, others from potential moral guilt, as the bond of a previous marriage.

It is not required by the natural law that, at the time of the marriage, each party must be able to perform the physical act required for consummation. If it can be anticipated that in the future this will be possible, as is normally the case, the natural law does not invalidate the marriage. Invalidating impotence must be perpetual. But mere sterility, or lack of fertility, does not invalidate a marriage.

According to the natural law, no particular age is required if both parties have sufficient discretion. The impediment of defect of age, relating to bodily incapacity, would arise, however, if either was so young as not to be aware at least in a general way of the nature of marriage, and thus

---

67. Canon 1052 parag. 1.
68. Canon 1054. See Bouscaren and Ellis, op. cit. supra note 9 at 559, 560.
69. Canon 1053 parag. 1.
70. Canon 1083 parag. 2, § 1.
71. Bouscaren and Ellis, op. cit. supra note 9 at 558.
72. Canon 1058 parag. 1.
73. Canon 1058 parag. 3.
74. Bouscaren and Ellis, op. cit. supra note 9 at 522.
incapable of the matrimonial consent. Most generally, the mere age of reason before puberty does not afford adequate knowledge.

Marriages between persons related in the first degree of the direct line and probably in all other degrees of that line, and probably also in the first degree of the collateral line, are invalid according to the secondary principles of the natural law. Such marriages are not *mala in se* (evil in themselves), however, and may be justified under highly speculative and improbable conditions of a hypothetical character. But they would certainly be *mala per accidens* (evil by circumstances) with reference to the natural law in the present condition of mankind. Such marriages would not be conducive to the physical and mental welfare of the children, who would suffer from such excessive in-breeding. These marriages would be highly detrimental, moreover, to the good of society, which benefits from the extension of affection and friendship through marriages between members of families not closely related by blood.

A previous and existing marriage would be an impediment, which results from the inherent unity and indissolubility of the marriage bond. Hence it would be clearly unreasonable to permit a person who is already bound by the bond of a prior marriage to remarry while the former spouse was alive. To authorize such a marriage would be to sanction the crime of adultery, which the impediment seeks to avert.

In addition to the internal factors of will and reason, there is the extrinsic element of actuality or form. The natural law does not prescribe any particular form for the manifestation of the matrimonial consent, authorizing the State to select any reasonable form for the marriage of the unbaptized, while the Church lays down such condition for the baptized. Of course, the consent must be known to both parties. The form must be such that it will enable persons “whose means of perception are confined to the five senses, acting upon physical matter,” to apprehend the expression of the marital consent. Natural law does not exclude

---

75. Ayrinbac, op. cit. supra note 9 at 170, 171, Bouscaren and Ellis, op. cit. supra note 9 at 543.
77. Ayrinbac, op. cit. supra note 9 at 171.
78. Canon 1059 parag. 1.
79. Bouscaren and Ellis, op. cit. supra note 9 at 530-532.
80. Ayrinbac, op. cit. supra note 9 at 131-136.
81. See Brown, The Indissolubility of Marriage, since 1914, According to the Canon Law of the Roman Catholic Church, Manuscript to be published; presented before the Round Table on Canon Law of the Fourth International Congress of Comparative Law, University of Paris, August 6, 1954.
82. Brown, op. cit. supra note 76 at 83-85.
83. Id. at 83, 84.
84. Id. at 84.
vicarious expression through a proxy or interpreter, nor the form of an exchange of letters in absentia for serious reasons. Witnesses are not absolutely demanded.85

V. THE LEGAL ORDER AND THE LEGAL PROFESSION HAVE A SPECIAL RESPONSIBILITY

How has the law of the land met its obligation to formulate and maintain a juridical institution of marriage and divorce which gives effect to the norms of the natural law? This law has more and more encouraged divorce, and thus increasingly contributed to the disruption of the stability of the home.86 This is manifest from the growing policy of multiplying the number of grounds for divorce in certain jurisdictions.87 It is apparent from the trend toward the reduction of residential requirements for the acquisition by the plaintiff of domicile,88 which is the basis of judicial jurisdiction, toward the removal of restrictions from the remarriage of the parties,89 and toward the detachment of the factor of the moral guilt or fault of the parties to the marriage from the law of divorce.90 Further evidence may be found in the tendency toward the exemption of the guilty spouse from legal penalty.91 At the same time, the Anglo-American law has remained faithful, generally speaking, to the model of the natural law in regard to the requirements for the inception of marriage. It has made great advances in the direction of insuring a permanent family life by the recognition of many new material domestic interests, and by providing remedies for their protection.92 This is the second great paradox in American life with reference to the law of domestic relations.93

89. Ibid.
90. Ibid. See Brown, op. cit. supra note 86 at p. 72.
There is no doubt that divorce has become a most serious sociological problem in the United States.\textsuperscript{94} Statistics disclose the appalling growth of divorce. The divorce curve has risen sharply since the first estimate was made in 1906. At the end of the forty year period from 1906 to 1946, divorces were increasing about fifteen times as rapidly as the population, although in the first decade, 1906 to 1916, they increased only about three times as fast. The divorce rate for 100,000 population rose from 84 in 1906 to 431 in 1946. The highest ratio of divorces to marriages was reached in 1945, with one divorce for about every $3\frac{1}{3}$ marriages. The number of divorces was equal to 26% of the marriages in 1946 compared with 30% in 1945, 24% in 1947, 22% in 1948, 25% in 1949, 23% in 1950, 24% in 1951, and 25% in 1952, the latest figures on a national scale available from the Department of Health, Education and Welfare, Public Health Service, National Office of Vital Statistics, Washington, D.C.\textsuperscript{95} The 1953 Annual Summary of the Monthly Vital Statistics Report, Part I, issued by this Office, containing divorce figures for twenty-one states for 1953, shows that the combined total for these states is quite close to their combined total for 1952. The United States still holds the world's record in the matter of divorce, unsurpassed even by pagan Japan and atheistic Russia.\textsuperscript{96}

Members of the legal profession have a special responsibility to assist in the maintenance of the stability of family life. The juridical order through which civil authority functions for the granting of divorce is in their hands. They occupy a more strategic position than those in the other sociological professions, who can do no more than advise and recommend. It is the legislator who selects those values of the family which will receive the support of politically organized society. That support is delineated with precision in relation to specific facts by the judge in the course of adjudication. The practicing lawyer, who handles divorce cases, plays an important role in bringing the issue of whether or not the State should

\begin{itemize}
  \item American Families, The Factual Background, VI, Legal Status of the Family 14 et seq. (1948).
  \item Secularism, Statement of the Bishops of the United States, 1947, published by the National Catholic Welfare Conference, Washington, D.C.
  \item Sheedy, op. cit. supra note 5 at 70; Ayrinhac, op. cit. supra note 9 at 372.
\end{itemize}
declare that a particular marital bond ought to be terminated, within the sphere of the judicial process.

It is rather well known, however, that a higher standard of duty is imposed upon lawyers than upon judges, relative to their respective co-operations in dissolving the marriage bond.\textsuperscript{97} This higher standard stems from the fact that "unlike judges, lawyers are free to choose what business they will accept and what business they will reject."\textsuperscript{98} The judge is a public officer and does not have the same liberty as the lawyer who is engaged in private practice. By the very nature of his office, a judge is obliged to decide cases in accordance with the existing positive law, despite his personal views. The harm resulting from his cooperation is far outweighed when balanced against the irreparable damage to the public good which would follow from the resignations of all conscientious judges on the ground that they could not in conscience apply the law of divorce.\textsuperscript{99} In the hearing of divorce cases, however, the natural law makes it incumbent upon the judge to act so that it will be certain that he does not personally favor the granting of the divorce, or the implicit right of remarriage.\textsuperscript{100}

The lawyer stands in the place of his client so that if the client has the moral right to seek a divorce, the lawyer is entitled in conscience to be his attorney.\textsuperscript{101} But if the client seeks an unworthy divorce, then the attorney proximately cooperates in disobeying a command of the natural law, and becomes partly responsible for all the evil consequences, such as the occasion of adultery, the public flouting of the ideal of indissolubility, scandal, and the undermining of society.\textsuperscript{102} Since these consequences are public, as well as private, sole justification may not be sought in the fee earned, as such, for this is only a private reason.\textsuperscript{103} Theoretical justification may be found in the fee if it were absolutely necessary to avert great economic need, or to maintain the lawyer in his profession.\textsuperscript{104} But this is seldom, if ever, the situation,\textsuperscript{105} so that actually there remains only a justification derived from the protection of a public, social, or supernatural interest.\textsuperscript{106}

Divorce may be discouraged by a number of means, as by making it more difficult to obtain than at the present time. It may be curbed by the

\begin{footnotes}
\item[98] Sheedy, Mimeographed Material for Practicing Lawyers (1953).
\item[99] Ayrinhac, op. cit. supra note 9 at 372, 373; Sheedy, op. cit. supra note 97 at 154.
\item[100] Sheedy, op. cit. supra note 5 at 82.
\item[101] Id. at 67.
\item[102] Ayrinhac, op. cit. supra note 9 at 373, 374.
\item[103] Ibid.
\item[104] Id. at 374.
\item[105] Bouscaren and Ellis, op. cit. supra note 9 at 629.
\item[106] Sheedy, op. cit. supra note 5 at 67, 68.
\end{footnotes}