Annulment or Divorce?

A CRITIQUE OF CURRENT TRIBUNAL PRACTICE
AND THE PROPOSED REVISION OF CANON LAW

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INTRODUCTION

The incredible increase in the numbers of marriage annulments in the churches of Holland, Canada and our own United States is rapidly becoming one of the greatest scandals in recent Church history, and yet the true proportions of this problem are still relatively unknown to many American Catholics. In 1976 alone over 15,000 annulments were declared in this country, and that number can be expected to greatly increase in the years ahead, given the present orientation of growing numbers of our tribunal officials.

Is this situation merely a case of scandal taken—the case where there is no objective cause of the scandal which is merely "taken" through the ignorance or misunderstanding of uneducated people; or is it a true case of scandal given which is accounted for by objectively erroneous activity? In such a complicated matter as the theology and canon law of marriage surely one should hesitate to accuse Church tribunals of scandal given without a thorough and responsible investigation of the present problems surrounding the increased granting of annulments. This very consideration kept me, as well as the author of the present monograph, from any precipitous launching of criticisms against the present practices of marriage tribunals. Mr. Marshner's manuscript was even submitted to several eminent canon lawyers and judges for criticism before publication. Moreover, it is the fruit of several-years’ reflection and discussion on the subject, as well as the end product of a scholarly research effort. The results, I believe, justify the implication that many of our tribunals are involved in scandal given, and not the other way around.

At any rate, the present situation will at the very least shake the stability of marriage, as increasing numbers of annulments alert the laity to what seems to be a relaxed atmosphere surrounding marital indissolubility in Church courts. Surely people have a right to know what is going on, and surely the Church should be able to explain to them how it is that so many people who would have been thought to be married twenty years ago are now declared never to have been married at all.

But this question opens up more complex problems which strike to the heart of the Church’s teaching on marriage: the practice of tribunals, the role of the behavioral sciences in that practice, and the
like. Marriage cuts across theology, philosophy, canon law, and today the whole complex of the behavioral sciences. Consequently, fundamental values and beliefs become involved in any in-depth discussion of this annulment problem. Obviously, then, a more profound grasp of the various fields involved will be necessary to pursue the discussion, if it is to go beyond elementary considerations.

What seems like a rather threatening array of technical concepts related to these various disciplines has to be grasped if the full thrust of the analysis is to register in the reader’s understanding. Consent, contract, ends of marriage, integrity, validity, impediments, finis operis, finis operantis, primary, secondary, essential, non-essential but integral, consortium vitae, object of consent, in facto esse, in fieri—such concepts must be adequately understood if this whole problem is to be resolved. Nor can one escape struggling with at least basic concepts in canon law and psychology.

All of this would be rather discouraging for most people if it were not for excellent works like this analysis by Professor Marshner. Here we have a masterful combination of deeply scholarly work with a lucidity of presentation rarely found in such work. All of the essential concepts are carefully explained as the essay proceeds, making the work almost a short course in the theology and canon law of marriage. Two extremely important aspects related to this whole problem, the alleged essentiality of secondary ends and the issue of ‘evaluative’ judgement, are treated at some length in the excellent footnotes appended to this monograph (notes 5 and 7). Yet the depth of analysis and logical argumentation will challenge even the professional, as it did those to whom I presented it for criticism prior to publication.

Professor Marshner’s work emphasizes philosophical and theological aspects of the problem. He supports his theses with research, logical argumentation and contemporary case studies. He has gone to the sources, including the Fathers, the great theologians of the past, and papal teachings. But he has also gone to the sources of the positions he opposes, and he does a masterful analysis of the kind of personalist philosophy that lies behind the current press for expanding the grounds for annulments, and ultimately for changing the very teachings on Christian marriage. The monograph carefully draws the links between the older personalist philosophers and theologians, rejected by the Church’s Magisterium in the first half of
this century, and their intellectual offspring who have succeeded in establishing their thought as the theological and philosophical basis of modern canonical procedures for granting annulments. It is this philosophy-theology which, together with a most questionable exegesis of Gaudium et Spes, has led to the elevation of the traditional secondary purpose of marriage, or communio vitae, to an essential purpose coequal to the traditional primary purpose. This theological movement, coupled with the “insights” of the behavioral sciences, has opened up the grounds for annulment in a way which certainly makes indissolubility a highly questionable quality in the concrete of any modern marriage. It is the essential thrust of Marshner’s paper to call attention to this new sort of theology which, as he clearly demonstrates, has reached right to the heart of the marriage legislation proposed for the New Code of Canon Law.

It is this last aspect of the problem which clearly generated the author’s efforts and has caused a great deal of concern to many churchmen and scholars besides himself. Recent actions in Rome, both in the Apostolic Signatura (the “Supreme Court” of the Church) and in the Rota, indicate that the Vatican is indeed taking a second look at this whole problem, and it may well be that it is this new marriage legislation that accounts for the apparent delay in promulgating the New Code, which is certainly now past due. Yet Mr. Marshner is very careful to qualify his conclusions so as to avoid any suggestion that he is accusing the Church, even if the proposed legislation were implemented, of proposing formal and explicit heresy in regards to marriage. What this study rather shows is that this legislation, if enacted, would certainly call into question, on the practical plane, the Church’s constant teaching on marriage, and especially indissolubility. While the Holy Spirit will certainly protect the Magisterium from proposing formal heresy, on the practical level this legislation may well empty the formal teaching on indissolubility of any real force.

To replace juridically acceptable and workable definitions of the nature and purposes of marriage, and the consent necessary to contract marriage, by non-juridical definitions, which are really unworkable in any truly juridical context, is to inflict two wounds with one blow. It is to render the indissolubility of marriage an abstraction with little or no practical application—which, implicitly, is to empty it of any real meaning—and at the same time destroy the credibility and
eventually the viability of both the canon law of marriage and the tribunal system built upon that law. Needless to say this destruction could never be permanent, but it certainly could be with us for quite some time unless action is taken to prevent it happening in the first place.

These are the central concerns treated in this interesting work, but there are side issues which also emerge as the argument proceeds: the recurrent problem of nature and grace, the proper role of psychiatry in the tribunal process, and the whole question of moral responsibility and psychological disturbance which is clearly related to the parallel relationship of psychological disturbance and its impact on the consent necessary for contracting marriage. It is certainly not a coincidence that the whole problem of psychological incapacity to give consent has arisen just at the time when so many are denying the practical capacity of most people to commit serious sin by a single act, and some interesting insights on this problem can be gained from Marshner's treatment of the annulment question.

A careful reading of what follows can be a rewarding and informative experience for the average Catholic as well as for the canon lawyer or theologian with an open mind on the theses the author is presenting. It should make a genuine contribution to the dialogue which is hopefully beginning on this complex subject, a dialogue one can only pray will continue as the Holy See considers the proposed legislation for the New Code, and continues to study the present practices of marriage tribunals which, because they have already anticipated the proposed changes in their present practice, give us a preview of what is coming if that legislation is enacted.

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AUTHOR'S PREFACE.

This essay has been written with a non-technical audience in mind, and yet with the intention of grappling with the real difficulties—philosophical, theological and canonical—of the topic. Hence a sustained effort has been made to explain in every-day language each item of technical jargon, where it first occurs in the text. The author hopes by this device to have produced a work helpful to lay people and yet not beneath comment by theologians and canonists.

The subject matter is a set of ideas: the ideas of marriage and marriage law which lie behind the recent and unsavory flood of annulments. I observe (what is hardly a matter of doubt) that prominent among these ideas is an equalization of the traditional "ends" of marriage. Then about those ideas I make three basic claims: (1) this set of ideas cannot guide tribunal practice coherently—that is, it fails to provide realistic and workable criteria for distinguishing an unhappy union in which a marriage bond is present from an unhappy union in which no bond is present; (2) the same set of ideas is inconsistent with a doctrine taught irreformably ex magisterio ordinario, namely, that procreation and education of offspring is the primary end of marriage, to which all other ends are secondary and subordinate; (3) yet the same set of ideas informs key sections of the proposed revision of canon law (Schema de Sacramentis). These claims are logically independent, such that any one of them might be false without affecting the truth of the other two. I present evidence for all of them at various points in the body of the essay, and I pull them together as premises from which to derive the following conclusion: current tribunal practice represents a serious deformation both of Catholic doctrine and of authentic Catholic pastoralism, so that the proposed Schema, if adopted, will merely sanction that deformation. Defense of that conclusion, from various angles of vision, might be called the 'aim' of the essay.

Such is the thing's logical 'skeleton'. Its overt organization into chapters might have followed that skeleton, but only at great sacrifice, I think, to the pedagogical needs of the layman. If one has not dabbled in these matters before, one needs a quick historical
orientation, which I try to provide in chapter I, and an early opportunity to look at the actual texts of canon law, which are presented in chapter II. The beginner will be well advised to skip lightly over the “comments” in chapter II, however, since they contain some technical expressions whose meaning will be clearer after one has read the following chapters.

W.H.M.
I

A BRIEF HISTORICAL BACKGROUND

Not since the 1520's has there been a more profound crisis in the Catholic understanding of marriage than there is today—and nowhere more so than in the Church's marriage courts, which are called “tribunals.”

The trouble started more than a generation ago, with a rash of books published in the late Thirties and early Forties by authors who called themselves “personalists.” These thinkers wanted to see in marriage primarily a relationship of mutual enrichment for the spouses, rather than an institution for the procreation of children. To accomplish this shift of emphasis (itself praiseworthy in many aspects), they set about nothing less than a new beginning for the theology of marriage, which they insisted had to be based henceforth on research findings in human psychology, sexuality, and interpersonal dynamics—findings which had been unavailable, of course, to the Fathers of the Church and the great Scholastic doctors, on whose teachings the Code of Canon Law reposed. The result was a theology which so alarmed Pius XII that in 1944 the Holy Office condemned it.

Nevertheless, very slowly, the assumptions of the personalists found their way into scattered decisions of the Sacred Roman Rota (the final court of appeal for marriage nullity cases)—decisions which despite their atypical character quickly became “influential,” thanks to the deep sympathy of many canon lawyers for the new ideas. It is well to recall that already in those days, in every diocese of the world, canon lawyers had virtually nothing to do except decide marriage nullity cases. Every week they were confronted by tragic situations brought about by unhappy unions—hence their acute interest in whatever guidance a new theology could provide. Throughout the 1940’s and ’50’s, this slow infiltration of personalist ideas among tribunal personnel had but one symptom: a few contested marriages, whose validity undoubtedly would have been upheld a decade earlier, began to be annulled on the basis of a more psychological understanding of the act of matrimonial consent or, more precisely, of the “due discretion” which such consent requires.
By the middle of the 1960's, however, a visible cleavage had opened between the "conservative tribunals, whose decisions still reflected the theology of the ages (as crystallized in the 1917 Code of Canon Law), and the "progressive" tribunals, whose decisions reflected a "personalist" theology (now alleged to be the teaching of Vatican II). In the progressive dioceses, too, a direct and expanded role for psychiatrists in tribunal work began to become standard. The influential Canon Law Society of America (CLSA), founded in the 1930's and destined to become the prototype of many national "professional" associations of Church bureaucrats, became a formidable partisan of the progressive tribunals at this time. In 1970 the U.S. bishops, urged on by the CLSA, requested and secured from Rome permission to use special, streamlined rules of procedure (now called the ‘American Procedural Norms’) which radically reduced the time, paperwork, and red tape involved in considering annulment cases. There was nothing wrong with these reforms in themselves; indeed, they held great potential for speedy justice. But when combined with the "personalist" theology of marriage, also urged by the CLSA, the new rules produced speedier injustice. In a typical progressive tribunal, the number of annulments granted rose from two dozen to three hundred within a year.

By 1971, the scene had darkened into a pastoral nightmare. A few progressive tribunals in Holland, Canada and the U.S. became divorce mills as notorious in their own way as Reno and Tijuana, except that these divorces, of course, were called "annulments." The Dutch situation was so bad that, after a year of fruitless discussions between the Holy See and the local bishops, Dino Card. Staffa, prefect of the Apostolic Signatura, was forced to send Cardinal Alfrink a stiff letter condemning twenty-four doctrinal and procedural errors of the Dutch tribunals and demanding that the judges obey or be removed. This explosive document (dated December 30, 1971) remained confidential until La Documentation Catholique published it, six months later. In late 1973 it appeared in English, buried quietly in the pages of The Jurist (vol. 33, pp. 296-301), where the popular press has yet to discover it.

Ironically, however, the Dutch situation which drew down Cardinal Staffa's ultimatum was less extreme than the current situation in North America. Theories and procedures now operative in
the tribunals of Brooklyn, Detroit, and Dallas-Ft. Worth (to name only a few), though expressed in more orthodox vocabulary, perhaps, than the Dutch theories, are more far-reaching in practice—as many canon lawyers freely, indeed proudly, admit. The conservative tribunals in this country are often bypassed. The cause of moderation, desperately sought by a beleaguered hierarchy, is alternately served and betrayed by other progressive tribunals (including certain judges of the Roman Rota) who have taken a "middle" position. But as the contents of the Staffa letter will allow us to see in detail hereafter, no stable "middle ground" is possible. Because the same theology and the same small collection of "influential precedents" inspire all progressive tribunals, the only real difference between the "middle" and the "extreme" is one of boldness in application.

It is important to understand exactly what happened in the early Sixties to spur this rapid disintegration. One can point, I think, to a remote and a proximate cause. Remotely, Pope John XXIII promised a general revision of the 1917 Code in light of the Council, and this innocuous act became a pretext for revolutionary forces within the Church to call the whole status of existing canon law into question. Proximately, the same Council said a number of excellent but very general things about marriage (especially Gaudium et Spes 48-52), in the course of which the bishops took for granted and hence failed to mention the age-old doctrinal distinction between the "primary end" of marriage (procreation) and the subordinate, "secondary ends" (mutual assistance and remedy of concupiscence). Now, it so happens that discontent with that language about "ends," and a denial of any real subordination between them, had been the very hallmark of the condemned personalist theology of thirty years ago. Hence it is hardly surprising that canon lawyers in Western Europe and North America, long attracted to the condemned ideas, seized upon the Council's silence as a great "vindication." The bare non-mention of "primary" and "secondary ends" was interpreted as a conciliar repudiation of them, and indeed of the entire Patristic and Scholastic theology of marriage, from which those terms are inseparable. Hence arose the implausible claim that Vatican II had "redefined" marriage and thus in a radical way reoriented all future teaching. Needless to say, the canons on marriage of the 1917 Code
were singled out for special denunciation as a "dead letter". Despite the fact that these claims had no shred of foundation in the authentic mind of the Council, they met with very little resistance.

The upshot of such tendentious interpretations was this: by the mid-Sixties, with the old Code in discredit and quasi-abeyance, the canon lawyers themselves were free to create, for the first time in the history of the Church, a new corpus of marriage legislation from the ground up. This they would do as judges and as para-legislators. As judges: no one could object to "implementing the Council"; the Council "redefined" marriage, ergo nothing could be more natural than for tribunal judges to "implement" the new definition in concrete decisions. As para-legislators: no one could be more qualified to serve on the Pontifical Commission charged with the general revision of the Code than the very men who were already struggling to implement the teachings of the Council in practical, tribunal work. And indeed a large number of prominent canon lawyers have worked as consultors on the Commission. The great project has suffered its defectors, mostly extreme progressives who lost faith in the tribunal system. But by-and-large, the moderate progressives, "loyal to the system," have worked tirelessly toward the day when this new body of precedent-law would receive Magisterial approval—that is, the day when a new definition of marriage and all its consequences would be written into the Revised Code of Canon Law, to be promulgated for the whole Church according to the mandate of Vatican II.

That day is coming closer.
II
PRELIMINARY REMARKS ON THE SCHEMA

The Pontifical Commission has completed its long-awaited draft or Schema of the part of the Code which deals with the Seven Sacraments (including, of course, marriage). Since February of 1975, that Schema de Sacramentis has circulated confidentially among the bishops. Thanks to the aid of friends who must remain anonymous, the present writer has had an opportunity to study the entire Schema, with special attention to the 119 new canons on marriage. One does not know, of course, what criticisms the bishops of the world have been sending back to Rome; but it is fair to say that if their advice has not been to reject major parts of the text totally, the Church will be sanctioning, in disguised form, the very errors condemned by Cardinal Staffa.

Item: the Schema abolishes all mention of marriage’s primary and secondary ends. Thereby it adopts an incorrect interpretation of Vatican II and throws open the doors to a condemned theology.

Item: the Schema psychologizes (dis-intellectualizes) the notion of matrimonial consent by recognizing undefined “psycho-sexual” disorders as “defects” of this consent.

By those two steps alone, the draft Schema gives the progressive tribunals of Utrecht and points west everything they need to continue the open scandal by which indissoluble marriages are disappearing from Roman Catholic life.(1)

In order to see at a glance the revolution which the proposed draft would ratify, let us juxtapose the canons of the old Code with those of the Schema on two key points: the definition of marriage and the definition of consent.

1917 Code
1013, 1. The primary end of marriage is the procreation and education of offspring; the secondary end is mutual assistance and

1975 Schema
243, 1. Marriage, which comes into existence by mutual consent . . . is an (intimate) partnership of the whole life between a man and
remedy of concupiscence. a woman, which by its very nature is ordered to the procreation and education of children.

Comments:

(1) The Schema version is a compilation of phrases from Gaudium et Spes, paragraph 48. But the draft does what the Council never intended: it uses this manner of speaking as a total replacement for the traditional analysis in terms of primary and secondary ends.

(2) At first blush, these two canons do not seem to be parallel in intent. It looks as though the new version explicitly defines what marriage is, whereas the old one does not. But this first impression is wrong. The 1917 Code took it for granted that marriage is a “partnership” and then really defined the nature of this partnership by stating what its intrinsic purposes are. After all, it is largely by virtue of these specific purposes that marriage is different from any other association of two people. On the other hand, to say that marriage is a “partnership of the whole of life” (consortium totius vitae) is to say too much. No doubt it is true that husband and wife should share everything; but must they do so in order to have a valid marriage? That is the question which canon law ought to address: not the maximum desirable but the minimum essential.

(3) By specifying that this partnership “of the whole of life” is “ordered” by its very “nature” to the procreation and education of children, the new definition will appear to most people, perhaps, to be saying exactly what the old definition said with its language about the “primary end.” But this impression, too, is false. The new definition gives us an all-embracing partnership which has a natural fruit (children). The old definition gave us a primary purpose which defined what is essential to the very existence of the partnership. The new definition does not tell us what is essential to the thing’s existence; it merely tells us what the thing will produce if not interfered with. It thus leaves open the possibility that “mutual assistance,” “remedy of concupiscence,” “romantic love,” or anything else we usually associate with marriage is just as essential to its existence as are procreation-related acts. It is for this reason that the real thrust of the new definition can be called an equalization of the traditional ends of marriage—an equalization which is
accomplished precisely by not mentioning them and thereby not distinguishing what is essential to the existence of the bond from what is perfective of it. (2)

We discover what the consequences of that equalization are by turning to the question of matrimonial consent.

1917 Code

1081, 2. Matrimonial consent is the act of the will by which both parties give and receive a perpetual and exclusive right over each other's body (ius in corpus) for the purpose of acts which are suitable of themselves for the procreation of offspring.

1082, 1. In order that matrimonial consent may be possible, it is necessary that the contracting parties be at least not ignorant that marriage is a permanent society between man and woman for the procreation of children.

1975 Schema

295, 2. Matrimonial consent is that act of the will whereby a man and a woman by means of a mutual covenant constitute with each other a communion of conjugal life which is perpetual and exclusive and which by its very nature is ordered to the procreation and education of children.

296. They are incapable of contracting matrimony:

1. who are so affected by a mental illness or a serious disturbance of mind that, lacking the use of reason, they cannot give matrimonial consent;

2. who suffer from a serious defect of discretion of judgment on the matrimonial rights and obligations to be mutually given and received.

297. They are unable to contract marriage who are unable to assume the essential obligations of matrimony because of a serious psychosexual anomaly.

298, 1. In order that matrimonial consent may be possible, it is necessary that the contracting parties be at least not ignorant that marriage is a permanent
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community between man and woman, ordered to the procreation of children through some physical cooperation.

2. This ignorance is not presumed after puberty.

Comments:

(1) One can see at a glance that the two proposed canons 296 and 297, which create psychological conditions for the act of consent and thereby to some degree dis-intellectualize it, have no counterpart in the old Code. There, one proceeded directly from the definition of consent to the (intellectual) impediment of ignorance. It should be noted, however, that some of the defects recognized in 296 (but not those of 297) had already been accepted in case law under the Code, though from a more philosophical angle. In other words, it was already Thomistic doctrine that one who lacks reason cannot consent, and that children under the age of 14-16 years lack "due discretion."

(2) The 1917 Code was absolutely clear that the object of matrimonial consent (that is, the thing consented to) is in the last analysis nothing more than a "right over each other's body" in perpetuity for the sake of procreative acts. Now this notion of the object is directly deduced from the "primary end" established in canon 1013. By defining matrimonial consent in this way, I mean, as specified by this object, the Code was nailing down the fact that only those things connected with the primary end are essential to the existence of the marriage bond—not the things connected with the secondary ends, however important they may be to a happy marriage. Therefore, it was perfectly natural for the old Code to move right on to canon 1082, insisting that it is only ignorance of the primary end which invalidates consent—not ignorance of the secondary ends, and certainly not a psychic incapacity to "assume" or carry out those secondary ends. The proposed Schema, however, cannot proceed so straightforwardly. Note that it has expanded the act of consent enormously to make it consist in a "mutual covenant for a communion of conjugal life." Concomitantly, it must expand the object of matrimonial consent to include all of the old secondary ends and perhaps a great deal more besides. Warmth, tenderness, self-sacrifice, responsibility, cooperativeness, good manners—nobody knows where the list ends—become now part and parcel of the very "rights
and obligations” exchanged in the “covenant.” Concomitantly, also, the required “due discretion” must be expanded in scope: failure to appreciate in a mature way how any of these things function in marriage becomes, for the first time in the history of Christendom, an adequate ground for annulment (296). Even more: an inability to put any of these secondary aspects into practice becomes a ground (297). This last is a stupendous innovation, for the following reason.

(3) One may ask: how can a person ever know that he or she is not able to practice these obligations? Clearly, he or she must first marry. Then, if the marriage goes “on the rocks,” there is prima facie evidence of the inability in question. For, please note, the inability to “assume obligations” is a time-tested thing. It is an inability manifested today to carry out commitments which were made yesterday. Thus the class of impediments recognized in proposed canon 297 is radically different from the class recognized in the first part of 296. There it was a question of some mental disease that was diagnosible on the wedding day (at least in principle); here it is a question of something not diagnosible until after the partners have already broken up. In short, the Schema proposes to recognize a class of impediments for which sheer marital unhappiness is the sole decisive symptom. The danger of putting that notion into practice is signalled already in the Staffa letter. In effect, the Cardinal remarked, the spouses become the real judges of the “value of their marriage,” which is seen to consist “in the measure in which, by what follows, their union represents a success or a failure.” In the Schema as in the Dutch tribunals, it is the spouses themselves who can “establish by their own judgment if the marriage was valid because it was happy or else null or dissolved because it ended in failure” (the complete text of Cardinal Staffa’s letter appears at the end of this essay). But what we have just seen is by no means the only problem with 297.

(4) The phrase “serious psycho-sexual anomaly” appears to limit the scope of this canon to a significant, and perhaps even safe, degree. In fact, it does not. The Reverand Francis G. Morrisey, O.M.I., dean of the faculty of Canon Law at St. Paul University, Ottawa, president of the Canadian Canon Law Society, and by all accounts one of the most learned, careful, and influential of the progressive canonists, analyzed this very phrase at the 1974 convention of the CLSA, in a speech entitled “Proposed Legislation
on Defective Matrimonial Consent.’” Morrisey is well acquainted with those working on the Code revision and with prominent canonists throughout the world who, as tribunal judges, will give canon 297 its practical interpretation. On the basis of his discussions with these men, Morrisey reported to the CLSA that the term “sexual” in the phrase “psycho-sexual anomaly” is used “not in the sense of matters relating to genital activities, but rather to those aspects of complimentarity of the spouses.” “Consequently,” he concluded, “a psycho-sexual anomaly would be understood to mean a disorder that prevented the couple from giving and accepting the basic obligations of the consortium vitæ” (typescript of the speech, p. 15). Now, as soon as you realize that this consortium vitæ and marriage are the same thing, you realize that “psycho-sexual anomaly” means anything an unhappy couple wants it to mean, if the tribunal is sympathetic. Why do I say that? Because Morrisey’s undoubtedly correct interpretation of 297 leaves the canon an empty tautology. Namely: they are unable to contract marriage who are unable to assume the essential obligations of marriage because of an inability to assume the essential obligations of marriage!

These few texts and notes will suffice to indicate the scope of the problem. The new Schema gives us a body of legislation which is scarcely legislation at all. It is hard to think of a single abuse currently causing scandal in tribunal practice which could not be justified under this draft. Father Morrisey, if I may appeal to his authority again, said much the same thing in the above-mentioned speech to the CLSA, when he urged tribunal personnel not to wait for the official promulgation of the new Code in order to begin handing out annulments on the basis of its provisions, because these provisions are “simply the result,” he said, “of a post-factum analysis of decisions already granted by the courts and applied in practice in the larger tribunals” (page 16, my emphasis). In other words, the proposed Schema reflects, incorporates, and blesses the existing state of affairs. A more damaging indictment is hard to imagine.

But let us be clear about what, exactly, the trouble is. It is one thing to say that the proposed Schema is open to abuses. So is
everything. It is something else to say that the doctrine it presents is inherently wrong. Abuses are a superficial problem. They can be corrected by a variety of actions, including tighter procedural norms. If it is only a question of abuses, the new Schema might be accepted after minor surgery—the removal of canon 297 and perhaps a reworking of 296.

But what if the problem is deeper than that? What if the very definitions of the Schema de Sacramentis are unacceptable? Then we are no longer dealing with a crisis in discipline, but a crisis in doctrine. It is my own view that the crisis is, in fact, both doctrinal and philosophical. In order to defend that view, I must first shoulder the unpromising task of defending the 1917 Code’s definition of marriage as somehow adequate to the subject.
I number among my friends many hard-headed people who, though married, have no patience for romantic slop. I can’t imagine that any of them, however, would describe his or her marriage as cold-bloodedly as does the Code. A perpetual and exclusive right over each other’s body for the purpose of procreative acts—is that what you think about on a wedding day? Or on the day you fall in love? Or on the day you “pop the question”? Not likely. Now I realize one must distinguish between the objective purposes of marriage (known technically as the finis operis) and the subjective motives of the couple getting married (which are called the finis operantis). I realize that the Code is only talking about the former. It is not describing what is actually in anybody’s mind at the time of a wedding. It is describing only the intrinsic finalities of this primordial institution, which is something that two people enter into. They do not create it; they enter it. It is something bigger than both of them. It cannot be scaled down to their own motives, for it is something higher than the stars in a bride’s eyes. It is something founded by Almighty God and endowed with purposes of its own, from Him. It is these purposes which the Code is talking about as primary and secondary ends, not your purposes or mine.

Nevertheless, it is hard to be satisfied with that 1917 definition. By all means, let us make use of the helpful distinction between the finis operis and finis operantis. Let us adhere strictly to what is objective. Nevertheless, it is awfully hard to swallow a definition of marriage which says not a single word about love, companionship, self-giving, self-sacrifice, or even caring a damn about each other. How can one pretend that the Creator Himself did not want to see those things realized in marriage? And if they are part of God’s design, how can they be anything but objective?

This strikes me as a very strong argument and, in fact, unanswerable. One may balance it a bit by a cross-cultural move. One may point out that the Church’s definition must fit the reality of marriage not only in our own society, where dating and romance are
standard, but also in societies where mere children are married at puberty, and in aristocratic social strata, where marriages are dynastic alliances. It is certainly correct to point out that we can not expect to find in these cases the same romantic relation between the spouses which we consider desirable. Nevertheless, the argument stands. For we can hardly deny that there ought to be present in these unions something which corresponds to what we mean by loving and caring. We cannot accept the notion that a marriage in which the two parties are personally quite indifferent to each other should be anywhere considered a "good" marriage. We see something of divine intent in married love, and we can hardly deny that divine intentions are valid in all cultures.

Having made this important concession, do I now concede that the 1917 Code's definition of marriage ought to be revised? No, I do not. For while I concede the objectivity of spousal love, cross-culturally nuanced, as intrinsic to marriage and essential to an integral definition of it, I deny that the Code's definition is or should be such a definition. To defend this new thesis, I must distinguish three levels of discourse about marriage.

First of all, we refer frequently to marriages which are so happy as to be truly "ideal." We say that those marriages were "really made in Heaven." Either from literature or from personal experience, we know that there are men who have an extraordinary capacity to make a woman happy for the rest of her life. And there are women with the same power to fascinate. We say that these are extraordinary people or, perhaps, extraordinarily "right" for each other. Very well: what is our response to the level of perfection we see in these marriages? We admire it. We try haphazardly, perhaps, to imitate it. but we do not seek the confessional if our own marriages are not quite so blissful, and we certainly do not require other people's marriages to meet that standard on pain of being invalid.

At a second level, we speak of "good" marriages. They have no story-book features, but they are still "good," because they meet our normative expectations of what a marriage "should" be. This word "should" is very important and must be taken here in an almost technical sense. The "should" we want is the one which recognizes an objective norm (as in "Chairs should be comfortable")
or "Thinking should be logical"). We are not talking about the "should" which daydreams, as in "I should have married Grace Kelly." In this way, when we say that marriages "should" be characterized by spousal love, we are saying something both normative and definitive. We are not merely expressing a preference. The difference between a good marriage (defined by some of the "shoulds") and a defective marriage (lacking all the "shoulds") is just as objective as the difference between a good cabbage and a rotten one. My point is that on this second level, we can write a definition of marriage which will include normative claims and for that very reason be a certain kind of objective definition. This is what I call an "integral definition." The well-known works of Dietrich von Hildebrand, if I am not mistaken, offer an integral definition of marriage. The same is true of Vatican II.

But I insist that we must also recognize a third level. A rotten cabbage, though it lacks all of the edible qualities it "should" have, is still a cabbage. An utterly loveless marriage is still a marriage. This fact is one we can't help recognizing in everyday usage.

"Are those two married to each other?" one asks in surprise.

"Oh, yes," a mutual friend says, "but they can't stand each other. If they weren't Catholics, they'd have been divorced years ago."

Consider that snippet of conversation. We find it perfectly intelligible, and that fact alone is the key to my third level. For if an integral definition of marriage were the only kind possible, that snippet would be self-contradictory. A "loveless marriage" would not be a misfortune but an oxymoron, like "Socialist realism." As soon as we grasp this point, we recognize the need for another kind of definition. And this I shall call a "minimum definition."

A minimum definition, I suggest, does not tell us what we usually mean by the word it purports to define. It would not make a very good dictionary entry. It is too bare of connotation. It is a highly refined thing, deliberately created for the sake of some technical, and probably distasteful, business. But for that business, perhaps, it is the very thing needed. The canon law of marriage is intended for tribunal work, and tribunal work is a distasteful business. One needs a bit of imagination to see how a good marriage, as we defined that
term above, could ever come before a tribunal at all. The definition of a good marriage, the integral definition, then, has no use there. If your task is to sort rotten cabbage from rotten lettuce, the definition of good cabbage is quite useless. You must judge the stuff not like a housewife but like a chemist. You need some rather arcane test for distinguishing one wreck of protoplasm from another. Just so, a canon lawyer needs what I call a minimum definition for distinguishing an unhappy union in which a bond is present, from another unhappy union in which no bond is present. Given that precise task, an integral definition of marriage is of no use to him, unless precisely it is his intention to annul every unhappy union because it is unhappy. Our chemist, in that case, wants to judge like a housewife!

Once we arrive at this perspective, the 1917 Code's very curious way of speaking begins to make sense. The Church's dogma that a sacramental marriage cannot be annulled, sooner or later imposes upon us the very difficult task of sorting one kind of existential wreck from another. This work requires a definition of marriage which translates the sentence "x is married to y" into the minimum information which that relation can be said to convey. In the eyes of the Fathers and Scholastic Doctors, that translation was as follows: "x has given to y a perpetual and exclusive right-over-the-body for the sake of procreative acts, and y has given the same right to x."

I doubt that this translation can be improved upon. At any rate, given its technical purpose, it is certainly not improved by the proposed Schema, which goes a long way toward replacing it with an integral definition.(3)

In order to illustrate with different examples the mischief which is done when an integral definition is used where a minimum one is wanted, I propose to consider a relation which is conceptually less complicated than marriage but closely allied to it. Let us talk about the relation which we call "motherhood."

If we say that x is the mother of y, what is the irreducible minimum of information which the sentence conveys? Clearly, it is this: that y was born from the womb of x, with the necessary implication that x is (or was) a woman. From this elemental
consideration, most people can see that motherhood is a real relation. It is neither created nor dissolved by attitudes. If this woman is your mother, then whether she raised you properly or not, and whether you love her or not, she is your mother. The relation is founded on a bedrock of biological fact which no amount of wishful thinking or human failure will undo.

Most people can also see that this real relation (like the marriage bond) entails certain rights and obligations. For every value of \( x \) and \( y \) for which the sentence “\( x \) is the mother of \( y \)” is true, we know at once that \( x \) possesses certain rights and obligations to nurture, educate and command \( y \), until \( y \) reaches legal majority. We also know that \( y \) possesses obligations to obey \( x \) until his or her majority, and further obligations to comfort, respect and support her thereafter. These rights and obligations remain no matter how bad a mother \( x \) was, and no matter how worthless a son or daughter \( y \) turns out to be. We recognize how inalienably these obligations attach to motherhood in our “should” statements. Let Mrs. \( x \) be a tramp and a drunk: we still say she “should” take care of her children and raise them properly. Our behavior here is curious. She is obviously unfit, and there is a nice federally-funded State Home down the road. Yet we continue to say that she should raise them, and that if she needs to reform herself in order to do so, we say that she should do that, too. Why should she? Because, we say, despite all her failures, the fact remains that she is their mother. Let the son, \( y \), be estranged from his mother these past twenty years. We say it is wrong, or at least “too bad.” He should be reconciled with her and comfort her in her old age. Why? Because, we say, despite everything, the fact remains, she is his mother.

When we talk this way, are we expressing a moral ideal? Not at all. It is more like a moral minimum, a minimum which everyone recognizes as somehow inseparable from the brute biological fact of motherhood among human beings. In our discussion so far, we have certainly not given a phenomenologically complete description of motherhood, with all the complex values of love, nurture and family which ought to be realized therein. We have not elaborated the materials for an integral definition. But we have established a viable minimum definition, for which I shall now invent a not-too-implausible application.
A wealthy playboy inherits a sizeable annuity with the proviso that he must spend up to 80 percent of it each year, if necessary, for the support of his mother. Curiously, the will does not say, "Mrs. x" or "the widow of the late Mr. x"; it says "his mother." Now it happens that the mother in question, for whom he has no affection whatever, lives in a grand style: a few months in Switzerland, a house in Palm Beach, a suite in Biarritz. Her expenses are going to cost him every penny of that 80 percent, a calculation which he understandably resents. He would dearly love to transfer the obligation to an old nurse of his, who practically raised him anyhow, and who lives on social security in a duplex somewhere. She'd be very grateful and very cheap. So, with the aid of a "personalist" lawyer, who is going to play tricks with the definition of motherhood, our young friend goes to court to have this ancient nurse declared legally "his mother" within the meaning of the will.

We shall drop in upon the hearing. The real mother's lawyer has just argued as we would expect: "to be a man's mother means that he was born from your womb; period; end of case." The personalist lawyer now rises.

"May it please the Court: my colleague's definition of motherhood is a grotesque impoverishment of the reality. He has mentioned nothing which cannot equally be said of breeding 'vermin. This case deals with human persons, and he reduces them to an animal level. Who does not see that motherhood is above all a personal thing, involving not only the body but also the spirit, the heart? In my colleague's concern for mere biological facticity, he has missed the very essence of the mother-child relation, which is a unique and peculiar love, a distinct species of love, if you will, containing its own special dynamisms and finalities. It is this love which makes a mother, and not some physical event which happened years ago. In fact, it is only this love which makes a mother. My colleague appeals to ordinary usage, but ordinary usage refutes him. Look at the case of a woman who adopts a baby and raises it as her own, giving the child everything that is in her. Do we deny to this woman the title and reality of 'mother'? Do we muster the cruelty to insist that she is nothing, and that only the faceless woman who abandoned her child on the orphanage doorstep is a 'mother'? God forbid. And yet look at the present case! All the love in my client's
young life came from this humble nurse; if anyone was mother to him, she was. And shall we now say that she is nothing?"

Perhaps the other lawyer has an answer to this impressive case. He rises.

"I am deeply moved, your Honor, by my colleague's words. He has reminded us that there is such a thing as maternal love, which is different from any other kind of love and richly deserves our study. But we are here to decide the law. My colleague has further reminded us that any woman who steps into the life of a child and gives him this special love, at least in some measure, is in that same measure, morally, his mother. If my colleague's client feels an obligation on that account toward his nurse, nothing hinders him from discharging it. But there is no claim here that a legal adoption was made, and hence there is no justification in asking the Court to acknowledge this "moral" motherhood to the detriment of the real one. But let us not rest content with legal arguments alone. Let us consider my colleague's fine-sounding theory on its own merits and see where its consequences would lead us, if we were to base the law on it.

"My colleague wants us to redefine the sentence, 'x is the mother of y,' to mean something like this: 'x carries out a special sort of love and care for y.' Well, I don't for a moment deny that mothers normally exercise a 'special love and care' for their children. I could bring forward a hundred shining examples of that behavior. But none of those examples, your Honor, would be of any use to this Court, either in the present case or in any other action which could likely arise under the legal principle we are trying to settle. I never heard of a suit whose cause was exemplary behavior. No, if my colleague's definition is accepted, this Court is going to need a criterion for very unexemplary behavior. We will have to draw the fine line between minimum love and substantial indifference, or between rudimentary care and not-quite-total neglect. Your honor, I submit that this is like trying to draw a legal line between the last hour a man is unshaven and the first hour he has a beard. It can't be done. The law requires a different kind of standard, and in our case that standard must be 'birth from the womb.'

"Furthermore, if the relation we call 'motherhood' is constituted by love as actually exercised, then I must ask whether any woman
ever exercises it perfectly. Was there ever a child who grew to manhood without some complaint, in his own eyes just, against his mother? I think not (unless it was Jesus Christ Himself). Must we not admit, then, that every mother we have ever met falls short of absolute perfection? Yes, we must. Then how much falling short can we tolerate? If the relation is constituted by love, at what precise point does the failure of love dissolve the relation? Clearly, that point is a matter of opinion, which each of us must decide from personal experience. But if it is a matter of opinion, and if I feel that my mother did not give enough love to me, then I am at liberty under this definition to declare the relation dissolved between us.

"For this very reason, my colleague's argument becomes a refuge for scoundrels. If I have a mother to support but am pinched for cash, I need only discover some flaw in her exercise of maternity in order to declare before the world that she was no fit mother to me, and I am clean quit of my obligations. There is, in that case, no bond of motherhood independent of our mutual wills and affections by which I could be constrained. A monstrous doctrine. And absurd on its face. For, if I declare the bond of motherhood dissolved, I have no mother. Did I, then, enter the world by spontaneous generation? My colleague's contempt for 'mere biology' has blinded him to the fact that certain biological events among human beings are never 'mere' biology but are events capable of themselves of establishing real, binding, and personal relations. We honor the adoptive mother, of course; and we recognize that her de jure relation also entails rights and responsibilities. But we do not forget that personal birthgiving alone constitutes real mothers and gives them rights which no power on earth can take away."

I trust that the patches of illumination which this parable was intended to throw upon our subject are too obvious to require comment. Men don't usually try to dump mothers, but they are perennially trying to dump wives. And the form of their argument is perennially the same. Major premise: marriage is a deep, loving, glorious thing. Minor premise: my marriage is a pain in the neck, or elsewhere. Conclusion: my marriage is no marriage.

Notice how the whole argument turns on the major premise. It must be an integral definition if the conclusion is to follow. Now, what
kind of definition did Vatican II give us? Surely, an integral one, a tribute to Christian conjugal love. And so the truth emerges: the whole post-1965 project of the canon lawyers to “implement the Council” in concrete, tribunal work was from the very beginning a mistake, an absurdity, an impossibility.

One could implement the Council’s teaching in pre-Cana conferences, in family life workshops, in marriage encounter groups, in pastoral counseling, in sermons, in theological exegesis—anywhere, in fact, but in tribunals. Canon law requires a minimum definition, or else it has no reply to the perennial argument. Admit an integral definition into the Code, and the tribunals may as well close down. Failure to appreciate this point reflects a blunder not so much in the understanding of marriage as in the understanding of law itself.

In fact the point is so obvious that the reader may well suspect I am doing the progressive canon lawyers an injustice. Surely they can’t be as confused as I make them out. No? See for yourself.

One of the most interesting moments of the refresher course at the Gregorian in Rome (October-December 1971) was when Monsignor Fagiolo, then a Rotal judge, turned in his lecture to discuss the juridical importance of conjugal love. His remarks were obviously favorably received by one section of his audience and, equally obviously, the hackles began to rise in another section. He departed from his prepared text to emphasize his point: when engaged on pastoral preparation of couples for marriage, or preaching on the meaning of Christian marriage at the wedding, or expounding the Scriptural doctrine on marriage, we all, as priests rightly and happily hold up true conjugal love as a Christian ideal. Why, then, as canonists, should we ignore it, or fight shy of it?

This was a Rotal judge speaking. He thinks conjugal love, the key to an integral definition of marriage and therefore an appropriate theme in the pulpit, is also an appropriate concern in the tribunal. Need we be surprised any longer that certain Rotal decisions have led the way in the self-destruction of canon law? Moreover, the above story was recounted with approval by Cyril Murtagh, himself a prominent canon lawyer, in an article praising Fagiolo’s “insight”—an article considered competent enough to be published in the “learned journal” of the United States canon lawyers, The Jurist (XXXIII,
1978, p.378). You might keep this name Fagiolo in mind, by the way, because we are going to encounter him again.(4)

But perhaps Fagiolo is an extremist. Perhaps we can find a middle ground. Perhaps we can admit that the Council’s teaching on marriage, in its full sweep and beauty, is unsuited to tribunal work. But maybe some aspects of it could be brought in. After all, look at what the Schema says: it doesn’t lyricize about love and devotion. It never mentions those words. Therefore, why could it not be the case that the Schema, too, is presenting an acceptable, minimum definition, albeit a little different from the old?

This is a very fair question. On its surface, it is merely asking us to consider, impartially; the legal suitability of what the Schema has to say. Look at it this way: we grant that the old Code’s minimum definition was a reasonable thing. But after all, reasonable statements can be supplanted by other reasonable statements or even, if you insist, by less reasonable statements; and no enormous harm is done. Maybe it is true that the new definitions are not quite so rock-ribbed as the old ones, but so what? That doesn’t compromise our Faith, certainly.

I answer this plausible argument with a new investigation. I must see now whether our Faith is, in fact, committed to the old Code’s minimum definition, or to any of its parts, presuppositions or implications, in such a way that to replace it, as the proposed Schema does, contradicts Magisterial teaching. Our legal-suitability question transforms itself into a theological question. And it is my contention that a contradiction does, indeed, arise.
We have seen that the old Code definition consisted of two basic parts: canon 1013, which listed the purposes of marriage and said that one of them, procreation, was "primary"; and canon 1081, which defined the rock bottom of what we can consent to and still be consenting to marriage rather than to a shack-up or some other arrangement. We saw that this minimal object of consent was an exclusive and perpetual ius in corpus (right over the body), exchanged for the sake of "acts suitable of themselves for the procreation of children."

Is it dogma of the Church that matrimonial consent involves precisely that object and nothing more? No. There is no document of the Extraordinary Magisterium which defines matrimonial consent or its object.

However, there is more to the problem. It is obvious how closely the Code's notion of consent centers on the sex act (or more precisely: the right to the sex act). Everything seems to hinge on the couple's intentions in that regard. Why should this be so? From what source can the Code derive this particular focus? We have already seen the answer: the object of consent as presented in the Code is derived from the doctrine that marriage has a primary end which is the procreation and education of children.

There is surely no need to exhibit the derivation in detail. It is obvious why, if procreation-cum-education is primary, matrimonial consent must be to a right over the body, and not to a right over the soul or to a condominium of real estate, or anything else. It is further obvious why the ius in corpus must be granted for the sake of acts "suitable of themselves for procreation," and not acts suitable for mutual amusement or personal "enrichment." It is finally obvious why the grant must be exclusive and perpetual, since the nurture and moral training of children requires the stable society of their parents. Pull the string marked "primary end," and all the contents of the object of consent come popping out, one after another. That's what we mean by a "primary end."
Now the trouble is—and here is the nub of my whole complaint—that the same string-pulling experiment does not unpack the overstuffed object of consent presented by the new Schema. Here we must consent to a "communion of conjugal life," which we are told is an "intimate partnership of the whole of life." The string marked "procreation" is still hanging about; but if you pull it now, you find out only what the fruit of this partnership is, not what the relation holds in itself. Marriage has acquired a meaning ("communion of the whole of life") which is intelligible antecedently to any consideration of its fruit. And the contents of this "communion" simply cannot be unpacked without pulling other strings, marked "mutual aid" or "assumption of obligations" or whatever. That very situation, I contend, is decisive evidence that there is no longer a "primary end" in sight. The truth of that contention is patent as soon as one attends to what the term "primary end" means in technical parlance.

Here is the way Father Anthony Ostheimer stated the matter in his far-reaching dissertation, *The Family: A Thomistic Study* (Catholic University of America, 1939):

The primary end of anything is that principal good for which the thing exists; it is the end that first arises from the very nature of the thing and is sufficient to account for the essential perfection of the thing, apart from any other contributing ends.

(There is the point we are looking for. Pause to take it in. Ostheimer continues:)

The secondary end, however, is some added or accessory purpose for which the thing exists. It may proceed from the primary itself; or from the nature of the thing itself, but only for its integral, not its essential perfection. Of itself it is insufficient to account for even the essential perfection which the nature of the thing demands [p. 32, emphasis added].

Anyone who understands this paragraph understands immediately the logic of the old Code's definition. It zeroed in on procreation-related issues because what is directly connected with these is all-by-itself sufficient to constitute a valid marriage. Conversely, in the absence of this end, no amount of partnership, mutual aid or cohabitational bliss is sufficient either to make a marriage or to
render the very word intelligible. *Ergo*, a defect in the capacity or intention to fulfill the primary end is directly and immediately a cause of nullity. But a defect in the capacity or intention to fulfill any of the secondary ends, or even all of them, is a cause of nullity *if and only if* that defect also renders unattainable the primary end. I repeat: so long as the primary end remains open, a defect relative to a secondary end prevents only the integral perfection of the marriage but not its essential perfection, and the defective marriage is still a marriage. (5)

In the progressive tribunals of today and, as we have just seen, in the new *Schema*, this principle is discarded. Now any defect in the capacity or intention to fulfill a secondary end is in itself a cause of nullity, without reference to the procreative aspects. That policy is an admission *eo ipso* that the "primary end" is no longer admitted. The flood of unsavory annulments is *therefore* unrestrained and unrestrainable. For, without a primary end, there can be no minimal definition; and without a minimal definition, tribunal work is deprived of its only coherent rationale.

Everything hinges on the affirmation of a primary end in the technical sense. In that light, we return (at last) to our theological investigation. Is it a binding teaching of the Church that marriage has a primary end to which every other end is intrinsically subordinate, and that this primary end is the procreation and education of children? Yes, absolutely. This doctrine enjoys a consensus of the Fathers as well as the support of the infallible ordinary Magisterium of the bishops of the world, teaching in union with the Sovereign Pontiffs, especially Pius XII, who declared his express intention to settle this question.

My claim is hotly rejected by all progressive canon lawyers, but it is surprisingly easy to prove.

Many popular Catholic writers ignorantly suppose that the Church Fathers and the Scholastic theologians acquired the doctrine that procreation is the primary purpose of marriage from St. Augustine. It is said that the great bishop of Hippo had a hang-up on the subject of sex, that he never quite got over his Manichaean period, and hence required the motive of procreation in order to justify sexual relations at all. It is true that few people would care to defend all of St.
Augustine’s views in the area, but it is false to claim that the
Church’s tradition originates in St. Augustine. Even a cursory exami­
nation of the ante-Nicene Fathers will explode that myth. In fact, the
doctrine that marriage is primarily for the sake of procreation is
already taught at a time when the ink is scarcely dry on the New
Testament. It is found in Justin Martyr (Apologia, 1) and in St.
Ignatius of Antioch (Epistle to the Philadelphians). If we ask where
the early Fathers got this teaching, we discover a very surprising
answer: from the Old Testament. Remember that Tobias was hesitant
to take Sarah as his wife. The Archangel Raphael therefore
commanded him:

And when the third night is passed, thou shalt take the virgin with fear
of the Lord, moved rather for love of children than for lust, that in the
seed of Abraham thou mayest obtain a blessing of children (Tobias
6:22).

And on the night in question, Tobias prayed as follows:

And now, Lord, thou knowest that not for fleshly lust do I take my
sister to wife, but only for the love of posterity, in which thy name may
be blessed for ever and ever (Tobias 8:9).

Exactly there is the source of the Church’s constant and immutable
teaching that procreation is the primary end of marriage as an
institution. Charges of Gnostic influence on the Greek or Latin
Fathers are exegetical red herrings.

Other writers of pulp theology say that the definition of marriage
offered in the Code of Canon Law is un-Patristic in that it reeks of
“legalism,” supposedly the besetting sin of the Latin West,
especially after the fifth century. Well, I don’t know what else a code
of law is supposed to “reek” of, but I think it will be granted that St.
Clement of Alexandria was hardly a Latin, nor a legalist. He was the
first of the Greek Fathers to offer an explicit definition of marriage. If
this sentence were not found in the third book of this Stromateis,
however, one would swear it had been composed by an editor of the
1917 Code. Here it is:

Marriage is the first legitimate conjunction of man and woman for the
procreation of legitimate offspring (Migne, Patrologia Graeca VIII, col.
1086).
The truth is that the agreement of the Fathers on this doctrine of procreation as the primary end is so massive, that only one plausible dissenter can be brought forward. This is St. John Chrysostom (see especially his *De Virginitate*, c. 19). Chrysostom acknowledges that at the time of man's creation, the need to multiply and fill the earth was the controlling justification for marital relations. But now that the world is populated "from sea to sea," he says, and the survival of the species is assured, the use of the marriage act has no excuse whatever, except the avoidance of a greater evil, namely, mass fornication. To say the least, this view of spousal love can hardly be much comfort to modern personalists! Indeed, it seems that Chrysostom rejected not only the Code's primary end of procreation but also the secondary end of "mutual assistance," leaving nothing at all but the *remedium concupiscentiae*. It requires very little reasoning to show that such a view of marriage is theologically untenable. For our present purposes, however, the crucial thing to understand is that Chrysostom's position is very arguably not a position on marriage at all! Let me explain.

There are two closely related but formally distinct questions which Chrysostom has not, perhaps, kept apart. One concerns the finalities of marriage. The other concerns the finalities of the marriage act. So long as we talk only of procreation, it is not clear that there are two sets of finalities, since procreation belongs to both. But as soon as we talk of "mutual assistance," the divergence opens up. Namely: if we define "mutual assistance" correctly (that is, as *all* the ways in which spouses help each other, in that two heads are better than one, and four hands are better than two, etc.), it is clear that such assistance is a purpose of marriage but cannot possibly be a purpose of the marital act. Conversely, if we define "mutual assistance" in a sexual way (as roughly equivalent to the "unitative" aspect of sex), then such "assistance" is no longer a distinct purpose of marriage, for it is no longer distinguishable from the *remedium concupiscentiae*. In other words, "mutual assistance" cannot be listed in both sets of finalities without equivocation. And oddly enough, though this point is very little understood, the same is true even of the *remedium*. For, if this "remedy" is defined as sexual satiety or, more sweetly, as a "warm, happy sex-life" (as many theologians now teach), then the *remedium* is indeed a finality of the sex act, but it is an odd remedy. It is fighting
fire with fire, as St. Albert the Great long ago remarked with scorn. It is much more plausible to interpret the famous “remedy” as an effect of God’s grace, given through the marriage bond, whereby the disorderly element in sexual desire is restrained or sublimated precisely as part of the change which married love works in people. Authentic married love is so shot-through with charity, that all its elements are transfigured, including the explicitly sexual. To put it another way, the union of husband and wife becomes, as a result of the sacramental grace, a pure expression of love and not an expression of either partner’s unrestrained “need” for a certain kind of gratification—and that result is the remedium. (It may also be the case that some shadow, at least, of this transformation of man’s sexual dynamism is accomplished on the natural level in non-sacramental marriages.) At any rate, if we take this second, and more plausible, view of the remedium, then it is obviously not a finality of the sex act but only of marriage itself. Now back to St. John Chrysostom. It is obvious that his distaste for the marriage act is the result of a purely material view of it, whereby it is materially identical to the act of fornication. Hence he could not have recognized the properly marital sense of the remedium, for that would have introduced a formal distinction between the two acts. The only purpose of “marriage” which he seems to accept, therefore, is not a purpose of marriage at all, but simply an effect of the sex act as limited to one partner. As soon as one sees this point, it is evident that the Saint’s whole discussion is not about the ends of marriage but about the ends of the sex act. He argues that these are tawdry in order to persuade people not to marry in the first place. He is not setting their priorities for them if they already are married. Hence his unusual opinion, even if it were correct, is not an opinion on the question we are investigating. The only apparent dissent to a Consensus of the Fathers on our question vanishes.

There is no point in rehearsing the (uncontested) evidence for our thesis which accumulated during the Middle Ages and in the encyclicals of the modern Popes (cf. Leo XIII, Arcanum Divinae Sapientiae, and Pius XI, Casti Connubii). We shall proceed directly to Pius XII, who considered the issue precisely in its contemporary form and resolved it.

Pius XII was confronted with a rising tide of discontent over the
meager treatment accorded to marriage in the theological manuals of the period. Beyond doubt, there was reason for discontent. Articulate and zealous Catholic couples were looking for a vision of marriage which would do full justice to the vocation they were living out. They turned to the theological manuals and found almost nothing which could inspire them. Hence, a ready market awaited the "personalist" publications.

But why were the manuals so disappointing? The reason is rather important. These works were satisfied, on the whole, to rehash the very questions which had been resolved substantively in the Middle Ages. Now ordinarily there is nothing wrong with that; after all, medieval questions had a habit of being penetrating. But there was something peculiar about the present case. Each of the towering figures of the Middle Ages had done his work on marriage in the course of commenting on the Fourth Book of Peter Lombard's *Sentences*. But this part of the *Sentences* had gathered problems arising largely out of canonical jurisprudence. Then as now, what was of interest to canon law was a set of answers serviceable in tribunal work. And right there was the source of discontent 700 years later. The *Sentences* and its commentators (and thus the manuals) were interested in what I have dubbed the "minimum definition," and not a vision of marriage which could inspire pious couples. That sort of thing was supposed to be handled in sermons, and of course was not. If we can fault the manualists, it is not because of what they did say but because of their failure to see that a different kind of discussion was possible and appropriate.

Enter the "personalists." They proposed to fill the gap, all right, but they did not seem to realize that the gap was there. They seemed to think it necessary to punch a hole first in the existing theological structure. They did not see the possibility of adding what I have called an "integral definition" of marriage alongside the classical "minimum definition"; instead they proposed to attack the latter, refute it, and replace it with something more "adequate." Here is the source of their future trouble. One cannot "attack" the minimum definition without attacking the principle which makes that definition possible, namely, the principle that procreation is the "primary end" of marriage in the technical sense. And to deny *this* principle, I am arguing, is doctrinal error, if not heresy.
Very well: the personalists justified their attack on three grounds: sexological, apologetic and moral. These have been admirably summarized by Monsignor F. W. Carney in his doctoral dissertation, *The Purposes of Christian Marriage* (Catholic University of America, 1950). He says the three grounds were these:

first, the general development in biological and psychological knowledge of the sexual life of man, resulting in a deeper recognition of sex as a factor influencing the whole human personality; secondly, the need of combatting the anti-personalism of our generation expressed especially in biological materialism which would interpret the life of man completely in terms of physiological processes; finally, the inadequacy of the traditional doctrine on the purposes of marriage to explain certain practical difficulties arising from union between sterile partners, from virginal marriage, and from those marriages in which the birth of children is prevented through the morally unobjectionable practice of periodic continence (p. 204).

In a nutshell, the personalists proposed to meet these three challenges by saying that marriage has a primary "meaning" different from any of the traditional "purposes." This meaning was as follows: "the fulfillment and personal perfection of the spouses through a full communion of life and action," or words to that effect. (The discovery of this "meaning" was to meet the apologetic challenge against biological reductionism.) If marriage has such a "meaning," however, its "primary purpose" must be to achieve or realize this meaning. Thus we get a new "primary end" which seems to be on a different plane from the old primary end or, indeed, any of the three traditional ends. (This step was supposed to solve the moral problem of "sterile partners," etc.) Moreover, the three old ends had to be related to the new one in different ways. "Mutual assistance" is obviously part and parcel of what we mean by a "full communion of life." The *remedium concupiscentiae*, understood as a "warm, happy sex-life," is equally inseparable from the personalists' idea of marital "communion." (This met the sexological challenge.) But procreation, please note, is not inseparable from the realization of this "meaning." If it were, the personalist doctrine would have just as hard a time explaining the "sterile partners" case as does, allegedly, the traditional doctrine. (6) No, procreation must be on a different footing again: it must be a fruit of the meaning-already-realized. Hence, the old "secondary ends" have one relation to the new
primary end, and the old "primary end" has a different relation to it. And as a result, the old "secondary ends" are independent of the old "primary end."

Confused? Maybe a chart will help.

**Old Scheme [Canon 1013]**

Marriage defined by its primary end (procreation).
To this end, two other ends are subordinate: mutual aid and remedium concupiscentiae.

**New Scheme [Personalists; 1975 Schema]**

Marriage defined by its "meaning" (full communion of life).
The primary end is the achievement of this "meaning". Intrinsic to the achievement are mutual aid and remedium. Consequent upon the achievement is a fruit (procreation).

(Note: in terms of Humanae Vitae, the new scheme conforms to natural law if the fruit is intrinsically consequent upon the achievement, such that avoidance of the fruit debases the very meaning achieved. The 1975 draft meets this test; certain personalist writings do not. But in terms of our question, the new scheme is acceptable, if and only if the Church permits this displacement and dissociation of the three traditional ends, which, I am arguing, She does not.)

If we want to look at a personalist writer who exemplified all the mistakes we have been talking about, we can find none better than Herbert Doms. In fact, the theology of marriage upon which the progressive canon lawyers today rely (and falsely attribute to Vatican II) is an exact repetition of the condemned theology of Dr. Doms. His book Von Sin und Zweck der Ehe, first published in Breslau in 1935, enjoyed an enormous vogue. A French translation was published in Paris in 1937; an English version (*The Meaning of Marriage*) came from Sheed and Ward in 1939. Doms was sharply critical of St. Thomas and of "scholastic terminology"; he wanted to get rid of the very terms "primary" and "secondary end" of marriage, on the ground that such language gave an "inadequate picture" of marriage, neglecting the "personal elements of love and companion-
IMMUTABLE ELEMENT

ship’’ (op. cit. pp. 108-109). Such an attack on terminology hallowed by the Fathers and long employed in documents of the Magisterium is temerarious in itself. More importantly, Doms had no grasp of why a minimum definition is minimum.

Doms grounded his theory of marriage in a theory of sexuality which might have appealed to Wilhem Reich. He maintained that the immediate, intrinsic purpose of sexual activity and the immediate biological object(!) of the union of the sexes is simply the actual realization of the unity of two persons. Thus:

The marriage act has one immediate purpose, and that is the realization through the fusion of bodies of the real two-in-oneship of husband and wife (ibid. p. 68).

Beyond this “immediate” purpose, and quite distinct from it, Doms recognized two “ulterior” purposes: one the personal “perfection” of the partners, and the other the continuance of the race (ibid. p. 85).

The Humanae Vitae dissenters of 30 years later hardly needed to say more.

When Doms turned from the marital act to consider marriage itself, he claimed that its inner meaning was the whole conjugal life as shared in common. For example:

This two-in-oneship of husband and wife is . . . the immediate object of the marriage ceremony and their legal union. This vital two-in-oneship is to some extent a purpose in itself (ibid. p. 95).

In that brief statement, one sees already the whole personalist scheme which I outlined above. Doms has turned the distinction between meaning and purpose into a chasm between intrinsic and extrinsic, immediate and ulterior. No continuity with scholastic doctrine remains. And how could it? After all, Doms has fallen into an elementary metaphysical blunder.

You see, by “meaning” Doms has in mind marriage’s formal cause or essence. He thinks this essence can be understood independently of the “ulterior” purposes or final causes (e.g. procreation) for which marriage may exist. Such talk makes sense
only if one conceives of marriage as a substance, a thing like a saw, for example. A saw is to cut with (final cause), but quite apart from that it has its own intrinsic make-up (handle, blade, design, etc.). But marriage is not a substance or a tool; it is an activity. To marry is a free, human act. But every such activity receives its essence (or specification) precisely from its final cause (cf. St. Thomas, *Summa Theol.* 1-11, q. 1, a.3). To pretend to find a meaning in marriage independent of its final cause is philosophically absurd. One suspects that Dom’s “meaning” is really an interpretation of the immediate motives or hopes of the couple, in which case he is handling the finis operantis as though it were the finis operis.

But this blunder is not his worst, by any means. We have seen that Doms invented a new primary purpose, namely, the actualization or realization of the “meaning” of marriage, which, remember, is the whole conjugal life as shared in common (community of life). Now, to say that the primary purpose of marriage is to realize its own meaning is an odd thing to say, in any case. But if one does say it, and then adds that this meaning is the community of life, one is changing the whole meaning of the distinction between marriage *in fieri* and marriage *in facto esse*. I think this is the first time I have mentioned this formidable-sounding distinction, so perhaps I had best pause to explain it.

Marriage *in fieri* is the act of marrying; it is what you do in order to bring into existence the marriage bond. Marriage *in facto esse* is the state of affairs brought about by your action. It is what we ordinarily mean by marriage, that is, a marriage already in existence. All of our talk so far about primary and secondary ends has been about the ends of marriage *in facto esse*; by contrast, marriage *in fieri* has only one end, namely, to bring about the marriage *in facto esse*. Everything should become clear if I say, simply, that marriage *in fieri* is your process of giving consent. It is what you act out and publicly finalize on your wedding day. At least, that is what it is traditionally; it might be something else in Herr Doktor Doms.

In fact, it is something else. Watch: the purpose of marriage *in fieri* is to bring about marriage *in facto esse*, but Doms has redefined this latter as “actualized” community of life. In that case, marriage *in fieri* becomes no longer the mere wedding-day consent as such but
the totality of acts and dispositions necessary to achieve this actual community. And when is the job finished? Whenever the couple deeply feel that they have “gotten it together,” perhaps.

But what if they feel they never did “get it together”? They sailed out of the big church wedding into a torrid honeymoon, but soon they quarrelled, and one little thing led to another, you know how it goes, and five years later they are tired of trying to “make it work.” Up to the tribunal they go. Can they get out of it? Can they say there is no bond between them because ultimately, and, as it were, “existentially,” they never grooved?

Dr. Doms himself did not pursue this promising line of thought, but the progressive canon lawyers have, as we shall see in due time.

Pius XII first spoke out against the personalist doctrines in 1941 (cf. Acta Apostolicae Sedis 33, 1941, p. 423). As their vogue still continued, the question was referred to the Holy Office. A decree was published on April 1, 1944, whose very existence is nowadays surrounded by a curtain of silence. Because many of my readers have never seen this text, and may never see it again, I present now a translation of the entire decree.

Decree of the Sacred Congregation of the Holy Office, April 1, 1944

“In recent years, several works have been published concerning the ends of marriage as well as the relation and order which these ends have to each other. In these works it is said that the procreation of children is not the primary end of marriage, or else that the secondary ends are not subordinate to the primary one but are independent of it.

“In these studies, some authors assign one end to marriage as primary, and some another: for example, the fulfillment and personal perfection of the spouses through a full communion of life and action; the mutual love and union of the spouses, which must be promoted and perfected through the psychical and physical surrender of the person; and many other assertions in the same vein.
Sometimes these writings use terms employed in ecclesiastical documents (such as end, primary, secondary) but give them a sense which is not in harmony with the one commonly attributed to them by theologians.

This new manner of thought and expression has begun to spread errors and give rise to uncertainties. In order to ward off both dangers, the Cardinals of the Sacred Congregation, meeting in plenary session on March 29, 1944, considered the dubium proposed to them, namely: ‘Can one accept the opinion of some modern writers who either deny that the procreation and education of children is the primary end of marriage or else affirm that the secondary ends are not essentially subordinate to the primary one but are equally primary and independent?’—and resolved that one must answer: no.

‘On the 30th day of the above-mentioned month and year, His Holiness approved this Decree and commanded it to be published’ (Acta Apostolicae Sedis 36, 1944, p.103).

Here is an act of the ordinary Magisterium of the Roman Pontiff. What does it require, and how are we to gauge its theological weight? The norm we are looking for is clearly stated in the Dogmatic Constitution Lumen Gentium of Vatican II, para. 25. Thus:

This religious submission of will and of mind must be shown in a special way to the authentic teaching authority of the Roman Pontiff, even when he is not speaking ex cathedra. That is, it must be shown in such a way that his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will. His mind and will in the matter may be known chiefly either from the character of the documents, from his frequent repetition of the same doctrine, or from his manner of speaking (Abbott edition, p. 48).

Very well: if we wish to know the precise mind of Pius XII on the content of the above Decree, we must know whether he frequently repeated the doctrine in question, and in what manner he spoke of it. No one denies that he frequently repeated it; as to how he thought of it, we need only to turn to the famous Address to the Italian Catholic Union of Midwives, October 29, 1951, entitled “Moral Questions
Affecting Married Life.” In para. 47 of this text, the Pope insists that the secondary ends “are subordinated” to the primary one of procreation. In para. 49, he says that this doctrine in no way trivializes the secondary ends. In between, in para. 48, he tells us what he thinks of the status of these doctrines. I quote:

Some years ago, with the precise aim of putting an end to all these uncertainties and errors which threatened to spread mistakes about matrimony and the mutual relation of its ends, We Ourselves made a statement on the order of these ends. We indicated that the inner structure of the natural disposition reveals, what is the heritage of the Christian tradition, what the Sovereign Pontiffs have frequently taught, and what is established in proper form by the Code of Canon Law (1013, 1). A few years later, to correct conflicting opinions, the Holy See issued a public decree stating that the opinion of certain recent authors could not be admitted, authors who denied that the primary end of matrimony was the procreation and rearing of children or taught that the secondary ends are not subordinated to the primary end but are of equal importance and independent of it” (AAS 43, 1951, pp. 835-854, emphasis added).

No honest reader can doubt that Pius XII intended to do three things: (1) to close the question, (2) to reject a certain opinion as error, and (3) to recognize the truth opposed to that error as the heritage of the Christian tradition. My own case requires no more. For, if it is the case (as I shall now claim) that no subsequent Pope or Council has reopened the question in such a way as to qualify the above teaching, then that teaching remains in force to this day, and it would be preposterous for the Church to sanction a new edition of the Code which suppresses it.

Did Vatican II, then, reopen the question closed by Pius XII? Every progressive canon lawyer claims, and must claim, that in some sense it did. Otherwise it is ridiculous to say, as they all do, that the Council “redefined” marriage. But the argument they usually present for this “redefinition” is alarmingly simple-minded. Isn’t it obvious, we are asked, that Vatican II spoke of marriage in a new way? And didn’t the Council in so many words say that marriage is an “intimate partnership of life and love”? And isn’t it the case that the 1917 Code nowhere said any such thing? Well, then, isn’t it obvious that Vatican II redefined marriage? Well, no; not in the least.
We have seen the difference between an integral definition and a minimum one—a difference which this argument ignores. We have also seen that the two definitions can peacefully coexist—a point the argument also ignores. The question, then, is not whether the Council gave us an integral definition of marriage. (It did.) The question is whether it redefined the minimum definition. Otherwise, the Council did not "redefine" anything; it simply defined something new. So, the canon lawyers must prove that the Council intended its words to replace the existing norm for tribunal work. That means they must prove that the Council repudiated the basis for the existing minimum definition, namely, the doctrine of Pius XII that procreation is "primary end," to which the other ends are intrinsically subordinate. If they can't prove this, they have no case—and the more intelligent among them are quite aware that this is the neuralgic point.

We turn, therefore, to this make-or-break question. Where, precisely, did Vatican II repudiate or substantially qualify the doctrine concerning the three "ends" of marriage? The canonists join in chorus: it was in the Pastoral Constitution on the Church in the Modern World (Gaudium et Spes), either in Article 48 or in Article 50, or in both. If one reads the texts in Latin or in an honest translation, one cannot find what the canonists are talking about. But if one is so ill-advised as to consult Father Donald Campion's footnotes in Walter Abbott's famous edition of the Council documents, one will discover all.

At the end of the second paragraph of Article 48 (p. 250 in Abbott), the Council says that "matrimony itself and conjugal love are ordained for the procreation and education of children." This remark the industrious Abbott could hardly let pass. You see, it was 1965, and Abbott was firmly convinced that the Church would soon reverse herself on artificial birth-control. He as much as says so on the same page (footnote 153). But a change on birth control was very difficult so long as the traditional teaching on the aim of marriage, technically expressed in terms of a primary end, remained in force. (Whereas, if you take away the technical expression, the teaching becomes obligingly vague.) Therefore, it was necessary for Abbott and friends to suggest that this teaching was no longer wedded (no pun intended) to its technical expression. And so, when the Council
Fathers made the statement which I just quoted, it behooved Campion to conjure away its technical resonance. Hence footnote 154:

Here, as elsewhere when the question arises, the Council sedulously avoids the terminology of primary and secondary ends of marriage. It insists on the natural ordering of marriage and conjugal love to procreation but without recourse to such formulations. The same teaching is repeated in Article 50, and the Council’s care to avoid distinguishing ‘‘primary’’ and ‘‘secondary’’ is again evident.

We shall turn to Article 50 in just a moment. Meanwhile let us savor what we have learned. Vatican II’s alleged upheaval in the theology of marriage was accomplished not by saying something but by ‘‘sedulously avoiding’’ saying something. It seems an odd way to make a new definition, much less a revolution. But let us suspend judgment until we see Article 50.

Here the relevant sentence appears near the top of Abbott’s page 254. The Council Fathers say (again) that ‘‘the true practice of conjugal love’’ and the ‘‘whole meaning’’ of family life have one aim: ‘‘that the couple be ready . . . to cooperate with the love of God’’ in procreation. And they preface this sentence by saying exactly what Pius XII had said long ago in his address to the Midwives (paragraph 49), namely, that this procreative aim does not make the other ends of marriage ‘‘of less account’’ (non posthabitis ceteris matrimonii finibus). Now Campion strikes again. He wants this hoary remark to sparkle with novelty and to contain a technical possibility, viz., that the three ends of marriage might be equalized. Hence footnote 168:

The Commission charged with drafting the text made every effort to avoid any appearance of wishing to settle questions concerning a hierarchy of the ‘‘ends’’ of marriage. Thus, the passage includes a beautiful reference to children as ‘‘the supreme gift of marriage,’’ but this sentence makes it clear that the present text cannot be read as a judgment on the relative importance or primacy of ends. Since the clause has been phrased with so much care, it may be useful to cite the Latin: ‘‘non posthabitis, etc.’’

Did you notice a delicious irony? We are supposed to be looking at the very texts (or the very silences) in which Vatican II revolutionized the theology of marriage. And yet our commentator assures us that the Council never touched the question—‘‘made every effort to avoid any appearance’’ of touching it! Dear Heavens, I’m afraid that Donald
Campion has made my case. Campion pretends, without a shred of evidence, that the question was open, of course, and the Council did not close it. (He needs this pretense for his birth-control case.) I say, with abundant evidence, that the question was closed, and the Council did not open it. Either way, the Council did not do what the canon lawyers have to claim it did.

With the main point disposed of, let me quickly say why Gaudium et Spes never mentioned "primary" and "secondary ends" in just those words. Please turn to Article 2, entitled, "For Whom This Message is Intended." You will read that the whole document is addressed not only to Catholics and to Separated Brethren, but also "to the whole of humanity." Now what does the man in the street know about the meaning of the finis operis as technical terminology in Roman Catholic theology? About as much as he knows about quantum mechanics. Probably less. Do you know what it sounds like to the man in the street, to say that procreation is the "primary end" of marriage? It sounds like this: "Yes, sir, that's the Roman Catholic Church for you. The Pope don't give a damn if you love each other, you just gotta keep havin' kids." I was in a Protestant college in the early Sixties, and I heard this sort of thing all the time. The Fathers of Vatican II had heard it, also. That is why there is no technical terminology in Gaudium et Spes. An observation so simple as that destroys the very possibility that Articles 48 and 50 of this document could have redefined marriage. It is just too absurd to believe that an Ecumenical Council could have introduced major technical innovations in sacramental theology in a non-technical, pastoral document addressed to everything which hath breath.

And now I am ready to issue a challenge. To the officers and members of the Canon Law Society of America, to the editors and contributors of the Jurist, and to every canon lawyer who reads these pages: if you can, bring forward the records of the Council debates, the modi of the Council Fathers, the responses of the Theological Commission, or any other primary source in which you can point to a single shred of evidence that Vatican II intended Gaudium et Spes or any of its other documents to repeal, rescind, supplant, or substantively qualify the Holy Office decree of April 1, 1944.

There is just one more item to dispose of in this theological portion
of my case. For there is one more document to which canon lawyers sometimes appeal, on the ground that it has equalized the ends of marriage. This, of course, is *Humanae Vitae*. It is claimed that this Encyclical touches our problem in two ways. First, it builds up a new vision of marriage by analyzing the intrinsic dynamics of conjugal love—a procedure which might be thought to imply a new point of departure and hence a whole new theology. Secondly, *Humanae Vitae* notoriously insists that the procreative and unitative aspects of marital union are *inseparable*. Hence it might be said that they are on the same plane, and that their equality implies an equality among the ends of marriage. Both lines of argument are worthless.

*Ad primum.* The analysis of conjugal love was dictated by the fact that several plausible arguments for contraception claimed a basis in the needs of this love. Pope Paul’s analysis simply showed that the pretended basis does not exist. It is true that in the course of this analysis a vision of marriage emerges. But this only means that marriage finds its integral definition in this line of reflection, not a new minimum definition. If anyone wishes to say that an integral definition arrived at in this way is incompatible with the notion that procreation is the primary *finis operis* of marriage, to which the others are subordinated, he must refute Pope Paul, who perceived no incompatibility between his own position and that of Pius XII, whose Address to the Midwives, so crucial to my own case, is cited in *Humanae Vitae* no less than six times.

*Ad secundum.* It is highly doubtful that the inseparability of the procreative and unitive aspects of the marriage act implies their collocation on the same “plane” (whatever that means). But even if it did, that conclusion would have nothing to do with my case. Whether or not there is an intrinsic subordination among the ends of the marriage act has nothing to do with whether or not there is a subordination among the ends of marriage; for, as we have seen, the two sets of ends are different. The two sets have only one term in common, procreation, and even here I am not sure there is univocity. After all, “procreation” is the end of the marriage act because of something to do with organic structure. The reproductive system is exactly that, not a set of ingrown toys. But “procreation” is an end of marriage because of something to do with the nature of children, over and above the nature of the marriage act. God intends to continue the
species through this institution because it assures a stable environment for the nurture and moral formation of the child. At any rate, my topic is one thing, and the main topic of *Humanae Vitae* is another. Pope Paul himself expresses the difference when he distinguishes the doctrine on "the nature of marriage" from the doctrine on "the correct use of conjugal rights" (*H.V.*, para. 4). The first is my issue and belongs to sacramental theology; the second is Pope Paul’s issue and belongs to moral theology.

I now conclude the theological portion of this essay. I set out to prove that the 1917 *Code*’s definition of marriage could not be changed in one regard. It had one feature, I said, its specification of the primary end, which had dogmatic force. To justify this assertion, I set out to prove that it is a binding doctrine of the Church that marriage has a primary end to which all others are subordinate, and that this end is procreation. We have seen it affirmed by the Fathers, settled authoritatively by the Holy Office decree in 1944 according to the manifest intention of Pius XII, and never subsequently rescinded, redefined, or even qualified by any ecclesiastical authority.

Now what if this whole theological argument has been a waste of time? A member of the Pontifical Commission, or any other defender of the *Schema*, might easily say that it nowhere denies, in so many words, the doctrine I have been insisting on. Granted, there is no mention of it; granted, too, the *Praenotanda* which introduce the text say the "listing of the ends of marriage" has been replaced. But to not-mention something is hardly to deny it, as I myself have had to admit in connection with *Gaudium et Spes*. Why, therefore, do I lay myself open to the inevitable charge of overstating my case? Why not rest content with saying that the *Schema* is open to abuses and that this or that little point needs to be tightened up? Why do I undercut my own credibility by advancing the strongly improbable claim that the Pontifical Commission has produced a document whose definitions of matrimony and matrimonial consent are radically unacceptable, and that for doctrinal reasons?

The attentive reader may have noticed that in all the ground we have covered so far, I have been carefully preparing the means to meet this objection. Let me now husband these means together in the form of a dilemma.
1. If the *Schema*’s definitions are intended to be minimum definitions, then the document’s doctrinal denial of procreation-as-primary-end can be inferred from its practical denial of the same thing. This practical denial does not consist, however, in the doctrine’s not being mentioned but, as I have shown, in the overstuffed character of the *object* of consent, as the *Schema* defines it. If this *object* is supposed to be truly minimal, its overstuffing can *only* be explained as the effect of an equalization of the three *fines operis* of marriage.

2. If the *Schema*’s definitions are intended to be more integral definitions than those of the old *Code*, then I grant that no implicit denial of the primary-end doctrine can be inferred. But in that case, the new definition of matrimony is still unacceptable precisely because it approaches being an integral definition, which, as I have shown, by its very nature cannot coherently guide tribunal work, because it does not even purport to translate the relational predication, “*x* is married to *y,*” into its minimum essential information.

The dilemma: either the definitions embody a theological error or else they are juridically impracticable.

The first horn is sound, because if the definition of the object of consent is minimal, the primary end should organize its (the object’s) contents just as exhaustively as it organized the contents of the object in the old *Code*. This is the precise function of a primary end. But we have seen that procreation does not organize the contents of the new object. Therefore, in the *Schema*, it is either the case that procreation is not the primary end (which is theologically erroneous), or else it is the case that the object is integrally defined.

The second horn is sound, because if the definitions are integral, they signal only that a defective union is defective. They do not state the criteria for determining whether a given defective union is or is not a marriage. In which case, every tribunal is free to improvise its own standards, and the *Schema* is no longer “law,” nor even a
helpful guideline.

Again the dilemma: the Schema is unacceptable theologically, or else it is unacceptable juridically. It is either false in theory or useless in practice.

I realize we are looking at a conflict of half-baked good intentions. There was a "good intention," see, to give marriage a rosier face—bring in some lovely phrases from the Council and make the Code sound better. This nice idea was really a thrust toward making the definitional canons (243, 295) integral, without the faintest idea what consequences such definitions involve. On the other hand, there was another half-baked good intention to catch up with clinical science in recognizing how mental diseases create impediments. In that case, the canons on impediments and defects of consent (296, 297) were intended as minimal. And nobody saw the contradiction. My dilemma is interior to this hapless document itself. It is both erroneous and useless.

Be that as it may, the fact remains that the Schema as a whole must be taken as presenting a minimum definition of marriage, whatever its intentions may have been, because it contains canons (especially 296 and 297) which purport to concern grounds of nullity. Transparently, the intention of the Schema is to say that, if \( x \) is married to \( y \), then it is necessarily given that neither \( x \) nor \( y \) suffers from a "psychosexual anomaly" of such-and-such severity, etc. The next phase of my argument, therefore, will be a reductio ad absurdum (in the form of a parade of horrors), designed to show the preposterous consequences of including the psychological factors enumerated in proposed canons 296 and 297 in a minimum definition of marriage. That is, I propose to show what happens when one allows these psychological or personality traits to function as grounds of nullity. I aim to investigate the effect of psychiatrists on the tribunal, and the effect of psychological jargon in canon law. We shall examine practical consequences, theoretical consequences, even theological ones.

First, however, I had best make crystal clear the basis for my attack. I can start by stating a traditional-style position on mental diseases in matrimonial jurisprudence.
There is no denying that there are mental conditions which make a person physically impotent. If the condition exists antecedent to the marriage and is incurable by the morally available means, it is a cause of nullity insofar as its effect, physical impotence, is a diriment impediment. Second, there are mental conditions which deprive the act of consent of its essential properties of freedom and rationality. What appears to be an act of consent, in that case, is really not; it is no longer an *actus humanus* but merely an *actus hominis*. In short, no genuine act of consent is elicited. This is a class of defects long recognized in case law, and now embodied in the *first part* of proposed canon 296. I have no quarrel with recognizing that class.

Now: the defects we are prepared to recognize may be so grave as to be visible to the untrained eye. But it may also be the case that a professional diagnosis is needed to ascertain the defect's existence. Thus I am compelled to recognize some role for psychiatry in tribunal work. This is not to say that psychiatry is a "science." It may not be. It may be only a collection of descriptive data whose conditions and mutual connections are not yet causally explained. But even on that assumption, a psychiatrist should be able to judge that the data verified in person $x$ are always or almost always tantamount to a "lack of reason" in the canonical sense. The tribunal would reach its decision accordingly. If the diagnosis indicates a condition which is only sometimes or rarely tantamount to lack of reason, then the diagnosis cannot be the sole basis for a judgment of nullity. In either case, the diagnosis must have established a high degree of certainty (mere probability cannot prevail against the presumption in favor of the bond) that the disease was present at the time of the wedding.

What I have just stated is traditionally all there is to the role of psychiatry in tribunal work. I argue that nothing more is appropriate. Hence the second part of proposed canon 296 and all of 297 ought to be excised like a cancer. Why? If I admit a small role, why not admit a larger one? Well, because small or large is not the issue. The issue is the very *nature* of the role and hence the very nature of canonical jurisprudence.

Look: two people, legally free to marry, attempt marriage; if there is no lack of reason or knowledge, consent is given; if there is no impotence, the right consented to is truly exchanged. Under a
properly minimal definition of marriage these two people have validly married. There is just no room for purely psychological problems in a minimal definition unless they cause lack of reason, lack of conceptual knowledge, or impotence. Therefore, the true nature of psychiatry's role in tribunal work is this: to provide psychological evidence for a non-psychological defect. Impotence is a physical defect; lack of reason or knowledge is an intellectual defect. The formality under which canon law recognizes these defects, even when their causes are psychological, is not a psychological formality. Hence, there is no invasion of psychological jargon into the juridical norm itself, and hence the canon lawyer remains the judge, and the psychiatrist the witness. That was the situation in the old Code; it must be preserved.

And now I can say why. I can do it in three sentences. (1) As soon as you recognize a psychological problem, as psychological, to be an impediment, the juridical norm (that is, the canon) must recognize it. (2) As soon as you load the canons with psychological jargon, the psychiatrist is the only one who knows what they mean. (3) As soon as you try to apply the canon to a concrete case, the psychiatrist is the judge, the tribunal his rubber stamp.

Inevitably. And often enough the shrink and the lawyer are the same man. As amateur psychiatrist he diagnoses, and as canon lawyer he annuls.

I do not have to prove that this development is inevitable. I do not have to prove that anything will happen under the proposed Schema, because what I am talking about has already happened, and the Schema merely ratifies it. Recall, please, the all-important statement made by the President of the Canadian Canon Law Society to his United States counterparts. He said the provisions of the Schema are "simply the result of a post-factum analysis of decisions already granted by the courts and applied in practice in the larger tribunals." That means it is methodologically correct for me to infer the meaning of the Schema's canons from what has already developed in tribunal practice since the middle Sixties.

We now take a good, long look at what that development has produced.
First Reductio

The place to begin is the background to the second part of proposed canon 296. This is the part, remember, which says you can’t marry if you suffer from a serious “defect of discretion of judgment” on the rights and obligations of marriage. This wording was not in the old Code, but the idea was always around and was applied to children and, perhaps, morons. You couldn’t marry unless you had “due discretion,”’ and this term simply meant that you had to be able to grasp, intellectually, what marriage was. If you didn’t understand the difference between being married and “playing house,” you didn’t have discretion. It had nothing to do with psychological problems. Yet in the Schema, 296/2 is sandwiched in between 296/1 and 297, both of which deal exclusively with such problems. The arrangement seems odd, until you realize that the notion of “due discretion” has been totally psychologized in post-Conciliar decisions and that already before the Council, in the development which I referred to at the beginning of this essay as the “slow infiltration of personalist ideas,”’ the transformation of the notion of due discretion was the starting point for the invasion of psychological terminology into the whole of matrimonial jurisprudence.

We can re-create this starting point in our own minds if we assume the theological error I have been attacking from the first: the equalization of the ends of marriage. Thanks to it, a couple’s ability to, say, mutually aid one another becomes just as crucial to the possibility of their marrying as their ability to perform the marriage act. Hence, a new sine qua non of marital consent emerges, namely, the ability to bind oneself “affectively” to another. This means the ability to create a consortium vitae through psychological and personal traits such as “warmth,” “maturity,” and “self-giving.” Thus, for the first time in history, the canonical judgment as to whether John Q. Public possessed at the time of his marriage enough “due discretion” to give genuine matrimonial consent reduces to a series of psychological judgments as to the presence (or absence) in John Q. of qualities which have neither canonical nor clinical definition.

This invasion of Church jurisprudence by undefined, and perhaps
undeniable, psychological terms was well documented already in 1964 by John R. Keating, whose dissertation (written at the Gregorian University in Rome) was entitled *The Bearing of Mental Impairment on the Validity of Marriage. An Analysis of Rotal Jurisprudence*. Keating saw that the notion of due discretion had been described in earlier jurisprudence solely in terms of the traditional (Thomistic) prerequisites for the intentional act of consent (in other words, the ability to know and freely will what marriage is). But by the early Sixties, Keating found that the same due discretion was being described more as “the psychic ability to affectively bind oneself, to assume marital rights and obligations.” He explains:

Due discretion in early sentences is the power to: *percipere*, apprehendere, cognoscere, suspicere, intelligere, non ignorare, habere notitiam, scire objectum contractus matrimonialis, quid sit matrimonium eiusdemque essentiales proprietates, etc... et sese libere determinare, etc. Later jurisprudence explains due discretion rather in terms of ability to assume, undertake, fulfill, put into practice, etc., the obligations, duties, burdens of married life. Due discretion is not knowledge but a quality of the psyche (p. 164, emphasis added).

This is what I mean by “dis-intellectualization.” In this light, we can see that proposed canons 296/2 and 297 had a common pre-history. They must stand or fall together.

This psychologized (dis-intellectualized) version of due discretion required some new Latin vocabulary, and Keating was able to cite some influential Rotal decisions as holding that, in order for a person to marry, he or she must have:

*id robur voluntatis, quod ad corrivantia iura obligationesque danda et acceptanda par sit*, which is missing if he or she is *impar ad illum servandum,* ‘*natura sua inhabilis ad implendum,*’ etc. (loc. cit.)

So, poor John Q. does not contract a valid marriage unless his *robur voluntatis* (firmness of will) is up to “par.” Because you speak English or read Latin, dear reader, you undoubtedly think you know what these expressions mean. You deceive yourself. To discover what *robur voluntatis* (and hence due discretion) “canonically” means, you must consult recent cases in which the Rotal decisions highlighted by Keating have been appealed to as the guiding
precedents, and then see what the psychological problem was in each case. By putting together some of the interesting cases from North America, England, and Rome itself, you discover that the lack of *robur* or *vigor* or *maturitas voluntatis*, as a ground of nullity, is used to cover a long string of alleged psychological ills, e.g.: “affective infantilism,” “affective retardation,” “immature character,” “narcissistic orientation,” “impulsivity,” “virtual incapacity for any profound and enduring human relation,” “inadequate personality,” etc., etc.

In terms of the *Schema*, these psychological terms and dozens more provide the hidden content of three expressions: “discretion of judgment” (296/2), “psycho-sexual anomaly” (297) and “inability to assume obligations” (297). It is this identity of content which makes the two key expressions of 297 synonymous, and hence the whole canon becomes tautological, as I pointed out above. Moreover, since these three expressions have *no meaning* independent of their hidden content, they are completely different from terms like “impotence” or “lack of reason.” Those are *real* canonical grounds, distinct from their psychological causes and not necessarily even due to such causes. But “lack of discretion” and “inability to assume” have become mere stand-ins. They have no function save to introduce into the law the whole string of psychiatric “diagnoses” which they represent and summarize.

To give a vivid impression of how these three *Schema* stand-ins, translated back into their psychological definers, give rise to preposterous annulments, I shall now cite two cases.

The first concerns “inadequate personality.” Almost five years ago, the Provincial Tribunal of Quebec gave a sentence of nullity based on “inadequate personality” (case 87/70). Here are some of the medical data on which the decision was based (taken from A. M. Freedman, *et al.*, *Modern Synopsis of Psychiatry*):

This patient’s day-to-day responses to emotional, intellectual, social, and physical demands regularly fall short of the expectations of others. In the patient’s own view, however, his low level of performance seems natural and inevitable.

This inadequate personality is deficient in physical and emotional energy, socially inept, lacking in judgment, incapable of long-range
planning, and defective in incentive and task performance. His social adjustment is borderline, and he exists as a marginal member of society. He may hang on to a nondemanding job or drift from one job to another with little concern for the future. Significant numbers of them are on welfare rolls and in such institutions as prisons and hospitals (p. 371).

This is all. This is a set of diagnostic criteria! In the hands of the late Senator Bilbo, such stuff would have sufficed to forbid marriage among the "'shif'less niggers'" of Mississippi. And before that, in the hands of a Beacon Hill Yankee, it would have served the same purpose against "'micks'" and "'wops'" in the tenements of Boston. Look at the quotation again: this is the way rich, successful people always describe the poor as a class. And when it ceases to be fashionable to despise an economic class, it is converted into a psychological class.

Note: I am not saying that this preposterous quotation does justice to the case decided in Quebec. I never met the parties involved. The problem is that the canon lawyers think this very quotation really describes a ground of nullity. I know, because I found it in Lesage and Morrisey's Documentation of Marriage Nullity Cases, a massive handbook on how to give out annulments, available "'for private distribution only.'"

My second case concerns—I'm not going to tell what ground it concerns. I'm going to make you guess. This is a 1971 case from the diocese of Helena, Montana. Here are the facts.

John A. and Mary B., both of good Catholic families, were married in the Church in 1944. They had known each other for a long time. They had met in the Twin Cities while he was in high school, she being a little older and already holding down a job. He was a perfectly normal kid—nobody ever said he wasn't. When he met Mary, he was really more interested in cars than in girls, but not so much so that they didn't date, you understand. Then John got into a row with his folks, who wanted him to finish high school, which he had quit. He wanted to go into the Air Force, as his already-married older brother had done. Unable to take the nagging at home, John started spending more and more time at Mary's folks, who lived in the Minneapolis suburbs. He even stayed over night on some weekends. Mary's mother didn't mind—he was a nice boy—and
Mary was obviously stuck on him in a big way. Mary and her mother were very close.

Before long, John entered the Air Force as planned, and went off to pre-flight training in Michigan. One weekend, Mary went down to visit him and passed herself off as his wife at the local hotel. It’s hard to say exactly what happened, but afterwards John sent Mary a letter saying he was worried that what they had done might have been pretty serious. (Everybody agrees that John was a fine boy and didn’t know all that much about sex as far as the how-to-put-what-where stuff is concerned). Well, the letter fell into the hands of Mary’s mother, who of course assumed the worst and insisted on marriage. Mary was delighted. Marrying John was just what she wanted; and John was enthusiastic, too; and even his parents didn’t mind. So they were married in the Catholic parish near the base in Michigan.

Of course, with him in the Air Force, it was hard on the young couple for the next two years. They could see each other only intermittently, but after a while Mary got pregnant and went home to live with her parents.

In 1946 John was discharged, came back to the Twin Cities, and got a job. The couple moved into their own home. Another child was born within the year. But now there began to grow a seed of discord. Mary’s family was well-fixed and socially prominent. John’s was not. Mary had certain social aspirations which John didn’t share. Nevertheless, he went out and got a second job in an effort to support her in the style to which she was, or wanted to be, accustomed. But she was never satisfied and began to show it by withholding herself from his embrace. Then, in the winter of 1948-49, it was discovered that Mary was pregnant by another man. Civil divorce followed, and Mary “married” the other man. John lived with his parents for a while, then moved to Montana.

Okay, reader: it is now your turn. I have given you the whole ensemble of the facts, exactly as they appear in the Helena decision. Only, I have left out two or three pejorative adjectives which merely reflect how the judgment went and really have no basis other than the facts as I have related them. Are you ready? Flex your wits and guess the grounds on which the Helena tribunal annulled this marriage.
Stumped? Let me play. I'll guess that the problem was in Mary. She was a spoiled kid, momma’s pet, used to getting her way, wanted John, kind of threw herself on him, manipulated the letter deal, etc. Everything was fine until she had to live in the kind of house John could afford—a guy just back from the service, starting at the bottom of the job ladder. Her princess-complex couldn’t take it, so she started seeing this tonier guy.

Sound good? Now let me see: I’ll pick “incapacity to assume obligations,” and I’ll match that with . . . Nuts, I get the buzzer.

I suppose the Quiz-master will have to tell us the answer. From Helena, Montana—the envelope, please.

Given his interest in sports and old cars, his immaturity with regard to the dealings with the opposite sex are (sic) more than evident in his inept handling of the rather strange situation in the household of (Mary’s parents) and in the weekend in Michigan which led to the marriage. Compared to the boys of his own age, and with regard to the events of the marriage, a definite immaturity beyond that to be expected of a boy at that period in life was evident in John.

It was John! Match “immature personality” with “inability to assume obligations,”’ canon 297.

Let’s quickly go back and pick up the clues we missed. First of all, we should have realized it had to be John, because the case came from Montana. That means John was the petitioner (the one seeking the annulment) and Mary was the respondent (the spouse to be dumped). Now, from what we already know about Mary, do you think she’s the type who would cooperate very well with a Roman Catholic tribunal in some other part of the country? Not likely, and in fact she didn’t. The Helena tribunal got her on the long-distance phone, once, and she told them nothing. So they had to figure out something wrong with John.

Second clue: John’s older brother was already married at the time John was dating Mary. That means there was a sister-in-law, the ideal witnesses. Did you ever know a family in which the sister-in-law was not, in private, eloquent on her husband’s younger brother? Well, this one told the tribunal that John was immature “in so many ways—just a kid brother;” he would do “stupid things, and not use
his head in so many ways. He was interested more in old cars’’ (now we know where *that* came from) and he would ‘‘drift from job to job,’’ as if this were the oddest thing in the world for a teenage boy. How many jobs did you have before you were twenty?

Here’s a kid who was mature enough to assume war-time responsibility with complicated aircraft. He was mature enough to try to save his marriage by working his butt off in a second job. His own parents told the tribunal that, in their opinion, he *was* capable of assuming the responsibilities of marriage, even though they did think he was ‘‘too young,’’ as what parent does not?

One last clue. This one I didn’t give you. Besides a brother and a sister-in-law, poor John also had a sister. She, too, told the tribunal he was ‘‘immature,’’ and here is her reason: before he got married, he had not had responsibilities. ‘‘He was never on his own, had never had to worry about clothes, food, etc.’’ How’s that for a ringing indictment? See, sisters are pretty good witnesses, too. As you might reflect, was there ever an American teenage girl who didn’t think her teenage brother was a ‘‘big, immature dope’’?

No, it is just impossible to believe that this man John could ever have been declared decapacitatingly immature, if he himself had not wanted to be so declared. Which he did. Do you know why? Because out there in Montana he was now on his third wife, and he wanted to get *this* marriage validated. Clear?

You say, wait a minute. If he’s so confounded immature that he *can’t* marry, how can he get this new marriage approved? No problem: all of the alleged impediments we have been talking about can be either permanent or temporary, and either absolute or relative. ‘‘Relative’’ means that when you married Susy, something about the personalities of her and you both made you so ‘‘sick’’ that the whole thing was invalid, but that doesn’t mean you can’t turn around and marry Pauline and be just fine. Also clear?

Now ’fess up. You think I invented this case. You’re not even sure there is a diocese of Helena, Montana. But there is.

All right, you think I have a spy out there, and through this spy I got hold of the worst, most indefensible case I could possibly find, just to make progressive tribunals look silly. Wrong again. I got hold
of this case because the head of the Helena tribunal was so proud of it that he sent the text of his decision to the *Jurist*, and the editor of the *Jurist*, viz., Frederick R. McManus, the man who gave you the ICEL and other presents, thought it was so good and such a model of how tribunal work should be done, that he thought canon lawyers all over the world ought to see it; so he published it (cf. *The Jurist* vol. 33, 1973, pp. 418-423).

Note: the case just described is actually written-up under the rubric of "moral impotence," but this term is just a peculiarity of the Helena tribunal. It means what is elsewhere referred to as "lack of due discretion" or as "inability to assume obligations." There is a good deal of terminological flux from one progressive tribunal to another, but the pseudo-diagnostic content of these various terms is always pretty much the same.

Let me make my objection to cases like the two we have just seen a little clearer. Let's concede for the sake of argument that there really is such a thing as "inadequate personality" and such a thing as "immature personality." Certainly we all know people who, though not sick enough to be put away, are pretty low-grade; and we are all ready to admit that being married to such a person would be a tragic situation. (We'd better face that ugly fact very squarely, because anyone with a couple of years of tribunal experience can come back at us with a string of cases that will tear one's heart out. Some of these cases are not one bit funny. And some of these unjustified annulments, humanly considered, are just about what any decent man would do under the circumstances. The only problem is that human standards are not enough. The doctrine of Christ, because true, is terribly hard; its defense has caused untold suffering. A Catholic who can't admit that is blind to reality; a Catholic who can't accept it has forgotten the awfulness of God. A gospel measured down to our weakness is no gospel of His.) To resume the argument—we concede there really is this disorder. Let's concede further that this disorder is one on whose essential properties all competent psychologists are agreed—which is rarely true, but let's concede it anyway. And let's concede, finally, that this disorder is so clearly diagnosible, that if our friend John Q. Public has it, and he walks into any psychiatrist's office anywhere in America, that shrink is going to spot it very quickly. Fair enough? My problem is this: John
Q. Tells the doctor he is thinking about marrying Susy in the Catholic Church. The doctor has experience in tribunal work; he knows the requirements embodied in proposed canons 296 and 297. Can he tell John Q. positively, for a fact, that he (John Q.) cannot marry her?—is not capable, canonically, of marrying anybody—or at least not her? Can the doctor make that judgment? No, he cannot. And the canon lawyers admit it. And there is the rub.

You see, the impediment or defect of consent does not consist in the sole fact that John Q. has a certain psycho-personality problem, but in the additional fact that he has it to such a degree that he cannot fulfill the duties of matrimony. And it is the degree which cannot be judged in advance.

This point is so important that I want you to have it from authoritative lips. Francis C. Bauer, M.D., is the psychiatrist who has worked for years with the Brooklyn tribunal, perhaps the most influential progressive tribunal in the United States. Dr. Bauer recently delivered an address to the Canon Law Society of America, entitled "Relative Incapacity to Establish a Christian Conjugal Union." On page 12 of his typescript, the doctor says:

As in all emotional disorders, however, we cannot speak in generalities, and the presence and degree of impairment must be determined in each specific case at issue. Diagnostic labels are nothing more than medical shorthand that allows us to broadly characterize personality patterns. The actual functioning of the individual cannot be inferred from the diagnosis, since very few psychiatric conditions result in total and permanent disability in all areas of activity. (emphasis added)

Therefore, in the specific situation which I have posed—and which deals with the vital question of precisely what can be determined at the time of the wedding—the professional psychiatrist or psychologist is on the same footing as any well-informed pastoral counselor: he can worry about the situation, he can think the prospects are grim, he can insist that John Q. keep coming in to see him, but he cannot call the Chancery and say, "Don't permit this marriage." No doctor, no priest, and no tribunal has ever told anybody he could not marry because he suffered any of the psycho-personal debilities with which 296/2 and 297 are concerned.

Again, I can quote Bauer to the same effect:
In all my experience in Tribunals, I have found it necessary to restrict my opinions to the particular marriage in question. Except in rare instances I have been unable to state with medical or moral certainty that a person was . . . absolutely incapable of marrying in the future. (p. 20f.)

And a few sentences later he adds:

Psychiatry is not an exact science . . . There are simply too many variables to permit absolute accuracy in forecasting. We can isolate one or more of these variables and say, "All other things being equal, this is what will occur." But in dealing with a human individual, all other things are almost never equal. To be sure, we may have a healthy suspicion regarding the individual's future. In one's early professional experience this is referred to merely as a hunch. After one has acquired his reputation in the field, however, this same suspicion is called clinical intuition (p. 21-22).

In fact, the thrust of Dr. Bauer's paper is a thesis even more radical than the point I am alleging. My allegation assumes the case of a John Q. who has never been married before, has one of these "impairments," and nevertheless can't be forbidden to marry. Bauer takes the same John Q. a year or two later, and adds that even if the marriage has broken up and been annulled on the very ground that John Q. was incapax assumendi, there is still no way to prevent him from turning around and marrying another woman next week—in Church. All psychological impediments, says Bauer in effect, are relative. That means that if you have one of these impairments—or can get a psychiatrist to say you have—you can marry and divorce and remarry as many times as you want in the Roman Catholic Church.

But even if Bauer goes too far (which I doubt; I think he's on top of the logic of the thing), we can see that already prior to Vatican II, Rotal jurisprudence had made the blunder of conditioning the validity of marriage upon the presence or absence of a degree of a psychic characteristic, for which degree there was not, and is not now, any certain diagnosis. The degree's indiagnosibility remains even when the characteristic itself is antecedently diagnosible, which is far from always the case. Therefore, in the last analysis, the Rota created a situation in which the only ground on which anyone could ever be judged to have lacked sufficient maturity (or adequate personality, or whatever) to undertake and fulfill the obligations of marriage is the
sheer fact that he or she did not fulfill them. "Did-not" replaces the
proof of "could-not." The break-up of the marriage is the only
decisive symptom. And right there, of course, is the beginning of the
fatal prejudice—destined to work many wonders in Helena,
Montana—that the failure of a marriage is prima facie evidence of its
nullity. It is the prejudice sanctified by proposed canon 297.

Now this very point—the point where evidence of "did-not" does
duty for evidence of "could-not"—conceals a subtle but very deep
denial of human freedom. Let me take a moment to elucidate the
nexus.

Suppose John Q. Public has divorced his first wife, and now he
wants to marry Susy. But Susy wants to get married in Church. So
John Q. goes over to the tribunal to see if there is some way the first
marriage can be annulled. At the tribunal's suggestion, John Q. and
his first wife are interviewed by a psychiatrist; and after a certain
amount of professional beard-stroking, it is determined that Mr. John
Q. had, at the time of the first marriage, an "immature character"
and hence was "unable to commit himself to a total sharing of
love-and-life with another." The medical judgment is submitted to
the tribunal, which must now make its own judgment. Let's stipulate
that both John Q. and his first wife agree that, although they got
along all right for a while, they never really attained, you know, a
profound union of heart and mind. And it is agreed by all parties that
poor John Q. did exhibit some of the features of what the doctor calls
"immaturity." But the fact remains that the case would never be in
front of this tribunal at all if, in fact, John Q. and the first Mrs. Public
had stuck it out. As Bauer has already told us, the doctor's diagnosis
can almost never amount to a prediction (ex eventu) that their
sticking it out could not have occurred. It just didn't. Therefore, the
real question is this: did a merely putative union fall apart inevitably,
because one of the parties (at least) had too much of a personality
problem to be able to make it work, or, did a real marriage "break
up" because, although the one party certainly had problems,
evertheless neither party lived up to his or her moral obligation to
make it work? In that alternative lies all the difference between an
annulible union (according to canon 297) and a real marriage which
cannot be annulled (even under 297). There is no question that John
Q., in this situation, if he had the "luck" to hit a progressive tribunal,
will get his annulment. But we can now see the gigantic *non sequitur* which the sentence will contain. It does not distinguish between moral failure and immaturity, or rather, it distinguishes them and then assumes they are incompatible! Given the diagnosis of immaturity, the canonical process contents itself with gathering evidence of the degree; it absolves itself from the further (and probably impossible) task of determining where "immaturity" left off, and things like stubborness, laziness, self-will, rudeness—in short, moral delinquencies—began.

A non-Catholic (e.g. the average psychiatrist) can avoid that question by assuming that all so-called moral problems are ultimately psychological. But no Catholic can accept a reductionism of that kind. A Catholic has to admit that psychologically superb people still sin, and that psychologically sick people, over and above that problem, also sin. Therefore without question, a Catholic has to admit that when two people fail to live together successfully in marriage, their failure is not necessarily the result of psychological or personality problems, even in the precise case where they do have such problems. Their failure can just as easily be the result of sin—in this case, a refusal to cooperate with the graces which flow from the marriage bond—in which case no annulment is possible.

This is perhaps the weightiest truth to which proposed canons 296 and 297 fail to do justice. And the failure is not surprising. Both canons are the "result of post factum analysis" (we are told)—analysis of the existing procedure in large North American tribunals. The largest of these is Brooklyn. And the source of Brooklyn's psychiatric expertise, Dr. Francis Bauer, has already told us, virtually in so many words, that the "canonical" evidence of what two people *could not* do, thanks to a non-diagnosible degree of an only sometimes diagnosible defect, consists perforce in evidence of what they *did not* do. That such a procedure cannot lead to moral certainty of annulability and hence cannot be accepted by the Magisterium of the Church is not merely a conclusion of this writer. It was already the conclusion of Cardinal Staffa in his letter to Cardinal Alfrink. Let us note just two of the criticisms Cardinal Staffa aimed at the Dutch tribunals:

5. In the sentences of the Dutch judges, the incapacity to contract marriage because of a lack in interpersonal relationships and in
psychological maturity is wrongly called a moral impotence anterior to marriage and demonstrated by the very marriage itself. Such a lack, in fact, appears after the marriage and cannot be looked upon with moral certainty as an incapacity anterior to the marriage . . .

6. When the sentences already given are reviewed, it is noted further that the experts contradict themselves in affirming the absolute incapacity of the marriage partners to marry, and in declaring, then, that these same persons are capable of contracting a new marriage.

Hence we arrive at another dilemma: according to Cardinal Staffa, Dr. Bauer contradicts himself. He escapes the contradiction only by claiming that all cases of psychological incapacity are relative. If so, then if \( x \) has not yet married \( y \), it is admittedly impossible to know whether the incapacity exists in this case. Therefore, if \( x \) and \( y \) break up, it is impossible to know with moral certainty whether the alleged incapacity caused them to do so, and hence no annulment can be countenanced. The dilemma: either self-contradiction or else lack of moral certainty.

Here ends the first part of my \( \textit{reductio ad absurdum} \), the part dealing with the \textit{practical} consequences of admitting purely psychological grounds of nullity. We have seen the absurdity in two ways. First we have seen the indefensible uses which are already being made of these grounds. But again it is not just a question of abuses. For, secondly, we have seen how the admitted (antecedent) non-diagnosibility of these disorders as sufficiently grave to be grounds results in the indefensibility of these annulments \textit{in principle}, because moral causes for the \textit{de facto} break-down of the marriage can never be ruled out. Hence it is impossible in principle to ever reach moral certainty in these cases that the marriage was not validly contracted. The annulments are being handed out because the psychiatrist, real or amateur, says so. The tribunal is a fiction.

\textit{Second Reductio}

The second stage turns to a theological consequence. Proposed canons 296/2 and 297 viciously compromise the entire theology of sacramental grace. Here is how.

What is the grace peculiar to the Sacrament of Marriage? Well, the grace of any Sacrament is traditionally divided into sanctifying grace and the peculiar grace which varies with the purpose of each
Sacrament. In the case of marriage, according to Monsignor Carney, "The special grace does not in reality differ from sanctifying grace, but adds to it the right to certain actual graces to be conferred in accord with the purpose of the Sacrament" (op.cit., p. 76; cf. St. Thomas, Summa Theol. III, q. 62, a. 2). In other words, over and above the configuration to God cause by the sanctifying grace given in Matrimony, the specific sacramental grace of marriage assists the couple in the following ways:

not only in understanding, but in knowing intimately, in adhering to firmly, in willing effectively, and in successfully putting into practice, those things which pertain to the marriage state, its aims and duties, giving the couple, in sum, a right to the actual assistance of grace whensoever they need it for fulfilling the duties of their state (Casti Connubii, Para. 40).

Now go back over Pius XI’s list of effects, negating each one. You get this: incapacity to understand, lack of intimate knowledge, incapacity to adhere firmly, inability to will effectively, incapacity to put into practice—an exact list of the lately concocted impediments! The very capacities which Pius XI attributed to grace within marriage, the Schema demands of nature prior to marriage.

No doubt the progressive canon lawyers will argue that, since grace builds on nature, if these capacities are not already present in a person’s psychic make-up, there is nothing sacramental grace can do to make good the lack. To see the full absurdity of this position, one need only apply it to the celibate state. The Church teaches that no one can persevere in the celibate life without the aid of the special graces which God offers in and through a vocation to that state. Indeed, the Church insists that without a vocation, it is presumption to enter vows. But if the modern canonist is correct, the graces of the celibate vocation are useless to a man who is not already naturally capable of living it. This is sheer Pelagianism: it demands that we be healthy before we can be healed!

In a nutshell: the expansion of "due discretion" into a comprehensive set of psycho-personal abilities necessary for the living-out of conjugal society in its broadest sense viciously trivializes the sacramental grace of marriage. Grace becomes an icing on the cake of nature, at best.
Third Reductio

From grace we go back to sin and the problem of motives. This is the third stage of my *reductio ad absurdum*, where the consequences in question bear upon moral theology and philosophy.

The medieval theological treatises on marriage have nothing to say about the psychological jargon, of course, which now describes "defects of consent." Nevertheless, the Scholastics did discuss what we can now see as a closely allied problem. They raised the question whether a true marriage could be contracted by an act of consent whose conscious motives were base (*inhonesta*).

St. Thomas, for example, was quite aware that many people marry for money, for status, to escape their parents, or just because they want to hop into bed together. The Medievals thought of these as sinful motives. Today, a theologian or a canon lawyer would be more likely to call them "immature" motives. I suppose all of us are sufficiently conditioned by the psychological way of looking at things to raise this question: what kind of a person, really, is so manipulative, or so shallow that he or she would enter into Holy Matrimony without a thought in his or her stupid head except sex, or money, or something of that sort?

Well, St. Thomas didn't think there was anything abnormal about such people. He thought they were ordinary sinners. He distinguished between the intrinsic ends of marriage (*fines operis*) and the ends or motives of the couple marrying (*fines operantis*), and he realized that they rarely coincide. Very few people marry with the dominant, conscious motive of procreation. They marry because they love each other, or whatever, but that is beside the point, because *in marrying* they get into something which has ends of its own (*fines operis*). Hence St. Thomas concluded that the motives could be as sinful or as "immature" as you please, but so long as the couple did not consciously exclude the primary end of marriage itself (*finis operis*), the marriage would be valid.

In other words, there is all the difference in the world between entering into marriage with the explicit intention that you are not going to be faithful or you are not going to have children (in which case there is no marriage), and entering into marriage with little or
nothing in your head at all except pretty Susy’s bank account or pretty Susy’s body. In the latter case, there is a true marriage, according to the whole tradition of the Church.

The progressive canon lawyers disagree. They really believe that a “loveless” marriage, a “convenient” marriage or a cynical marriage is a contradiction in terms. For if such a marriage breaks up, and the base motives come to light in a progressive tribunal, the officialis will immediately summon the shrink to find out what is psychologically wrong with people who could stoop to “marry” for such reasons—and an annulment will then be granted, diagnosis or no diagnosis. For if there is no diagnosis, another argument is resorted to—an argument whose implications are utterly fascinating. We shall take a moment to derive it.

Again, take the equalization of the ends of marriage as the bottom line. We have already seen the first step: to equalize the ends of marriage is to say that the loving, self-sacrificial demands of true consortium vitae are necessary ingredients of the very object of matrimonial consent. We have also seen the second step: to say that these things are part of the object of consent is to say that a grasp of these loving, self-sacrificial demands is a prerequisite to giving consent. And now we can see the third step: to say that such a grasp is necessary is to say that people must enter marriage with a good deal of upright motive and moral idealism consciously in mind. This St. Thomas did not have to grant, simply because he could distinguish finis operis from finis operantis and because for him the sole object of matrimonial consent was the exchange of a ius in corpus and secondarily, subordinately, the minimal “common life” which the granting of such a right ordinarily demands simply as a matter of practical fact. But as soon as one loads this “common life” with romantic and idealistic content, and then makes it a co-equal end of marriage, the object of matrimonial consent becomes as broad as the heart and as high as the Heavens. It becomes an object so sublime, to borrow a phrase, that ordinary, tawdry, bored, shallow, silly, and nasty people will never ascend to it.

With this last conclusion, the reader may think I’m on a limb. Everybody over the age of seventeen, you say, knows that there are loveless marriages and marriages of convenience. They happen all the time. And everybody knows that the Roman Catholic Church, you
say, is the most no-nonsense organization in the world on this kind of thing. It's just impossible to believe that canon lawyers are mewing like sentimental old women, and saying that if two people don't really have the right kind of love for each other, well, dear heavens, they just can't be married. But you're wrong. I reach no conclusion without a case to document it.

This is a Rotal case *coram* Fagiolo (30.10.70). The facts here are just the sort of thing that St. Thomas must have had in mind. A Chicago girl, see, married this guy who was rich as Croesus and in very bad shape. She stood to inherit a bundle if he died, and there were nine chances in ten that he would do so promptly. She told her friends that she didn't love him—a fact which came out in the canonical trial. On the other hand, there was no contention that either party had deliberately excluded conjugal rights or the essential properties of marriage from the act of consent. On Thomistic grounds, the case is open and shut: the marriage is valid. Moneybags didn't die on schedule; so Gold-digger is stuck. The poor man is also stuck with her, *caveat emptor*.

But Fagiolo disagreed, and in a sentence which reversed centuries of Rotal jurisprudence, annulled this marriage on grounds of defective consent. His reasoning? Simplicity itself: matrimonial consent, said Fagiolo, is a mutual self-donation which constitutes the "intimate community of life and love" (oh, yes) mentioned by Vatican II. From this fact alone he deduced that "conjugal love" is a necessary constituent of the object of consent.

Absurd? In fairness to Fagiolo, I should point out that he saw the absurdity himself. He scratched around to find a definition of *amor conjugalis* which would make it a canonically ascertainable phenomenon; he realized it had to be something *other than* the subjective disposition which is the secret of two people's hearts. What he came up with was our old friend "assumption of obligations." In other words, if two people objectively exchange the essential rights and duties of the *consortium vitae*, then they are said to manifest *amor conjugalis* in Fagiolo's sense. In which case, the wretched fellow contradicts his own sentence! He takes "love" in the romantic sense in order to annul this case, then takes it in a non-romantic sense in order to make the sentence canonically respectable, not noticing that he has already granted that an objective
Do you see how Fagiolo is foundering between an integral definition of marriage and a minimal one, unaware of the very distinction? He takes the hallmark of the integral definition, the notion of *amor conjugalis*, and first uses it as a club to destroy a valid but defective marriage. Then he takes the same hallmark and, slipping back into the habits of mind of a canon lawyer, denatures it so as to assimilate it to a minimum definition. He ends up with an *amor conjugalis* which is neither fish nor fowl—neither the "love" which we obviously mean by married love (the integral sense), nor a purely objective exchange of rights between the spouses.

But Fagiolo's very foundering brings us to the verge of an important discovery. We have been talking for a long time about integral definitions, and how the new *Schema* replaces a minimal definition of matrimonial consent with an integral one, and then tries to use that integral definition as though it were minimal. We have already seen many consequences of this mistake. Now we can see a new one: the use of an integral definition as though it were minimal *collapses the distinction between finis operis and finis operantis*.

This is what Fagiolo was up against and couldn't quite face. An integral definition includes the motives (*fines operantis*) of those who marry; it makes normative statements about what those motives "should" be, objectively-ideally. It recognizes that a marriage contracted for the wrong motives, or at least without a serious appreciation of the right ones (especially *amor conjugalis*), is off to a "bad" start. The motives may rectify themselves later on, of course, but meanwhile the marriage is "defective." This is the kind of information an integral definition is supposed to give us. It is meant to help us form our consciences and better ourselves in the way we enter and live out our married vocation. But as soon as this integral definition is used as though it were minimal, the judgments of what is "bad" and "defective" become *eo ipso* judgments of what is "invalid." Hence the very validity of marriage is made to rest upon the motives of those who enter it.

In the old *Code* the positive motives were neither here nor there. The only question was whether the couple had deliberately *excluded* consent to the "essential properties" of marriage had really taken place between the couple in question.
anything essential. But now they must have positively included everything essential—no, not only essential but integral to marriage! They must have intended to convey not only the *ius in corpus*, etc., but also everything proper to a complete "communion of life and love." This conclusion is explicitly embraced by Fagiolo's interpreter and defender, Cyril Murtagh (*The Jurist* XXXIII, 1973, p.383). You see, now, why I say that the theology of canonists like Fagiolo and Murtagh is an exact replica of the condemned theology of Herbert Doms; here, again, there is no primary end in the proper sense, but only a pseudo-primary end which is nothing other than the "realization" of this life-love community.

All right: what exactly happens when the *fines operantis* become decisive for a marriage's validity? Is it only that people who attempt marriage for really *sinful* motives fail in their attempt? No, it is much more. *All* inadequate motives, *all* motives which fail to measure up to the true sublimity of marital commitment, become causes of invalidity. *Marriage becomes the one and only Sacrament which only the worthy can receive!* It is not like Communion, which even the worst sinners can objectively receive, albeit to their damnation. It is not like Holy Orders, because a bishop can ordain an unworthy priest, and he is still a priest for all that. But unworthy spouses do not receive Marriage, on this view; they receive nothing. Only the deepest, most earnest, most serious and reflective people, in other words, can truly marry. Marriage becomes an elite phenomenon limited to those who are capable of "existential commitment" in the modern sense. Or, in Charles Curran's language, marriages become as rare as mortal sins!

Let me talk for a moment about this term "existential commitment." What does it mean? How does it differ from an ordinary commitment? Well, first of all, it is a bogus term. Its meaning really cannot be explained in ordinary English (nor in any other natural language). It acquires "meaning" only through several paragraphs of teutonic "existential hermeneutics." But for practical purposes, we can get at the meaning this way.

Suppose I make a commitment to mow your lawn next week for the sum of $2.00. This is what we all mean by an ordinary commitment. If I am old enough to know what a "job" is and what a "promise" is, you take my commitment seriously. You expect me to
show up and do what I said I would do—and you expect this without troubling to investigate the whole of my past, the inner structure of my character, the value-responses implicit in my motives, etc. Why? Why do you take me at face value? Well, because you don’t expect me to devote my whole life and commit my whole identity to the mowing of your silly lawn. In fact, if I told you that I planned to freely create myself by this act and to define myself to myself in my inmost being through the relation which I propose to cultivate toward your petunias, you would look upon me as a raving lunatic and hire someone else. But if I should use the same sort of language to describe the significance to me of my impending marriage, your attitude would be different. You would exclaim with the immortal Gilbert:

If this young man expresses himself
In terms too deep for me,
Why, what a very singularly deep young man
This deep young man must be.

And there would be your mistake. You would swallow this self-important rubbish because, though you perhaps never heard the term, you vaguely think of marriage as an “existential commitment.” You imagine that when a person marries, he not only does something permanent but also (just in order to do the thing properly) gathers all the threads of his life together and so disposes of himself totally.

Now when you were in the heady and hectic process of getting married, you were probably brought up short on one or two occasions by the finality of the step you were taking, and perhaps it scared you into “taking stock.” (It should have.) But as to wrapping your mind around all the pies into which your life had gotten its fingers, and getting the whole muck of it together so as to leave not the smallest particle of yourself uncommitted in the great “I do”—let’s be sensible. I suspect it never occurred to you to try.

Now what does this have to do with our subject? Well, the question is whether marriage is the kind of thing that comes into being by an ordinary commitment, or whether it is a relation so special that only some extraordinary act of total self-donation can bring it off. The question is about the very nature of matrimonial consent as causative of marriage. I think we can now see that the old
Code considered matrimonial consent on the pattern of an ordinary commitment. This is not to say that marriage itself was considered an "ordinary" or casual thing, like taking a part-time job. Not at all. It's just that marriage was extraordinary by virtue of what it itself was, and not by virtue of the act which brought it into being. That act was a simple, garden-variety consent, albeit to a great and permanent thing. It was the kind of consent which anyone could give who "knew" what he was doing, in the utterly everyday sense of "know."

In the new Schema, this perspective is changed. The prerequisites to valid consent have been expanded enormously. "Due discretion" now involves a long list of psycho-personal abilities, and psycho-sexually defined capacities to "assume obligations" are also presupposed. Even the subjective motives of the couple are considered crucial, as we saw a moment ago. The addition of these elaborate prerequisites, of course, changes the whole complexion of the act to which they are prerequisites. Matrimonial consent is now seen as a consent of special solidity and far-from-garden-variety intensity. The consent is now more like an existential commitment.

This change of perspective is freely admitted. The progressive canon lawyers frequently say that a man who is otherwise quite capable of leading a "normal" life, with all the ordinary commitments it entails, may nevertheless be truly unable to elicit a matrimonial consent. Special standards are here required.

Now why? What is the reasoning process behind this development? We can state it with photographic accuracy as follows:

Catholic tradition clearly teaches that marriages are made by the free consent of both parties, but modern psychological insights are showing us how rare and how difficult a thing it is to give a truly free, permanent and irrevocable consent. Today, therefore, when marriages break up, we can give out many more annulments than would have been possible in the past, because we now know, or at least suspect, how many marriages were vitiated at the outset by psycho-personal disorders and inadequate motives which render impossible the kind of complete, irrevocable consent by which alone a truly sacramental marriage is brought into being.

But even if you don't agree with all of our annulments, you must admit that a man's ability to contract a valid marriage is a function of his ability to commit himself in a truly lasting way. Hence the validity of the marriage depends upon the solidity of the act of consent.
I hope the reader finds this argument plausible, because it is immensely plausible. In fact, confess: if I had not set this argument up in a context almost guaranteed to make you suspicious of it, wouldn't you feel it was self-evident?

The force of this argument is, in fact, so great, that today it dominates the vast majority of canon lawyers, even the conservatives. But as soon as one accepts it, one is living on borrowed time. It may be a year, it may be ten, but sooner or later the morning is going to dawn, bright and clear, when it suddenly strikes the mind with blinding force that this "irrevocable consent"—there ain't no such animal. No man breathes who cannot utterly change his mind, and certainly no woman. Whereupon, my friend, if you are given to rigorous thought, you find yourself in the following trap:

An effect cannot be higher than its cause. But consent, which is the cause of marriage, frequently changes. Therefore the marriage itself can also be dissolved. And thus indissolubility does not always accompany marriage.

Divorce. Divorce follows from our "self-evident" premises as geometry follows from its axioms. Somewhere there must be a flaw. But where is it?

Do you know where I found this trap? It is an argument which St. Thomas Aquinas proposed to himself 700 years ago (in IV Sententiarum, dist. xxxi, q. 1, a.3, ad 4um). Maybe genius is just the knack of asking the right questions. I don't know; but in posing to himself that problem, St. Thomas anticipated what has become in modern times the most formidable of all objections against the Catholic dogma of indissolubility. He solved it, but only by calling upon the deepest resources of his own metaphysics.

How did St. Thomas solve it? Did he, perhaps, concede (like the modern canonists) that a truly marriage-making consent is a rare thing? Or conversely, did he try to argue, perhaps, that the average man's consent is psychologically a more solid act than we might otherwise think? Neither one. St. Thomas concedes the fickleness of consent as a mental act but absolutely refuses to draw the conclusion therefrom which modern thinkers draw. Here is his solution:

Against the fourth objection, one must say that although it is true that
the consent which makes the marriage is materially impermanent as far as the substance of the act is concerned, because that act of consent ceases and can be succeeded by a contrary act, nevertheless, formally speaking, the act is perpetual, because it has as its object the perpetuity of the bond. Otherwise, consent could not make a marriage at all; for, a consent to take a given woman for a limited period of time does not make a marriage. And I say "formally," in the sense that an act receives its (formal) specification from its object. And in this way, the indissolubility of the marriage is an effect of the consent.

In other words, St. Thomas is perfectly aware that people are fickle and that their acts of consent are accordingly fickle. But he is also aware (and here is the point the progressive canonists forget) that consent is an intentional act. Like any other intentional or cognitive act, matrimonial consent receives its formal specification from the object to which the consent is given. And the object in this case is a perpetual exchange of conjugal rights. Thus the perpetuity of my consent does not lie in the esse of the act of consent itself, considered as an accidental modification of the intellect (for in that case, I could literally never think about anything else!), but in the form of my consent, which is identically the object consented to. For the intellect in act formally as knowing a particular thing is that thing itself in act as known. Hence my consent is perpetual solely because I consented to a perpetual thing, marriage—and for no other reason.

That last sentence is so important that I'm going to say it again. When I marry, the consent which I give is perpetual solely because I am consenting to a perpetual thing—and not because of anything in me as a psychological specimen, not because of my capacity to assume obligations, not because of my freedom from psycho-sexual anomalies, not because of my firmness of will, not because of my lofty motives, not because of anything save the perpetuity which is contained in the very concept of marriage which I understand. UNDERSTAND. Here is the real explanation of why traditional canon law treated matrimonial consent as an ordinary commitment: because anybody but a child or an idiot can "understand" abstractly, conceptually what marriage is. Here is the real explanation of why traditional canon law treated "due discretion" as the basis for an intentional act, as a pure ability to scire, percipere, non ignorare, as Keating pointed out. And here is the reason why it is ruinous from the very outset, or at least superfluous, to treat this discretion as a
"quality of the psyche." It is ruinous insofar as it entails a dis-intellectualization of consent itself, which robs consent of its intentional character and turns it into a blind act of the will. It is superfluous in that, if the intentional character of consent is not denied, then these psycho-personal capacities do nothing to bring about a valid marriage.(7)

Here ends the third stage of my reductio ad absurdum. I now proceed to the fourth and final. With this we are once again in the area of practical consequences.

Fourth Reductio

We have just seen that matrimonial consent, as an intentional act, is specified by its object. We now turn from the perpetuity contained in that object to the whole content of the object. The act of consent of both parties, taken together, as embracing this entire content, is called marriage in fieri. When both parties have properly and publicly given this consent, their act becomes irrevocable precisely because the content consented to is thereby realized in being as the marriage bond. As soon as this bond exists, the marriage is said to be in facto esse. Thus marriage in fieri is the act or process which brings into being marriage in facto esse. And because marriage in fieri is nothing other than the consensual contract itself, marriage in facto esse is defined by whatever is contained in the object of consent.

Now, so long as the object of consent is truly minimally defined as the perpetual and exclusive exchange of a right-over-the-body, etc. (as it was in the old Code), marriage in fieri has to do with the pure exchange of rights and obligations; it is completed on the wedding day and has nothing to do with the carrying out of those obligations. However, as soon as the object of consent is defined as the actual "community of life," (as in the Schema), marriage in fieri has to do with everything needed to actualize this "community."

In that case, marriage in fieri is not completed (and therefore the marriage bond does not exist) until the couple have achieved some ideal degree of mutual self-donation; some "true" communion of life and love, some "complete" consortium vitae, etc. If this is true, some couples might be said to achieve marriage in facto esse immediately, others after two weeks, others after ten years, and still others would
give up trying. Therefore, of course, any marriage which failed could be declared null on the ground that no bond was present. The Church's teaching on indissolubility would be eliminated from real life and juridical process (if not totally reduced to nonsense), since any marriage which one or both partners wanted to escape would be known, for that very reason, to be no marriage.

A wild speculation? An absurdity which no responsible canon lawyer would embrace? If so, there are no responsible canon lawyers in Holland. For, on December 30, 1971, Cardinal Staffa, in his warning letter to Alfrink, condemned the following:

1. Marriage (the wedding) is not looked upon as a contract through which the actual marriage takes place, but rather as a starting point which inaugurates the relations between the spouses and becomes a true marriage progressively. Such an affirmation destroys the foundations of marriage law.

In fact, almost every point condemned in the Staffa letter can be shown to flow from, be implied by, or be permitted by the new Schema.

Meanwhile, this grotesque error regarding the relation between marriage in fieri and marriage in facto esse is not limited to the wild men of Utrecht, nor did it die after the Staffa letter. In 1974, at the convention of the Canon Law Society of America, the same error appeared in the already mentioned paper of Father Francis G. Morrisey, O.M.I., President of the Canon Law Society of Canada, and supposedly the soul of the non-crazy progressives. Beginning on page 5 of his typescript, Morrisey insisted that marriage was no longer to be viewed as a "contract" but as a "covenant" (cf. the Schema definition of matrimonial consent, canon 295/2). He said:

The importance of the change is that we must now take into account the long-range dimensions of marriage, and not limit ourselves to the event and the situation occurring at the time of the actual ceremony itself (what could be called the "contract"). Consequently, in the consent to marriage, we must now find this element of lifetime commitment.

As a parenthesis to this last remark we could quote from an unpublished decision of the Rota, February 28, 1973, coram Agustoni, which seems to ignore totally this change of perspective. We read as follows:

"The matrimonial consent gives and accepts only the obligations
which make up the object of the consent, not, however, the carry­
ing out of these obligations” (SRR, Dec., c. AGUSTONI, Feb. 28,
1973, Prot. No. 9565, par. 3).
This principle seems completely unacceptable at this time because it
means that we do not in any way take into account the capacity of
fulfilling the obligations of the matrimonial state, which is generally
accepted by the vast majority of the judges of the Rota.

From this precious but horrifying testimony, we learn a number of
interesting things: (1) the depth of division on the Rota itself; (2) the
fact that there is, or was, at least one judge who still accepts the
traditional teaching of the Church as to what marriage in fieri
involves; (3) the fact that a “vast majority” of Rotal judges, however,
have accepted a notion of matrimonial consent which falls under the
stricture of the very letter Cardinal Staffa sent to Alfrink. We also
learn that Morrisey is prepared to go the whole road in “destroying
the foundations of marriage law.” He interprets the Schema as
establishing a distinction between the “contract” and something
called the “covenant,” such that the “contract” is completed on the
wedding day, but the “covenant” is not. He then seems to assert that
marriage in facto esse has not come into being until the “covenant”
(and not just the “contract”) has been “carried out” to some
undefined degree. He says we must find an element of “lifetime
commitment” in the “consent to marriage.” What consent is he
talking about? He obviously can’t mean the intentional act of consent,
because that simply embraces the lifetime perpetuity which is
contained in the very concept of marriage. He is talking about some
kind of evidence of lifetime fulfillment of the obligations, in which
case the “consent” in his sense must not be complete until all the
evidence is in! There is no bond until the two spouses are satisfied
with each other’s performance! In which case, it is impossible to date
the time at which the bond comes into being at all. No couple has any
way of knowing whether they have yet succeeded in marrying each
other or not.

Here ends the reductio ad absurdum.
CONCLUSION/SUMMATION

From a number of perspectives, we have looked at the crucial canons of the *Schema de Sacramentis*, which, unless clearly rejected by a substantial part of the episcopate, is likely to replace the historic matrimonial jurisprudence contained in the *Code of Canon Law*. From every angle, this proposed document has shown itself to be not only inadequate juridically, not only permissive of the gravest abuses, but actually erroneous theologically, containing within its very structure, sometimes explicitly, sometimes implicitly, the denials of immutable doctrine which now disgrace the tribunal work of Holland, Canada, and many parts of the United States.

Because this conclusion has been reached by means of an extended, not to say unwieldy, argument, it may be helpful to distill the whole reasoning into a few lines. I believe that the following seven points are adequate to that end.

1. If there is a primary end of marriage whose prerequisites are alone essential to the existence of the bond, and if this primary end is procreation, then the only personal weaknesses or "incapacities" which are grounds for nullity are these: (a) total ignorance of the fact that marriage involves physical cooperation in having children, (b) mental derangement such as would rob a person of free deliberation and prevent the eliciting of a genuine act of consent; (c) physical impotence, such as to prevent the person from giving the very right he has promised to give in the consent. On this hypothesis the grounds for nullity are thus brief and justiciably clear, precisely because the acts and conditions connected with procreation are objectively ascertainable.

2. The acts and conditions connected with the secondary ends, however, are on a sliding scale. It is hard to decide when the conditions have been met, for the ideal is rarely attained. Therefore if the ends of marriage are all equalized, so that mutual assistance or community of life become just as essential as procreation-related acts, then a great many (and potentially all) personal faults or weaknesses become "incapacities" for communion in this true *consortium vitae* and hence grounds for nullity, if present
in a sufficient degree. For the most part, it is impossible to make these faults and their "degrees" plausible as grounds without resorting to psychiatric taxonomy. Hence the invasion of psychological jargon into tribunal decisions and, at length, into the canons themselves.

3. When what is essential to marriage for its very existence is thus broadened to include in some way all of the traditional "secondary ends," the object of matrimonial consent must be proportionately broadened. No longer a mere matter of perpetual *ius in corpus*, the object of consent must include all the ideals of the *consortium vitae*, including even "conjugal love" according to some canonists. Hence a vast new array of annulments based on "defective consent."

4. It has always been recognized that genuine consent presupposes a certain maturity or "due discretion." But under the influence of steps 2 and 3 above, the notion of "due discretion" must also be broadened. Such discretion becomes no longer the simple ability to know what the primary end of marriage is and to freely choose what is thus known, but rather the total set of psychological and personality traits necessary (or alleged to be necessary) to carry out into practice all of the things consented to in the expanded notion of the object of matrimonial consent. Hence a vast new array of grounds for nullity based on "lack of due discretion" (296) or "inability to assume obligations" (297).

5. This psychologization of due discretion transforms (dis-intellectualizes) the act of consent itself. No longer a simple, intentional act, matrimonial consent must be re-conceived as a total self-donation understood on the pattern of existential commitment. Then, since the number of people capable of the absolute self-dominion necessary to such "commitment," as it is usually conceived, is small (on exactly the same grounds on which the number of people capable of committing mortal sin is thought to be small), the instances of truly indissoluble marriages become a minute subset of the whole aggregate of unions among the baptized—an elite thing, an ideal but rarely attained.

6. The dis-intellectualization of the act of matrimonial consent transforms the realization of this act (and hence the realization of the marriage bond) into a "process," at least in the minds of many
CONCLUSION

canonists. This entails a radical transformation of marriage in fieri (formerly conceived as the mere making-of-the contract) into the total set of acts and dispositions necessary to achieve a full “community of life” (the new definition of marriage in facto esse). Hence the coming-into-being of the marriage bond becomes impossible to date, and the very existence of a bond becomes problematic in any marriage which has, in fact, “broken up.”

7. As a final consequence, the expansion of due discretion into a comprehensive set of psycho-personal abilities necessary for the living-out of conjugal society in its broadest sense viciously trivializes the sacramental grace of matrimony. All of the effects attributed to this grace in traditional teaching now become natural prerequisites to the very giving of consent. Hence grace becomes at best a spare tire on the limousine of nature.

These seven points suffice, I believe, to show why the pastoral and canonical ideas about marriage which are currently fashionable, just because they include an equalization of the traditional ends of marriage, cannot provide a coherent rationale for tribunal work. Applied in practice and implicit in the Schema, they produce a bitter train of consequences: indefensible annulments, objectively null second marriages, scandal among the faithful, cynicism among tribunal personnel. The heroic sacrifice of a couple in the past, trapped in unhappy union but faithful to the law of Christ, is mocked; the self-indulgence of a couple in the present, released from unhappy union by the lawyers of the Church, is encouraged. Individuals, once proud to be responsible, shrink from the rigors of adulthood and prefer the roles of “adolescent” and “patient”, where unwanted complications can always be dissolved in the warm fluid of irresponsibility. Conscience yields to sentimentality, the able advocate of concupiscence.

Let every man who has taken a wife in the name of Christ, and every woman who on her bridal day laid a bouquet at the feet of Our Lady, now implore that greatest of Mothers to intercede with her Divine Son, to spare the Church from this pastoral calamity, to sanctify the homes which are threatened by divorce, and to stir up repentence in those who know in their hearts that they have obtained, or given, dishonest annulments.
NOTES

1 To be sure, many canon lawyers (in this country at least) seem to have an opposite opinion. Spokesmen at the 1976 and 1977 conventions of the CLSA have been almost frantic in their zeal to denounce the Schema as "reactionary." They have threatened mass resignations of progressive tribunal personnel, should the draft go into effect. But these recent and well-publicized histrionics fall into perspective, if one keeps in mind two facts. First, the voting majority at recent CLSA conventions has been an extremely radical crowd, opposed to the whole tribunal system, opposed to the very concept of Church "law," and tending to deny flatly the dogma of indissolubility. Hence the CLSA resolutions of the last two or three years do not necessarily represent the thinking of even progressive canonists. Secondly, what irked the CLSA radicals in the new Schema was not primarily the points just mentioned, i.e. the ends of marriage and the scope of consent, nor any other substantive point, for that matter, but rather the Schema's abolition of the ultra-streamlined American Procedural Norms. In other words, the great complaint was not with the grounds for annulment which the Schema recognized but with the speed at which cases could be processed. Frankly, the questions of speed and efficiency have no place in the analysis which this essay proposes to undertake. We are after something deeper: to see whether the very grounds for annulment recognized by the Schema (and already being used in progressive tribunals) are compatible with sound theology and jurisprudence.

2 This analysis presupposes, of course, that things pertaining to the secondary ends are perfective of marriage but not essential to its existence. Such a presupposition has been contradicted by Jesuit Fathers John C. Ford and Gerald Kelly, who try to argue that the secondary ends, although really 'secondary' and in some sense 'subordinate' to the primary end, are also essential to the existence of the bond (Contemporary Moral Theology II [Westminster: Newman Press] 1964, pp. 36 ff.). I shall argue below that their position is incoherent; see pp. 30ff and footnote 5.

3 Space is lacking to develop here a full account of how minimum and integral definitions are related to each other, how many kinds of entities or institutions admit of such double definition, etc. But a few words may be helpful to stave off confusion.

Minimum definitions arise for many words whenever there is a need for unusual clarity about the boundaries of usage. For example, everybody knows the difference between a tree and a bush. But suppose there is a city ordinance which says you can cut down "bushes" but not "trees," and then two neighbors take each other to court over whether the foliage on their property line is bushes or trees. You get the point.

But it would be a serious mistake to think that minimum definitions are always arbitrary. In the case of marriage, it is clear that this kind of definition tells us the conditions for validity. Granted, it does not tell us the inner "meaning" of marriage as a Sacrament or as a natural vocation.
It merely specifies certain conditions without which the Sacrament/vocation cannot exist. But these "conditions for validity" are not therefore unrelated to the "essence" of marriage. They are not a legal fiction dreamed up by canon lawyers. The conditions for validity flow directly from matrimony's whole nature, even though they do not exhaust it.

This is why I have chosen to speak of minimum definition rather than of validity conditions, precisely to underscore the fact that these conditions tell us something true, albeit minimal, about the essence of marriage itself and are not merely tacked on artificially. Again, I grant that this is more clearly the case with marriage than with most of the other Sacraments. It would be very difficult to maintain, for example, that the validity conditions for the Eucharist amount to a "minimum definition" of that great Sacrament. But marriage is different in that it is not only a Sacrament but also a contract or a social institution, and hence is in its very nature juridical to an important extent.

4 In confirmation of my contention that *amor conjugalis* does not pertain to the minimum definition of marriage and hence is out of place in tribunal work, see the address of Pope Paul VI to the Sacred Roman Rota, published in *L'Osservatore Romano* (English language edition) Feb. 26, 1976. Even more emphatic is a recent sentence of the Apostolic Signature (*Periodica de re morali, canonica, liturgica*, vol. 66 [1977], pp. 297-395). In commenting on this sentence in *L'Osservatore Romano* (English edition) June 16, 1977, Giuseppe dalla Torre writes: "Therefore married love is one thing, matrimonial consent is another; the former does not constitute the object of the latter, though it is important for the purpose of the happy outcome of the marriage."

5 This is perhaps the right point at which to indicate why it is impossible to accept the position of Jesuit Fathers Ford and Kelly (see above, note 2). They claim that the secondary ends of marriage, while remaining secondary and subordinate, are nevertheless "essential" to marriage. Unfortunately, they give two mutually inconsistent accounts of what "essential" is to mean in this context.

In one place they define "essence" as follows: "We use 'essence' in the logical sense and mean by the essence of marriage all those things and only those things without which a true marriage cannot exist" (*op.cit.*, p. 41). In a footnote they add: "When we conclude that the fundamental right to acts by which the secondary ends are realized is 'essential to marriage' we mean the same thing the canonists mean when they say that the 'ius in corpus in ordine ad actus per se aptos ad generationem' is essential to marriage." Let us call this account A.

In another place, they offer this definition: "By an essential end we mean one which is intrinsic to the institution of marriage itself as one of its *fines operis* . . ." (p. 49). Call this account B.

Ford and Kelly assume, without evidence or argumentation, that these two accounts are equivalent. They assume, in other words, the following universal proposition. For any kind of end and for any kind of institution: if
annulment or divorce?

an end of the kind \textit{F} is a \textit{finis operis} of any institution of the kind \textit{I} then an end of the kind \textit{F} is an essential end of any institution of the kind \textit{I}. I phrase the proposition in this way in order to distinguish clearly the particular institutions which are instances of the kind (e.g. particular marriages) from the kind of which they are instances ("marriage" as a universal). The phrasing is necessary because \textit{essentialia} are defined for 'kinds,' not for individuals. I shall now prove that this universal assumption is arbitrary.

If the institution of marriage may be said to have (in the logical, as opposed to the metaphysical sense) an 'essence,' it may also be said to have (in the logical sense) 'properties' and 'accidents.' That is, within the \textit{total set} of features (and by 'features' I mean acts, dispositions, and intentions) pertaining to marriage, \textit{some} may pertain as essential, \textit{some} as proper, and \textit{some} as purely accidental. By features which pertain 'essentially,' of course, I mean features which universally pertain to unions which are marriages and must pertain if they are to be called marriages. By features which pertain 'properly,' I mean features which pertain by right (as following logically from the \textit{essentialia}) to every marriage and whose absence, therefore, universally signifies a defective marriage (i.e. a union which is a marriage but a defective one). By 'pure accidents' of an institution, I mean culturally relative features of the \textit{opus} itself. Surely there are such features: an institution such as marriage exists in a given culture with culturally given features which may be missing in another culture (and hence do not belong to the \textit{essentialia} or \textit{proprietates} of marriage) and yet, precisely because they are culturally given, are removed from the individual's control (and hence still belong to the \textit{opus} rather than to the \textit{operans}).

Depending on the nature of the institution, some or all of these features may exist for the sake of an end. Whenever features exist for the sake of an end, then (on the one hand) those features are acts, dispositions or intentions which are apt \textit{per se} to realize that end, and (on the other hand) that end renders purposive and intelligible the existence or the doing of those features. When these conditions are met, the end is said to "finalize" those features (with "finalize" used here in the sense of the Scholastic \textit{finalizare}—i.e. to cause after the fashion of a final cause). If, like marriage, the institution has a primary end, then by definition that end must finalize features which pertain essentially to the institution. In other words, if the end in question does not render the existence or the doing of essential features purposive and intelligible, or if the essential features are not \textit{per se} apt to realize that end, then the end is not 'primary.' So much, I think is agreed. But what if the institution also has one or more intrinsic secondary ends? The position of Ford and Kelly seems to be that whatever features are finalized by secondary \textit{finis operis} must be, by that fact alone, features also pertaining essentially to the institution. Why? Why may it not be the case that acts, dispositions and intentions finalized by a secondary end of the institution pertain to that institution \textit{properly}, or even perhaps accidentally?
Personally, I see no difficulty whatever with the view that acts, dispositions and intentions per se apt to realize mutual assistance and remedy of concupiscence pertain as properties to marriage. Though not essentialia of marriage, on this view, they would flow logically from the essentialia, like 'risible' from 'rational animal.' Therefore they would belong exigitively (like proprietates metaphysicae) both to 'marriage' in the abstract (which cannot be integrally conceived without them) and to particular marriages, but the particular marriages may exist in act without those same features (taken this time on the analogy of proprietates physicae) and for that very reason be 'defective (but real) marriages.' Analogously, a man who because of physical or psychological deformities cannot laugh is a real but defective man. He has the essentialia of man but lacks a proprietas physice sumpta; because what he lacks is a proprietas, he 'ought' to have it and so is recognized as defective. Analogously again, when I consent to marry, I must convey the fundamental ius in corpus in ordine ad actus per se aptos ad generationem (otherwise I do not consent to marry and hence do not marry), and in doing so I ought to convey another fundamental right, logically derivable from the first, namely, a ius assistentiae, etc., (otherwise I marry defectively).

If the reader agrees that this view of the matter is coherent (and perhaps even plausible), then he must agree that the universal assumption of Ford and Kelly is arbitrary.

Next, if their assumption is arbitrary, their two accounts of "essential" cease to be equivalent. For it might be the case that an end intrinsic to marriage as one of its fines operis is nevertheless not "essential to marriage" in the precise sense of finalizing acts, dispositions and intentions without which a marriage cannot exist at all. In other words, their account B is less restrictive than their account A. A secondary finis operis which finalizes features proper (but not essential) to marriage would count as an "essential end" of marriage in their usage under account B but would not count as an "essential end" in their usage under account A. Hence the two accounts are not equivalent.

Let us now see whether either of their accounts is tenable independently.

If one takes account B independently of account A (as Ford and Kelly themselves, of course, do not, having missed the non-equivalence of the two), one will be saying that any end, so long as it is an intrinsic end of some work, will be an "essential end" of that work, regardless of whether the features of the work which it finalizes are themselves essential to the work, or merely proper, etc. Well, aside from the fact that this would seem to be an odd, not to say improper, use of the term "essential," there is a serious theological difficulty. Church teaching requires that the secondary ends be "subordinate" to the primary end. But insofar as two or more ends are essential, there is no primacy or subordination between them. For whatever is essential is equally essential, as the two Jesuits themselves admit (p. 128). The question, therefore, is this: if the secondary ends are, qua intrinsic, equal with the primary end in
essentiality, whence is their subordinate character to be derived?

Ford and Kelly do propose an answer to this question, but it is inept and irrelevant. Before we look at it, therefore, let us see what a proper answer would have to be. By a ‘‘proper answer’’, I mean one which looks for the basis of the subordination within the nature and structure of marriage itself. Hence we may rephrase the question this way: what truth is there about marriage which makes the secondary ends subordinate to the primary one? I see only two possibilities.

Either the secondary ends are subordinate because the features which they finalize are subordinate to the features finalized by the primary end, or else the secondary ends are subordinate because the scope of their causality itself is subordinated to the causality of the primary end. In the latter case, the secondary ends are fines non-ultimi; they themselves and everything they finalize are in turn finalized by the primary end and to that extent have the ratio of means. This possibility Ford and Kelly themselves reject (p. 128). Hence we are thrown back to the first hypothesis: the secondary ends are subordinate simply because the features of marriage which they finalize are subordinate. But notice: if the features finalized by secondary ends are subordinate, they are not essentialia of marriage. For if they were essentialia, they would be equal to the features finalized by the primary end and not subordinate to them. Therefore the features finalized by secondary and subordinate ends must be either proper or accidental to marriage (but not essential). But if the features are proper or accidental, a particular marriage can exist without them—albeit, perhaps, defectively. Hence a defective marriage might be a real marriage in which absolutely nothing—no act, no disposition, no intention—finalized by one of the secondary ends exists. In other words, there can be a marriage (valid but defective) in which one of the secondary ends exerts no final causality at all. But if such a marriage is possible, what sense does it make to claim that these ends are ‘‘essential’’? If they are not essential to the existence of a marriage, to what are they essential? To this question I am unable to find an answer. Under every hypothesis, therefore, account B is untenable.

Suppose now we take Ford’s and Kelly’s other account. Under account A, we shall be saying that the secondary ends are ‘‘essential ends’’ of marriage because the features which they finalize are themselves essentialia of marriage (i.e. features without which no marriage can exist). On this view, the question of subordination is posed with even greater difficulty. Again, I see two possibilities, stemming this time from whether the essentialia finalized by secondary ends are the same as the essentialia finalized by the primary end, or different. Suppose they are the same. Then, since primary and secondary ends have the same finalizata, they must differ as ultimate and non-ultimate. Once again, the secondary ends and all that they finalize will be means to the primary end. We have already seen that the two Jesuits reject this possibility. We must suppose, then, that the essentialia finalized by the secondary ends are different from the essentialia finalized by the primary end. On this reading, the
position of Ford and Kelly will coincide substantially with the personalist ideas behind current tribunal practice. All the ends and all their finalizata will be equally essential to the existence of a marriage. The secondary ends will simply cease to be subordinate as far as the inner structure of marriage itself is concerned; there will be no reason why they should not have equal weight with the primary end in tribunal work, and the doctrine of the Church will be violated.

Such at least is the conclusion which a properly conducted analysis reaches. Let us now see how Ford and Kelly themselves attempt to make their "secondary but essential" ends subordinate to the primary end and thus save the orthodoxy of their position. In effect, they accomplish their objective by changing the topic. They concede that as far as marriage itself is concerned, the features finalized by the secondary ends are different from, but co-essential with, the features finalized by the primary end. Hence both the ends themselves and the various features they finalize are all equally essential to marriage. Nevertheless, the secondary ends are said to remain subordinate because, as far as the overall good of the human race is concerned, the primary end and its finalizata are "more important." Here is why. The secondary ends of marriage are concerned with people's happiness, whereas the primary end (procreation) is concerned with their existence. But in order to be happy, people have to exist. Therefore the primary end and its finalizata are "more important and more fundamental" than the secondary ends and their finalizata (pp. 130) Ford and Kelly are saying that there is no truth about marriage which makes the secondary ends subordinate to the primary; there is only a truth about the temporal common good which has this consequence.

For our purpose, at least, such a solution is irrelevant, because the "subordination" which it posits offers no guidance to tribunal practice. In order to annul a putative marriage, the tribunal must judge on the basis of what is essential to any marriage in itself, not on the basis of how marriage in general serves the common good. Hence it is difficult to see how the Ford and Kelly position could differ in practice from the ideas currently causing scandal.

However, there is a more fundamental criticism which must be mentioned. One cannot simply equate the procreation which is the primary end of marriage with the continued existence of the human race, which is fundamental to the temporal common good. For no particular marriage can have the continuance of the race as its finality; only the total set of marriages can reasonably be said to have this goal. Therefore the "importance" of continuing the race, however undeniable, can have only the most tenuous bearing on the "importance" of procreation in this or that marriage. No, if procreation and education of offspring is to be the primary and superordinate end of each particular marriage, it must be so on some other basis than that suggested by Ford and Kelly. And this point should be especially obvious today, when the traditional assumption that an ever-increasing population best serves the continuance of the species is under severe attack. Hence the solution of Ford and Kelly to the problem
of the subordination of the secondary ends is inept as well as irrelevant. That they are reduced to such a device merely underscores the untenability of their account A.

Hence the attempt by Ford and Kelly to claim that the secondary ends of marriage are "essential" to it illegitimately fuses two accounts of what "essential" is to mean, neither of which is tenable by itself, and the fusion of which is incoherent.

6 To the average Catholic, it must seem that the sterile partners' case does present an objection to our doctrine. Suppose two people know that they cannot have children but wish to marry anyway—for companionship in their old age or a similar motive. The Church does bless such marriages. But if the Church is logical, how can she do so, when procreation is supposed to be the "primary end" of marriage? Oddly enough, the answer to this objection is quite simple.

The term "contract" has fallen out of favor in recent years, but marriage is like a contract in that it is a free agreement. Whenever you make an agreement, you agree to do something which is in your power, that is, something under the control of your will. Traditional philosophy has a term for this kind of free or intentional act: it is called an actus humanus. It contrasts with the term for another type of act which we all 'perform' but which is not subject to our rational and voluntary control. Think of coughing, sneezing, digesting, the reflexes, etc. Such acts are called actus hominis. A moment’s reflection will convince one that whereas marital intercourse is a free human act (actus humanus), the actual conception of a child is not. It is not in the power of a woman’s free will to determine that by this intercourse she will conceive, any more than it is in a man’s power to determine that he will procreate. People can freely choose to have intercourse, but what happens after that is "out of their hands." It is up to the probabilities of nature and the providence of God. Therefore fertility or actual conception itself is not the sort of thing that can figure in an agreement. The most one can agree to do is to perform acts naturally conducive to conception. In marriage, one agrees to convey the fundamental right to such naturally conducive human acts. This is why sterility, which lies beyond the scope of human acts (and hence of human agreements) is not a ground for annulment, whereas impotence, which is inability to perform the free, human act to which one has pretended to convey the fundamental right, is a classic ground for annulment.

7 Perhaps a plurality of moral theologians would insist today that genuine moral action cannot be based on "mere abstract knowledge" but requires also what is often called "evaluative cognition." For discussion and bibliography, see Ford and Kelly, Contemporary Moral Theology I (Westminster; Newman Press, 1964) chapters 11, "Freedom and Imputability under Stress," and 12, "Judicial Aspects of Subjective Imputability." In a nutshell, abstract or conceptual cognition "expresses what the object is," whereas evaluative cognition is said to "appraise the
value the object has." A normal adult perceives both in the same act of cognition, but there may be pathological cases (it is said) in which the agent has a perfectly clear "abstract knowledge" of what he is doing but totally lacks a moral or "evaluative" awareness. Such an agent "knows what he is doing" in one sense, it is said, but not in another and hence is not fully responsible. Should he attempt marriage, his consent will not be valid for lack of "due discretion." In this way, it is alleged that a wide variety of neuroses and personality disorders become grounds of nullity.

The merits of this theory are difficult to decide, since the literature simply fails to give a clear account of what is supposed to be meant by the two sorts of knowledge. The decision to marry always involves knowledge of singlars and hence is hardly "abstract." Moreover, no human knowledge is "purely conceptual," because the human intellect grasps intelligibilities in and through the phantasm (abstractio and conversio). The abilities to produce and marshall phantasms are biological abilities, which vary from person to person (I.Q. differences, etc.) and which are certainly open to distortion by disease. But there is no way to examine people's phantasms. Hence, as far as this epistemological problem is concerned, the only evidence which a tribunal could have of "lack of due discretion" would be evidence of some judgment which the petitioner or the respondent expressed and which reveals a serious failure to grasp the essence of marriage.

How this epistemological issue is related to the (perhaps quite different) problem of moral inadvertence (whether normal or pathological) is not at all clear. A persistent and life-long pattern of strikingly amoral behavior might be evidence of a pathological condition, or it might not. The normal person, by the very fact that he is capable of sinning, is also capable of deliberate or habitual inadvertence to moral consequences. Hence it is difficult to say where, or even how, the line between inveterate sinfulness and pathological amorality ought to be drawn. For this reason the tribunal is faced with the grave evidentiary problem noted above: the record of amoral behavior tells only what a person has done; it does not tell what he or she could have done. A putative marital consent cannot be invalidated with moral certainty unless one has evidence of the latter as well as the former.
To Cardinal J. Bernard Alfrink, President of the Dutch Episcopal Conference

Your Eminence:

To this Supreme Tribunal of the Apostolic Signatura, to which has been confided the charge of helping bishops in the good administration of justice, have been submitted several appeals about which I have already spoken openly and in all confidence to Your Eminence. By this present letter I would want to inform you of certain points which urgently need to be corrected and amended in the administration of justice in the Ecclesiastical Province of Holland.

What is in question is not only the observance of law relative to court procedures but the very doctrine touching the nature of marriage between baptized persons. The following are a few of the opinions which are less proven (minus probatae) which have been found in the sentences to which we take exception.

1. The indissoluble unity of marriage sanctioned by Christ is called "the ideal" but should not in any fashion be considered as a norm or law for Christian spouses.

2. The marriage consent is seen not in a static but in a dynamic fashion. By it the spouses bring their mutual love gradually to its accomplishment. Such a concept is based on the doctrine of Vatican II which defines marriage not as a contract or an alliance but as a communion of life and love.

3. A distinction must be established between the will to marry and the affection by which a man and a woman realize their marriage. The spouses recognize the value of their marriage in the measure in which, by what follows, their union represents a success or a failure.

4. By this fact, it is for the spouses above all to judge the value of their marriage. It is they who can establish by their own judgment if the marriage was valid because it was happy or else null or dissolved because it ended in a failure.

5. This judgment of the spouses can, all things being well considered, be sanctioned or challenged by the ecclesiastical judges who are the guardians of the "ecclesial order."

6. Basing themselves on these opinions or like opinion, the ecclesiastical judges of this Province have introduced numerous
points into the marriage court process: (a) The spouses are heard with
the purpose of making a psychological examination of their sincerity
and of the evolution of their marriage. (b) Specialists in psychology
are asked to examine the capacity of the marriage partners to engage
in an interpersonal relationship permitting them to arrive
progressively at a happy union.

7. The spouses who in the judgment of experts are incapable of
such a relationship are declared incapable of contracting a valid
marriage. The spouses who, by their fault or not, impede or interrupt
the evolution of the interpersonal relationship are declared released
from the marriage.

8. Spouses who are incapable of this interpersonal relationship or
who interrupt without fault on their part the evolution of such a
relationship can marry again in the Church. But these persons are not
forbidden to enter upon a purely civil marriage which, it is affirmed,
is an exercise of their fundamental right to marry. In one and the
other case, if these persons are of good faith, they are admitted to the
sacraments which are necessary aids to salvation. To the contrary,
spouses who, in a culpable manner, interrupt the evolution of the
interpersonal relationship, even if henceforth they are no longer
bound by the marriage because the bond of love has been dissolved,
are nonetheless, as a penalty, still considered marriage partners and
cannot contract a new marriage.

9. Such a way of thinking and of proceeding is truly supported, it
is said, by the new model for the Church proposed by Vatican II,
according to which the Church is not a society of saints but of sinners,
pilgrims on earth aspiring towards the ideal.

10. It is understandable that all this provokes a crisis in marriage
law in the Church, which law is labeled pure formalism because it
attributes more importance to the institution than to the human
person. This legislation, it is affirmed, is opposed to the pastoral
concern which deals with these human situations and tries to bring
aid to them, and which is first of all based on the personal judgment
and concern of pastors.

Having said this, it is important to note what follows apropos of
the procedure and the sentences of the Dutch tribunals.

1. The manner of proceeding, such as it is applied today in the
tribunals of this ecclesiastical province to facilitate the sentence, can
be described as follows:
The hearing of the parties and if necessary of one or two witnesses; the judgment on the good faith of the spouses, this judgment being deduced from an interview which can be prolonged; the opinion on the success or failure of the marriage; the judgment of experts on the psychological attitude of the spouses towards the interpersonal relationship; the affirmation of the impossibility for the spouses to love each other again or to take up again their conjugal life; the recognition of the cause of such a failure, whether the responsibility of one or the other is involved or not; the opinion of the judge on the accord between the spouses who admit and recognize the failure of their marriage with, as a consequence, the recognition of the nullity of their marriage; the final sentence of the judge who declares the party or parties free, even without the knowledge of the other party; or the final sentence of three judges who establish that the marriage is invalid or that it should not be prolonged any further.

2. The supreme authority is asked at present to approve, post factum, this expeditious manner of proceeding, which, it is pretended, is more attuned to psychology and which has very often been employed.

3. This practice, even if introduced experimentally in virtue of the dispensation accorded to the bishops, cannot be admitted, since it concerns the constitutive law relative to the court procedure safeguarding the rights of persons and from which in virtue of the decree Christus Dominus, n. 8 b, and of the motu proprio De Episcoporum Muneribus, n.IV, not even the bishops dispense.

4. Nor can the sentence be invoked which was given by the Rota concerning the case in Quebec dated July 22, 1969, under the presidency of Anne, because it concerns the lack of discernment due to a serious psychic trouble anterior to the marriage.

5. In the sentences of the Dutch judges, the incapacity to contract marriage because of a lack in interpersonal relationships and in psychological maturity is wrongly called a moral impotence anterior to marriage and demonstrated by the very marriage itself. Such a lack, in fact, appears after the marriage and cannot be looked upon with moral certitude as an incapacity anterior to the marriage. There is moral impotence when there is an incapacity of the marriage partner to discern the object of marriage and to give a marriage consent.

6. When the sentences already given are reviewed, it is noted
further that the experts contradict themselves in affirming the absolute incapacity of the marriage partners to marry, and in declaring, then, that these same persons are capable of contracting a new marriage.

And finally, regarding doctrine and procedure the following must be added:

1. Marriage is not looked upon as a contract through which the actual marriage takes place, but rather as a starting point which inaugurates the relations between the spouses and becomes a true marriage progressively. Such an affirmation destroys the foundations of marriage law.

2. Furthermore, this wrong doctrine makes it impossible to establish whether a marriage is valid or not. This incertitude touches on the very existence of marriage and necessarily involves a social incertitude.

3. Contrary to the practice of the Church and to proven jurisprudence, the Dutch judges apply the concept of moral impotence, which is of capital importance in the nullity of marriage, either to fear, or to homosexuality, or to other conditions of the subject.

4. The judges, who base themselves on their own decisions, have declared marriages null or dissolved even after numerous years of cohabitation and of conjugal relations, and this does grave injury to the rights of persons.

5. Such a manner of acting on the part of the judges encourages free unions, does injury to the dignity and the stability of marriage, and weakens the value of the conjugal act itself, in which spouses are united, giving themselves to each other reciprocally. This doctrine of free marriage destroys the good order of society.

6. It is clear that a particular or local church cannot act in a manner contrary to the procedure and doctrine of the universal Church, taking account only of the particular church. The one holy catholic and apostolic Church is made present in the life and activity of all particular churches. Even where a certain pluralism is admitted, there remain essential points in which it is not permitted for any particular church to separate itself from the universal Church and from the other particular churches.

7. The pastoral concern to which the Dutch judges so often refer must be called superficial. It completely lacks any theologocal
foundation and is more concerned with bringing aid, in one fashion or another, to human situations rather than with conserving the revealed Faith.

8. For the rest, the judges themselves recognize that their judgments are accepted with difficulty in other regions. In their own country, they are challenged by certain of the faithful who are scandalized to see with what audacity even fundamental human rights are wronged.

May it please Your Eminence to consider all of this in good conscience and to inform the other Dutch bishops of it so that the ecclesiastical tribunals may be regularized in this country. In the case where a judge should refuse to conform, he ought to be dismissed from his charge by a competent authority, as is natural, and the task of administering justice should be given without delay to a more proven man.

May I take this occasion, Your Eminence, to express my devotion in the Lord.

Dino Cardinal Staffa
Prefect of the Apostolic Signatura

Given at Rome, the 30th of December, 1971
William H. Marshner brings a unique background to his authorship of the first of the Crossroads booklets. Formerly a contributing editor to *The Wanderer* and an assistant editor of *Triumph* magazine, Mr. Marshner has long experience in the apostolate of the Catholic Press. A Ph.D. candidate in Languages at Yale University and in Theology at the University of Dallas, Mr. Marshner is completing his dissertation on Cardinal Newman’s notion of doctrinal development. He is also professor and acting chairman in Theology at Christendom College.

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