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Charles Donahue, Jr.

# COMPARATIVE REFLECTIONS ON THE "NEW MATRIMONIAL JURISPRUDENCE" OF THE ROMAN CATHOLIC CHURCH†

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A recent review<sup>1</sup> of some developments in the law of the Roman Catholic Church<sup>2</sup> concerning the annulment of marriages suggested to me that these developments might be of interest to an audience wider than that composed of those professionally or religiously concerned with the activities of the Church's tribunals. In particular, these developments may reveal something about the problem of incorporating the findings of modern psychology and psychiatry into a legal system, about the ways courts behave when confronted with social change, and perhaps even about the problematic relationship between law and morality. What follows, then, is a series of reflections, by no means exhaustive, from one who does not pretend to be expert in modern canon law, or in modern secular family law, or in the relationship between law and psychiatry, and thus feels perfectly competent to offer reflections on all three.

## I.

Of all branches of Western Christianity the Roman Catholic Church is perhaps the most juridically inclined. She has a code, the 1917 Code of Canon Law,<sup>3</sup> modeled in form, if not in substance, after the great continental secular law codes of the nineteenth and early twentieth centuries. Behind this code lies a tradition, dating back at least to the twelfth century and continuing today, of academic study of canon law.<sup>4</sup> There is also a bar of canon lawyers, partic-

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1. Donahue, *Scandal and the Church's New Matrimonial Jurisprudence*, LAW & JUSTICE (forthcoming).

2. The "Roman" is important. The law to which we will be referring applies only to Latin-rite Catholics who are in communion with Rome. It does not, at least of its own force, apply to Catholics of the various Eastern rites even if they are in communion with Rome, much less to the Eastern Orthodox or Protestant churches. Hereinafter a reference to "the Church" will mean the Roman Catholic Church.

3. CODEX IURIS CANONICI (1919) [hereinafter cited as CODE with canon number].

4. In the universities of medieval and, to a certain extent, early modern Europe,

ularly strong in those European countries which are predominately Catholic,<sup>5</sup> and there is a court system, with a pyramidal structure that begins at the diocesan level and culminates in the Rota and the Apostolic Signature in Rome.<sup>6</sup>

Historically, ecclesiastical courts had a wide jurisdiction. In medieval England, for example, they heard cases concerning marriage, defamation, ecclesiastical property, contracts (at least in some periods), wills, and the administration of estates.<sup>7</sup> With the growth of the modern secular state, the ecclesiastical courts lost most of their jurisdiction to secular tribunals. Today, in most Western countries, even in those without a strong tradition of separation of church and state, the courts of the Catholic Church concern themselves principally with the internal administration of the Church (a jurisdiction principally if not exclusively of interest to clerics) and marriage.

The secular effect of the judgments of the Church's courts concerning marriage varies widely from country to country. In pluralistic countries such as our own these judgments have no secular effect. Secular marriage law is administered by secular courts, and the judgments of the Church's courts have effect only within the Church. Some countries, however, by agreement with the Vatican, accord some recognition to the judgments of the Church's courts.<sup>8</sup>

Whatever the situation with regard to the secular effect of the judgments of the Church's tribunals, within the Church the judgments of secular tribunals concerning the marital status of Catholics have no effect. With a few exceptions, the only determinations concerning marital status that have effect within the Church are those made by ecclesiastical tribunals. This fact should not be intuitively obvious, because marriage is virtually the only issue affecting Catholic laymen of which it is true.

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canon law had a stature rivaling that of Roman law. *See generally* P. ANDRIEU-GUITRANCOURT, INTRODUCTION SOMMAIRE A L'ÉTUDE DU DROIT EN GÉNÉRAL ET DU DROIT CANONIQUE CONTEMPORAIN EN PARTICULIER 1282-318 (1963).

5. For the history of the canonic bar, see J. NOONAN, POWER TO DISSOLVE 55-60 (1972).

6. For a description of the system, see N. DEL RE, LA CURIA ROMANA 227-59 (Sussidi Eruditi no. 23, 3d ed. 1970) (the Rota and the Signature); 2 S. WOYWOD, A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW 229-36 (C. Smith rev. 1952) (the diocesan and archdiocesan tribunals).

7. *See generally* Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647 (1974).

8. Countries which seem to accord some secular recognition to the judgments of the Church's courts in marriage cases include Colombia, the Dominican Republic, Italy, Portugal, and Spain. *See* G. PRADER, IL MARTIMONIO NEL MONDO 16, 22, 151, 177, 324, 442, 457 (1970). For the history of the agreements between the Vatican and the various states, see F. CONCI, LA CHIESA E I VARI STATI (1954).

Like most Western Churches, the Catholic Church has a moral code. This code is not the same thing as the Church's canon law, although the Church strives to keep her canon law consistent with her moral code. The enforcement of the moral code is a matter for the internal forum, to be dealt with between priest and penitent in the privacy of the confessional. Thus, if a Catholic commits murder or fraud he will, in addition to answering before a secular tribunal, have to square his conscience with his God by confessing his sin to a priest. In the case of marriage, however, and for all practical purposes only in the case of marriage, a Catholic's case must be brought not only before the secular forum but also before the external forum (the courts) of the church.

The enforcement of the requirement for a judgment in the external forum is grounded in the rule that a Catholic may not validly marry except before a priest and two witnesses.<sup>9</sup> If he does not so marry and lives with his putative spouse, he is committing the sin of fornication or adultery, and, as is the case with all serious sins, he may not be a communicant in the Church until he ceases the practice and is absolved of his sin.<sup>10</sup> Further, a Catholic may not licitly marry a second time "until the nullity or dissolution of the former [marriage] shall have been established according to law and with certainty."<sup>11</sup> With a few exceptions (most notably where the former spouse has died), this means that he must obtain a formal judgment from an ecclesiastical tribunal.<sup>12</sup> Unless the individual does so, a priest may not assist at the second marriage. Thus, for most practical purposes, a Catholic must bring a case in a Church court in order validly to remarry and remain a communicant in his Church.<sup>13</sup>

Leaving aside the complex question of why it is that marriage questions alone among all the legal and moral issues with which a Catholic layman can become involved must be resolved in the external forum,<sup>14</sup> let us look at the law applied by that forum. The

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9. CODE, *supra* note 3, canon 1094.

10. Cf. J. ABBO & T. HANNAN, THE SACRED CANONS 263 (2d rev. ed. 1970).

11. CODE, *supra* note 3, canon 1069, § 2.

12. See T. BOUSCAREN, A. ELLIS & F. KORTH, CANON LAW 538-41 (4th rev. ed. 1963).

13. In addition to this indirect enforcement mechanism which applies throughout the Church, a Catholic in the United States incurs excommunication *ipso facto* if he attempts remarriage after obtaining a secular judgment of divorce. See T. BOUSCAREN, *supra* note 12, at 943. The American Catholic bishops have recently voted to abrogate this provision. N.Y. Times, May 6, 1977, at A12, col. 1.

14. The Church has long claimed primary jurisdiction over the marriage of baptized persons because of the sacramental nature of marriage and, more broadly, because of the Church's general jurisdiction over the religious affairs of the baptized.

fundamental principle is stated baldly: "A valid marriage, ratified and consummated, can be dissolved by no human power and for no cause, save death."<sup>15</sup> Because the Church does not allow bigamy, the only way a Catholic can remarry while his former spouse is still living is by showing that his prior marriage was invalid, not ratified, not consummated, or, to the extent that this differs from invalidity, that it was not a marriage.

This fundamental principle, that marriages are indissoluble, rests on the New Testament. That Jesus taught that marriages are indissoluble can hardly be denied.<sup>16</sup> There are few specific legal points on which his teaching is so clear, except perhaps his flexibility with regard to the rules concerning the Sabbath. That St. Paul, despite this teaching, felt that he could create an exception on his own authority also seems reasonably clear.<sup>17</sup> Today we say that the "Pauline privilege" for converts to Christianity whose spouses remain non-Christian involves the dissolution not of sacramental ("ratified"), but only of non-sacramental ("unratified") marriages.<sup>18</sup> Paul did not so characterize this exception, although the sharp cleavage between the natural and the supernatural order in Paul's writing makes this explanation Pauline in spirit.<sup>19</sup>

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*See* 2 J. ABBO & T. HANNAN, *supra* note 10, at 170-72. Further, she has sought to obtain secular recognition of the judgments of the Church courts in marriage matters in those countries with which she has a concordat, an effort that has been successful in some countries. *See* note 8 *supra*. The arguments for the Church's continuing to treat marriage cases in the external forum include the following: (1) in those countries where the judgment has secular effect, the judgments must be made in an external, legal forum; (2) since marriage is eminently a public matter, it must be judged publicly; (3) of all the heads of jurisdiction conceded to the Church courts historically, this was the most universal and hence the last to fall before the courts of the modern secular state. *See, e.g.,* Manchester, *The Reform of the Ecclesiastical Courts*, 10 AM. J. LEGAL HIST. 51 (1966).

15. CODE, *supra* note 3, canon 1118.

16. Mark 10:2-12; Luke 16:18; Matthew 5:31-32, 19:3-9.

17. For the married I have something to say, and this is not from me but from the Lord: a wife must not leave her husband—or if she does leave him, she must either remain unmarried or else make it up with her husband—nor must a husband send his wife away.

The rest is from me and not from the Lord. If a brother has a wife who is an unbeliever, and she is content to live with him, he must not send her away; and if a woman has an unbeliever for her husband, and he is content to live with her, she must not leave him. This is because the unbelieving husband is made one with the saints through his wife, and the unbelieving wife is made one with the saints through her husband. If this were not so, your children would be unclean, whereas in fact they are holy. However, if the unbelieving partner does not consent, they may separate; in these circumstances, the brother or sister is not tied: God has called you to a life of peace. If you are a wife, it may be your part to save your husband, for all you know; if a husband, for all you know, it may be your part to save your wife.

1 *Corinthians* 7:10-16 (Jerusalem Bible).

18. *See* J. NOONAN, *supra* note 5, at 342-47.

19. *Cf.* Daube, *Pauline Contributions to a Pluralistic Culture: Re-creation and*

That Jesus himself allowed no exception to the indissolubility of marriage is a proposition more difficult to establish. The problem is created by the *except* clauses in Matthew 5:32<sup>20</sup> and 19:9.<sup>21</sup> The literature on the topic is vast, and none of the resolutions—either for or against the proposition that the author of Matthew meant to indicate that divorce and remarriage were permissible in a limited class of cases—seems totally satisfying intellectually.<sup>22</sup> Whatever the Matthean passages mean, however, the unqualified prohibitions of divorce and remarriage in Mark 10:2-12 and Luke 16:18 and the virtually unanimous opinion of the Church fathers<sup>23</sup> (a group not known for unanimity) to the same effect create a powerful bias in favor of the indissolubility of marriage.

The rule that marriages once made are indissoluble became an essential part of the law of the Roman Catholic Church. It was reaffirmed officially at the time of the Council of Trent (1563)<sup>24</sup> and has been reaffirmed on numerous occasions since.<sup>25</sup>

The institution of marriage, however, has undergone great changes, perhaps none greater than those of the last hundred years.<sup>26</sup> The family is no longer so important an economic institution as it was in the past, and its shape has changed from extended to nuclear. Perhaps as a result of these two phenomena, roles within the family are no longer clearly defined. We may decry these developments or welcome them, but they are clearly part of the framework within which any modern church must operate.

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*Beyond*, in 2 JESUS AND MAN'S HOPE 223 (Pittsburg Festival on the Gospels, Pittsburg Theological Seminary, D. Miller & D. Hadidian eds. 1971).

20. "[E]veryone who divorces his wife, except for the case of fornication, makes her an adulteress; and anyone who marries a divorced woman commits adultery." (Jerusalem Bible)

21. "[T]he man who divorces his wife—I am not speaking of fornication—and marries another, is guilty of adultery." (*Id.*)

22. Convenient summaries and references may be found in D. SHANER, A CHRISTIAN VIEW OF DIVORCE 43-57 (1969); Ambrozic, *Indissolubility of Marriage in the New Testament: Law or Ideal*, 6 STUDIA CANONICA 269 (1972).

23. For a definitive study of the matter, see H. CROUZEL, L'ÉGLISE PRIMITIVE FACE AU DIVORCE (Theologie Historique no. 13, 1971).

24. Council of Trent, Decree *Tametsi* (1563), in H. DENZIGER & A. SCHÖNMETZGER, ENCHIRIDION SYMBOLORUM NO. 1797, at 415 (36th ed. 1976); cf. *Professio fidei Waldensibus praescripta* (1208), in *id.* No. 794, at 257.

25. E.g., Benedict XIV, Constitution *Nuper ad nos* (1743), in *id.* No. 2536, at 504; Pius IX, "Syllabus of Errors" No. 67 (1864), in *id.* No. 2967, at 583; Leo XIII, Encyclical *Arcanum divinae sapientiae* (1880), in *id.* No. 3142, at 612; John XXIII, Encyclical *Pacem in terris* (1963), in *id.* No. 3962, at 804.

26. See generally E. SCHILLEBEECKX, MARRIAGE: HUMAN REALITY AND SAVING MYSTERY xv-xxx (N.D. Smith trans. 1965); J. DOMINIAN, MARITAL BREAKDOWN (1968).

The Church has reacted to these developments in different ways at different times over the past century. Most recently, the trend has been toward a reformulation of the traditional theology of marriage. This reformulation, at least in its official manifestations, does not undercut the Church's traditional view of the indissolubility of marriage; instead, it de-emphasizes the traditional teaching that the procreation and education of children is the primary end of marriage, and places more emphasis on the spiritual meaning of the expression of conjugal love. Further, the notion of marital consent has been given expanded meaning: the emphasis is now on the mutual self-giving of husband and wife at the expense of a more precise, but perhaps more sterile, contractual conception of consent.<sup>27</sup>

Thus, the removal of the support given marriage by its economic function, by the extended family, and by the resulting clearly defined roles for members of the family has enabled the Church to emphasize the spiritual nature of the marriage bond. This removal of support, however, has also placed the institution of marriage in great peril. Marital breakdown is now more frequent than ever before. How frequent is a matter of debate; the statistics suggest that in this country between one in six and one in three marriages ends in divorce.<sup>28</sup> The extent to which changes in the civil law of divorce have enhanced this problem is also a matter of debate,<sup>29</sup> but in any event the secular law of divorce is also part of the framework within which any modern church must operate.

This, then, is the problem of the ecclesiastical courts today: marital breakdowns occur frequently, and people obtain civil divorces. In virtually no case that comes before an ecclesiastical tribunal today is there any hope of reconciliation of the original couple. At least in countries with relatively relaxed standards for secular divorce, a large proportion of the people who come before the ecclesiastical courts have already married again outside the Church, and the dissolution of this new union may be legally, financially, and psychologically impossible, even if it could be morally justified.

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27. These developments are perhaps best seen in the *Constitutio pastoralis*, *De Ecclesia in mundo huius temporis* (Pastoral Constitution, On the Church in the Modern World) pt. 2, ch. 1 (1965), in *CONCILIORUM OECUMENICORUM DECRETA* 1100-06 (J. Alberigo et al. eds., 3d ed. 1973), translated in *THE DOCUMENTS OF VATICAN II* 249-58 (W. Abbott ed. 1966).

28. For the reasons why such a seemingly simple statistic turns out to be so difficult to obtain, see McHugh, *No-Fault Divorces*, 35 *THE JURIST* 18-19 (1975), and sources cited therein.

29. For a careful study concluding that a causal relationship between easy divorce laws and marital breakdown cannot be proved, see M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 261-307, 444-69 (1972).

## II.

These developments, as might be expected, have placed considerable pressure on the Church's courts. An increasing number of Catholics who have obtained secular divorces and have remarried outside the Church now desire to return to the sacraments. They have presented petitions before the ecclesiastical tribunals, and in many areas the number of declarations of nullity has increased dramatically over the past few years.<sup>30</sup> Part of this increase is attributable to changes in the procedure<sup>31</sup> of the ecclesiastical courts, which now have an expedited procedure and can more readily grant a final judgment. Some of these changes have also succeeded in making the decisions of the tribunals less visible and have thereby enabled the tribunals to render decisions for which the only rationale may be sympathy with the plight of the petitioner.

Let us put these procedural developments to one side, however, and focus on the more visible changes in the rationale of decisions rendered. These changes have been considerable, and we cannot deal with all of them here. The most significant, however, involve a body of doctrine that has developed from the single principle that the insanity of one of the parties to the marriage vitiates marital consent and renders the marriage void. A bewildering variety of terms has been employed to describe the expansion of this principle: lack of due discretion, emotional immaturity, psychic or moral incapacity, psychic or moral impotence. This lack of precision in terminology itself indicates the fluid and transitional nature of the doctrine.

Below the terminological level three separate but overlapping strains of doctrine may be identified:<sup>32</sup> a marriage may be annulled on the ground of (1) insanity, (2) lack of due discretion, or (3) psychic incapacity. The cases do not always distinguish clearly among these three grounds, and the doctrines, as we noted above, stem historically from an elaboration of the single ground of insanity (*amentia*) in the light of modern psychology and psychiatry, the find-

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30. See CANON LAW TRUST, *THE CHURCH'S MATRIMONIAL JURISPRUDENCE* ii (Westminster, Eng. 1975).

31. See, e.g., the *Motu proprio, Causas matrimoniales*, in 63 *ACTA APOSTOLICAE SEDIS* 441 (1971); *Procedural Norms for Matrimonial Cases*, in 30 *THE JURIST* 363 (1970).

32. The categorization adopted here is that of the consultants for the revised Code of Canon Law. See 3 *PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, COMMUNICATIONES* [hereinafter cited as *COMMUNICATIONES*] 69, 77 (1971). The language quoted in the text at note 34 *infra* has apparently become the basis of canons 294-96 of the *Schema* for the revised Code. See *SCHEMA DOCUMENTI PONTIFICI QUO DISCIPLINA CANONICA DE SACRAMENTIS RECOGNOSCITUR* (1975) (unavailable to me at this writing).



ings of which Pope Pius XII commended to the Rota as early as 1941.<sup>33</sup>

The ground of insanity is basically confined to those cases in which one of the parties to a marriage had, as the consultants for the revised Code of canon law put it, "[a] total incapacity to conjure up [marital] consent because of a sickness or disturbance of the mind by which the use of reason is impeded."<sup>34</sup> This is essentially the old ground of *amentia*, stripped, as a result of modern psychiatric teaching, of some of the more curious embellishments of the past. Lack of due discretion and psychic incapacity are more elusive. Included under these headings are (1) people who do not really understand what it is to be married (even though they might be able to recite the catechism's definition of marriage), (2) people who really do not want to be married (even though they say they do), and (3) people who may understand and want to be married, but who suffer from some defect of personality that makes it a foregone conclusion that they will not be able to live up to their marital obligations. The first group are those whom the consultants describe as having "an incapacity stemming from a grave defect of discretion of judgment concerning the marital rights and duties to be mutually given and received."<sup>35</sup> The second group may be covered in this description as well. The third group is probably composed of those whom the consultants describe as having an "incapacity to assume the essential obligations of marriage."<sup>36</sup> Plainly we are not dealing with insanity in the normally accepted sense of the term. Three recent cases may serve to illustrate:

(1) Two recent converts were married in December of 1959. The behavior of the bridegroom caused "profound concern" to the officiating priest. Three weeks later the bride went home to her mother: "[S]he [the bride] was broken up, completely in pieces, very frightened and in a state of nervous tension." She returned to her husband, left him again at Easter, and left him permanently in June. Two psychiatrists examined the record in the case but were unable to examine the husband. They concluded that he was a

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33. 33 ACTA APOSTOLICAE SEDIS 423 (1941).

34. 3 COMMUNICATIONES, *supra* note 32, at 77: "incapacitas totalis eliciendi talem consensum ob mentis morbum vel perturbationem qua usus rationis impeditur. . . ."

35. *Id.*: "incapacitas proveniens ex gravi defectu discretionis iudicii circa iura et officia matrimonialia mutuo tradenda et acceptanda . . . ."

36. *Id.*: "incapacitas assumendi obligationes essentielles matrimonii . . . ." The consultants then add: "proveniens ex gravi anomalia psycho-sexuali", a phrase which has provoked considerable discussion. See notes 42-45 *infra* and accompanying text.

psychopath and incapable of giving true marital consent in 1959. This finding, coupled with the history of the marriage, led the court to find nullity for lack of due discretion.<sup>37</sup>

(2) John and Mary—of unstated age, though John was apparently still in his teens—were married in 1944 while John was serving in the Air Corps. Two children were born of the marriage, but, in the winter of 1948-1949, John and Mary were divorced following Mary's adultery. John remarried civilly; his second wife died, he married for a third time, and in 1969 sought to have his first marriage annulled. The court quoted extensively from psychological writing on immaturity and on the personality disorders that can lead to marital breakdown. The witnesses (no experts are mentioned) all commented on John's immaturity at the time of the marriage and the fact that he then seemed to be dominated by three forceful women: his mother, his first mother-in-law, and his first wife. The marriage itself was precipitated by the bride's mother's fear (apparently unfounded) that her daughter had been compromised. The court concluded

that John A. was suffering from the behavioral difficulty of immaturity beyond that to be expected of a person his age, rendering him incapable of assuming the permanent responsibilities of a lasting marriage with Mary B. Moreover, the situation of immaturity perdured during the entire course of the attempted union and was not something that was curable by morally available means during the course of the marriage and in the place the couple were living. Accordingly it was in effect a moral impotence rendering this marriage invalid.<sup>38</sup>

(3) *A.B.* married *C.D.* in 1969, when both were in their early twenties. After much wrangling, this childless couple obtained a civil divorce some two years after the marriage. A psychiatrist examined them both on the court's behalf and concluded that *C.D.* had a passive-dependent type of personality and a poor self-concept, while *A.B.* was egocentric and found it difficult to "get close" to people. The marriage broke down because they were incapable of meeting, even minimally, each other's emotional needs. The court concluded that their "personalities and the operation of their joint systems together rendered each incapable of meeting the needs of the other and delivery of the object of the promises made at the time of marital consent was impossible." While the court chose to classify

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37. *coram* O'Ryan (Portsmouth Diocesan Tribunal, May 2, 1973), in 18 *L'ANNÉE CANONIQUE* 445-52 (1974).

38. *coram* Provost (Helena, Mont., Diocesan Tribunal, n.d.), in 33 *THE JURIST* 418, 428 (1973).

this case under a new heading, "essential incompatibility" (resting on the general provisions of canon 20 of the Code),<sup>39</sup> it did cite cases involving lack of due discretion and psychic incapacity. It also found *error in persona*, because each party thought that he was marrying someone whom he could "relate to with [some] degree of meaning."<sup>40</sup>

Now these are all decisions of tribunals in English-speaking countries, and it might be argued that ecclesiastical judges in countries which have a tradition of common-law jurisprudence and in which Catholics are in a minority tend to render decisions which are not in fact in conformity with the law of the Church as a whole.

Certainly, some of the doctrinal developments in the area of annulment have met with sharp criticism at the highest levels. For example, the Apostolic Signature, the Church's highest tribunal, has recently condemned the broad use of the doctrine of moral impotence by the Dutch tribunals. But the condemnation need not be taken to upset the results in any of the examples given above.<sup>41</sup>

More to the point is the language of the draft of the revised Code which recognizes "incapacity to assume the essential matrimonial obligations" as a ground for annulment but goes on to describe that incapacity as one "arising from a serious psycho-sexual anomaly."<sup>42</sup> This latter phrase has provoked considerable criticism, and not only in the English-speaking world,<sup>43</sup> but it does reflect the holdings (in the common-law sense) of the Rotal cases decided under the specific head of "incapacity to assume the essential matrimonial obligations." With but one possible exception, the holdings of these cases have apparently been confined to cases of nymphomania or homosexuality.<sup>44</sup> The reasoning of these cases, however, is not so confined and

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39. CODE, *supra* note 3, canon 20: "Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma sumenda est, nisi agatur de poenis applicandis, a legibus latis in similibus; a generalibus iuris principiis cum aequitate canonica servatis; a stylo et praxi Curiae Romanae; a communi constantique sententia doctorum."

40. *coram* Tierney (Patterson, N.J., Diocesan Tribunal, March 19, 1975), in 9 STUDIA CANONICA 178 (1975).

41. The text of the document, which is in the form of a letter to Cardinal Alfrink of the Netherlands, is given in 46 APOLLINARIS 294-98 (1973). While the matter is not free from doubt, it would seem that what the Signature is criticizing is the overly broad use of "moral impotence" as a substitute for analysis, rather than the doctrine of psychic incapacity itself. Indeed, the consultants to the Code Revision Commission suggest that the term "moral impotence" be abandoned entirely because of its possible confusion with physical impotence arising from psychological causes. See 3 COMMUNICATIONES, *supra* note 32, at 77.

42. 3 COMMUNICATIONES, *supra* note 32, at 77.

43. See Navarrete, 'Incapacitas assumendi onera' uti caput autonomum nullitatis matrimonii, 61 PERIODICA DE RE MORALI, CANONICA, LITURGICA 47 (1972).

44. E.g., *coram* Pompedda (S.R. Rota, Oct. 6, 1969) (homosexuality), in 80/2

would seem to apply to any situation in which one of the marriage partners was psychologically incapable of assuming the marital obligations.<sup>45</sup>

Further, the language of the draft Code does not seem to encompass a number of recent Rotal cases that annul marriages on the ground of psychic incapacity not of a psycho-sexual nature. These cases, apparently, fall under the heading of incapacity to give the marital consent rather than incapacity to assume the essential marital obligations. They are important because the people they concern are not insane in the normally accepted sense of the term and are not incapable, one would suppose, of making any other kind of contract. One such case dealt with a neurasthenic woman who was an alcoholic,<sup>46</sup> two others with men diagnosed as having paranoid personalities.<sup>47</sup> The line of reasoning of these cases may be illustrated by a passage from one of them:

Marriage in fact is fully completed by an *interpersonal exchange*, under which lies a healthy *intrapersonal state of affairs*. Therefore, if it is fully apparent in the judgment of the experts from the history

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IL DIRITTO ECCLESIASTICO 146 (1969); *coram* Lefebvre (S.R. Rota, Dec. 2, 1967) (homosexuality; alternative holding), in 93 MONITOR ECCLESIASTICUS 467 (1968); cf. *coram* Pinto (S.R. Rota, July 15, 1971) (nymphomania), in 97 MONITOR ECCLESIASTICUS 85 (1972); see generally Lefebvre, *La jurisprudence rotale et l'incapacité d'assumer les obligations conjugales*, 24 REVUE DE DROIT CANONIQUE 376 (1974) (cataloguing other cases). The possible exception is the case *coram* Serrano, note 47 *infra*, which I have chosen to treat as a defect of consent case.

45. And it is so understood by many of the commentators. See Bernhard, *Réflexion critique sur l'incapacité morale*, 25 REVUE DE DROIT CANONIQUE 274 (1975); cf. Zapp, *Incapacitas im Sinn von Erfüllungsunvermögen des Ehevertrags—Ein Neuer Ehenichtigkeitsgrund?*, 141 ARCHIV FÜR KATHOLISCHES KIRCHENRECHT 449 (1972).

46. *coram* Lefebvre (S.R. Rota, July 8, 1967), in 22 REVUE DE DROIT CANONIQUE 200 (1972).

47. *coram* Anné (S.R. Rota, July 22, 1969) (*semble*), excerpted in Di Jorio, *Causae nullitatis matrimonii secundum novissimam jurisprudentiam rotalem*, in IL DOLO NEL CONSENSO MATRIMONIALE 147, 150-51 (V. Fagiolo ed., Annali di Dottrina e Giurisprudenza Canonica No. 2, 1972) [hereinafter cited as *coram* Anné]; *coram* Serrano (S.R. Rota, April 5, 1973), in 30 REVISTA ESPAÑOLA DE DERECHO CANONICO 107 (1974). For a discussion of the *Serrano* case, see Lavin, *The Rotal Decision Before Serrano, April 5, 1973: Some Observations Concerning Jurisprudence, Procedure, and Risk*, 36 THE JURIST 302 (1976).

I can only echo here the common plea of those concerned with modern canon law. If the Church is going to proceed with development of the law through jurisprudence, she must do better than publish the principal opinions of the Rota ten years after they are rendered. The case *coram* Anné, *supra*, is clearly one of the most important of the recent cases. It is cited in the Signature's letter to Cardinal Alfrink, *supra* note 41, in the *Serrano* opinion, *supra*, and in many others. The irregular publication of a selection of opinions in a half dozen scattered periodicals, frequently with only the *in iure* sections or even less, as in the case of the *Anné* opinion, is no substitute for the full opinion including the facts. (The facts could be suitably disguised if need be to protect the privacy of the parties.)

of the life of person marrying that he was gravely deficient in inter- and intrapersonal integration before marriage, he is to be considered as not up to grasping rightly the very nature of the common life ordained for the procreation and education of children that is matrimony, and hence equally incapable of rightly discerning and judging about that perpetual common life which he is to found with another. There is lacking in this case, therefore, that discretion of judgment which is necessary to make a valid choice of conjugal consort. Indeed, he can remain capable of performing other duties which are extraneous to this inter- and intra-personal integration.<sup>48</sup>

What the Rota seems to be doing, therefore, is characterizing the psychic incapacity to form a stable marital relationship as a defect of consent. However unsatisfactory this approach may be from an intellectual point of view, and however much the approach may differ from that of some of the tribunals in English-speaking countries, we are led back to the problem of evaluating psychological and psychiatric evidence concerning a marital breakdown. I think it is safe to say that this is a problem being faced by the universal Church, not just by its English-speaking portions.

### III.

Forebearing both the technical and the theological objections which might be raised to these developments, one might initially conclude that the Church is simply opening the door to divorce and not saying so, that she has taken to dissolving marriages rather than confining herself to declarations of their invalidity. The simple answer to this conclusion is that it fails to distinguish between a declaration of divorce based on events which occurred after the marriage and a determination of nullity supported by evidence that postdates the marriage. More careful examination, however, reveals that this distinction between substance and evidence is fraught with difficulties.

To take a straightforward example, suppose a man who has never attempted sexual intercourse marries and shortly thereafter discovers that he is incapable of intercourse. He then disappears and so cannot be medically examined. His wife petitions for a declaration of nullity on the ground of impotence. The canon law is clear: if the man was impotent at the time of the marriage, the marriage is null; if he became impotent after that time, the marriage is valid.<sup>49</sup> Yet, no one would claim that if the court used the fact of the man's in-

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48. *coram* Anné, *supra* note 47, at 149 (emphasis original). Unfortunately the report of this case is most incomplete, and one can barely ascertain that it deals with a paranoid personality.

49. CODE, *supra* note 3, canon 1068.

ability to have intercourse after the wedding as evidence of his impotence at the time of the wedding, it really was allowing supervenient impotence as a ground of nullity.<sup>50</sup>

Unfortunately, when we move from the physical to the psychological, the distinction between the substance of the decision and the evidence supporting it becomes blurred. In the case of physical impotence, we are dealing with a condition that could have been verified medically at the time of the marriage. In the case of psychic incapacity, however, we are dealing with a disability that may be verifiable only after the marriage has taken place (and broken down). Further, there is a marked difference in the degree of certainty with which a physical and psychological diagnosis can be made. A well-trained physician can predict with virtual certainty that a person with a given anatomical structure will be incapable of intercourse. An equally well-trained psychologist or psychiatrist can frequently only make a probabilistic statement about whether a given marriage will break down, both because he rarely has the opportunity to test his theories on viable marriages and because the issue with which he is dealing—success or failure of an interpersonal relationship—is so much more complex than the capacity to perform the physical act of intercourse.<sup>51</sup>

Now all of this is of considerable significance for a legal determination of psychic *incapacity*. A psychologist wants to know why a marriage broke down or is breaking down and what he can do to restore these people or this marriage. He is not particularly interested in what might have been. But speculation as to what might have been is critical for the lawyer trying to determine psychic incapacity, because he must determine whether the parties were incapable of marriage or whether this was a marriage that simply did not work out.

There is a further difficulty: in order to maintain a distinction between declarations of nullity and dissolution, we must distinguish between existing and supervenient conditions. A person permanently incapable of intercourse at the time of the marriage cannot validly contract marriage; a person who later becomes incapable of intercourse may not have his marriage dissolved. But once again, when we move from the physical to the psychological, we can no longer draw such a sharp line. Virtually all psychologists and psy-

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50. I am not saying that this is how this hypothetical case would be decided by a modern ecclesiastical tribunal.

51. For an excellent introduction to both the psychology and psychiatry of marital breakdown, see J. DOMINIAN, *supra* note 26.

chiatrists (whether of the Freudian persuasion or not) trace the roots of many, if not most, mental disorders back to the childhood of the patient. At the same time, few would maintain that the personality is fixed immutably upon entry into adulthood. Events in an adult's life, among which marriage is one of the most significant, operate on the childhood-formed personality and can affect it profoundly.

Clearly, then, there is a problem created by the very nature of the psychological and psychiatric evidence that is now being admitted before ecclesiastical tribunals (even assuming that we can find judges who are competent to evaluate such evidence). The purpose of these sciences is not to solve juridical or theological problems; it is to explain the behavior of the person and to bring him to understand why he behaves as he does, so that he may be better able to deal with himself and with the society around him. Those who are familiar with the difficulties that American criminal courts have had with the "insanity defense" will recognize the analogy.

#### IV.

Indeed, the closer one looks the more striking is the analogy between the difficulties the Anglo-American criminal law has encountered with the insanity defense and those the ecclesiastical courts are encountering with psychic incapacity.<sup>52</sup> Both Anglo-American common law and the canon law begin with a notion, rooted deeply in the past, that an insane person is not responsible for his acts: he cannot commit a crime, he cannot perform a valid juridical act, such as marrying. Modern psychology and psychiatry, however, have deprived the law of its univocal conception of insanity. Mental illness is now perceived as running along a spectrum from mildly balmy to totally bananas, and psychology and psychiatry do not offer any convenient place along the spectrum at which to draw a line demarking "insanity."<sup>53</sup> Controversies abound as to where any individual is to be placed on this spectrum, and there is considerable disagreement as to the appropriate labels to apply to given combinations of symptoms. Psychiatrists and psychologists are

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52. Because of the speculative nature of this and the following two sections of this paper, I will not attempt to provide detailed documentation. Support for most of the factual statements and many of the judgments in this section can be found in A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967); A. WATSON, *PSYCHIATRY FOR LAWYERS* (1968); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 *YALE L.J.* 853 (1963).

53. Looking solely to convenience, the line could be drawn where the patient is totally out of touch with reality, a state that normally does not require a trained professional to identify, but which is too limited even for traditional legal purposes.

divided as to the causes of mental disorders. Some trace the origins of many, if not most, such disorders to organic peculiarities; others lay more stress on environmental causes. There is also substantial disagreement as to the curability, even more as to the likelihood of cure, of many mental illnesses.

Further still, and perhaps most important, the notion of free will, of the voluntariness of human behavior, plays little or no role in the psychiatric or psychological scheme of human behavior, whatever the personal beliefs of individual psychiatrists or psychologists. The Anglo-American notion of crime and the canonic notion of marriage, on the other hand, assume free will. The insane person cannot commit a crime because he lacks *mens rea*; the insane person cannot marry because he is "captive in mind."<sup>54</sup>

Thus, when a psychiatrist or psychologist is called to testify in an Anglo-American criminal case or in a modern canonic marriage case, he is being asked to answer or to aid in answering a question which his science does not ask. This dilemma has produced strikingly parallel results in the two systems. In canonic cases, as in Anglo-American criminal cases, the expert will frequently be asked and will attempt to answer the legal question that is before the court. Because this question is not within the realm of his expertise, his answer, not surprisingly, frequently seems to depend on his personal, as opposed to his scientific, views. The problem is particularly acute in the case of the canonic tribunals, which, as a result of their continental origins,<sup>55</sup> make more use of court-appointed than of party-produced experts, seem to pay more deference to experts, and do not employ a jury for finding facts. Further, in both systems, even where they do not venture conclusions on legal questions, psychological and psychiatric experts tend to present their testimony in conclusory terms, as if the statement "X is a psychopath" should resolve the legal question. In both systems, too, we find examples of expert testimony offered when the expert has not personally examined the person whose psychological state is in question.

The parallels are not confined to the behavior of experts. Courts in both systems have had considerable difficulty formulating a standard that takes into account psychological and psychiatric findings. The pulling and hauling among the *M'Naghten*,<sup>56</sup> *Durham*,<sup>57</sup>

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54. See J. NOONAN, *supra* note 5, at 149-56.

55. See Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1242-43 (1958).

56. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (Q.B. 1843); see W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 37 (1972).

57. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954); see W.



and ALI<sup>58</sup> rules has its canonic analogy in the outpouring of literature on the merits and meaning of lack of due discretion, psychic incapacity, and moral impotence.

Striking too are the parallels between the tentative solutions to the problem proposed or reached in the two systems. In both it has been suggested that the courts abandon their efforts to incorporate psychology and psychiatry within their findings of law and instead use these sciences only for determining remedies.<sup>59</sup> In this way the law, with its assumption of free will, remains the objective norm, while the intensely subjective findings of the psychological sciences would be used, in one case, to determine the treatment of the offender, in the other, to determine whether one or both of the participants in a broken marriage who have remarried outside the Church can return to the sacraments.

Granting the parallels between the two systems and in light of the fact that the Anglo-American criminal law has been dealing with the problem for a longer time, is the experience of the Anglo-American system transferable to the canonic? I doubt it. We can warn the canonic judge of the dangers of letting an expert make legal judgments for him, but we cannot tell him how to make the ultimate judgment of responsibility, because there is no consensus on that issue in our own system and because many of the judgments made in our system are concealed behind the verdict of an inscrutable jury. We can warn the canonic judge that psychiatric testimony given without an examination of the patient is probably worthless, but we cannot tell him what he is to do when the respondent does not appear and so cannot be examined. We can suggest that we, too, have considered the possibility of considering psychiatric evidence in a more informal setting in which only the remedy is at stake, but we must report that the most notable attempt to do so seems to have failed.<sup>60</sup>

The lesson, then, of this comparative exercise lies not in the specific solutions that can be transferred from one system to the other,

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LAFAVE & A. SCOTT, *supra* note 56, § 38, at 289. In 1972 the District of Columbia Circuit overruled *Durham* and largely adopted the test developed by the American Law Institute, *see* note 58 *infra*, in *Browner v. United States*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

58. MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962), developed by the American Law Institute. *See* W. LAFAVE & A. SCOTT, *supra* note 56, § 38, at 292-95.

59. *See, e.g.*, Goldstein & Katz, *supra* note 52 (American criminal law); Häring, *Internal Forum Solutions to Insoluble Marriage Cases*, 30 THE JURIST 21 (1970) (canon law of marriage).

60. *See* Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961).

but rather in what the developments in the Church courts can tell us generally about legal change and about the relationship between and among law, morals, and psychiatry.

### V.

In a world such as ours in which change is the only thing on which we seem to be able to rely, the nature and causes of legal change should be a topic of great interest to those who are concerned with law. Yet surprisingly little has been written on legal change as a general phenomenon,<sup>61</sup> although examples of legal change in both historical and modern contexts are abundant. Perhaps legal scholarship has focused on particular legal changes rather than on change generally because lawyers tend to view legal development as a quintessentially conscious process, one in which rational and informed choice explains all. Thus, the explanation for any change must be sought in the principles and policies consciously applied by lawyers, judges and legislators in the context of a given body of legal doctrine. In this view, legal change cannot be explained by a general theory like that of classical microeconomics—with its myriad actors, none of whom can perceive the effect of his acts on the system as a whole—or structural anthropology, in which a wide range of social phenomena are seen to conform to a few subconscious arithmetical patterns.

Certainly the rational element in law, as well as the wide range of possible changes that can occur in it, makes the fact and the nature of any given legal change more difficult to predict than, say, a rise in coffee prices after a crop failure in Brazil. Nonetheless, few would deny that the range of possible changes which can occur within a given legal system is limited by the nature of the society in which the system operates, by the nature of the institutions which create and apply the law, and by the legal ideas available at the time the change occurs. The question, then, is whether the diversity of societies, institutions, and legal ideas is so great, or the range of rational choice within the limits imposed by them so broad, that any

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61. After I had written this, I discovered some parallels between portions of this section and portions of R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923), L. FULLER, *LEGAL FICTIONS* (1967), and, somewhat surprisingly, H. HART, *THE CONCEPT OF LAW* (1961). My debt to Holmes is acknowledged in what follows. There are undoubtedly others from whose work I have unwittingly borrowed or who anticipated all or part of what I say. To them I apologize. I have also learned that Professor W. A. J. Watson of Edinburgh University has a book in the press with the intriguing title *Society and Legal Change*. I remain of the view, however, that legal change as a general phenomenon needs more study.

attempt to generalize about legal change is impossible, or that any generalizations will be devoid of predictive or descriptive power.

I am inclined to think that the effort at generalization about legal change can yield results which are at least moderately interesting. Obviously, any statement, much less proof, of a general theory of legal change is well beyond the scope of this paper. Let me instead offer some propositions, illustrated by the Church's new matrimonial jurisprudence, which may prove to be of some generality, perhaps even of some use in constructing a general theory of legal change.

Legal change can occur in a number of ways. A given legal rule may simply be reformulated, in the way that the Church's Code Revision Commission is currently seeking to reformulate the Code of Canon Law. Further, or in addition to such reformulations, the impact of a given legal rule can be altered by a change in the meaning of the terms of the rule. This is what the Church's courts are doing when they expand the notions of capacity to give marital consent or to undertake marital obligations. In both cases we might say that the formal legal rule has changed, in the first case by a formal change in the terms of the rule, in the second by a change in the import of the terms.

But legal change can also occur even though the formal legal rule remains unimpaired, because of a change in the pattern of initiation of cases (parties or prosecutors bring more or fewer cases) or in the application of the rule (administrators or judges apply the rule with greater or less frequency than before). In the case of the Church's marriage laws, for example, there is evidence both of a greater number of cases being brought and of less enforcement than before.<sup>62</sup>

Legal change with the rule formally unimpaired can also occur when there is a substantial change in the underlying social phenomenon to which the rule applies. The Church could continue to apply the old rules exactly as they are stated in the Code: "marriages" are indissoluble and may only be annulled in a few, limited circumstances. But if "marriages" are not the same as they were at the time the Code was promulgated, then a legal change has occurred. Of course, marriages could change in ways that are quite irrelevant to the rule of indissolubility. Without pressing the borders of relevance, however, social changes which undermine the stability of marriage clearly are relevant. A legal rule that bolsters an institution

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62. The limits of this type of change are *desuetude* (the total lack of use of a given legal provision) and *revival* (the application of a legal rule which has not been used for some time). But these are only the limits on a type of legal change that may also occur less dramatically.

which has numerous other societal underpinnings is quite different from a legal rule that bolsters an institution shorn of much of its social support. Indeed, if we define a legal rule to include not only its formal statement but also the social context to which it applies, we would say not only that a legal change has occurred but also that the legal rule itself has changed.<sup>63</sup>

Now all of these types of legal change do not occur only in response to changes in the nonlegal context of the rule, but all of them occur sometimes in response to contextual change, some of them occur usually in response to contextual change, and the last-named occurs only in response to contextual change. We can illustrate this with some examples of contextual change. Suppose that an ordinance passed in 1820 permits "vehicles" in the park between sunrise and sunset.<sup>64</sup> With the invention of the automobile a legal change must occur. Normally it will be of the formal type. Either a body empowered to make rules will amend the rule specifically to include or exclude automobiles, or a body empowered to interpret the rule will decide that automobiles should or should not be included within the definition of "vehicles." But even if no formal legal change occurs—the park police, for example, simply assume that automobiles are included and the rulemaking and rule-interpreting bodies never consider the matter—a legal change will have occurred. Whether automobiles are allowed in the park or not, the function and effect of a rule about vehicles in the park is different in a society which has automobiles from what it is in one which does not.

Because of the eminently rational quality of law, contextual changes as dramatic as the invention of the automobile normally produce a reconsideration of the rule itself. The prediction that reconsideration—and hence the opportunity for formal change—will occur becomes less certain where the contextual change takes place slowly or in proportions rather than absolutes. For example, if there is a significant increase in the number of murders in an otherwise static society, a legal change will occur even if this increase is not perceived and the formal rule remains unimpaired. Either the enforcement rate will go down because courts or prosecutors cannot handle the caseload, or the enforcement rate will remain constant

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63. A most striking example of this type of change is found in S. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976). According to Milsom the writ of right and the possessory assizes were originally designed to force lords to follow their own customs with regard to their tenants. With the decline of the importance of the lords' courts they became the remedy for the owner and the possessor respectively.

64. An example borrowed unwittingly from H. HART, *supra* note 61, at 125-26.

or go up, as a result of greater effort by enforcement institutions or neglect of other types of cases. In all of these instances there will be a change in pattern of the enforcement of the rule, either a reduction in the rate or an increase in the number of cases involving the rule, and that change in pattern is itself a legal change. The significance of the rule in the total scheme of societal rules will have changed. This change may of itself produce a reconsideration of the rule.

Suppose, however, that the contextual change is not one in the number of cases generated but in the nature of the phenomenon to which the rule applies. The number of murders may remain constant, for example, but the type of murder may shift significantly from gangland slayings to uxoricide with Saturday-night specials. The enforcement rate may remain the same; the formal rule may remain the same, but a legal change has occurred. The rule is now being applied to a different type of case from that to which it was previously applied.

This last type of change is the hardest to perceive and hence the least likely to produce formal reconsideration of the rule. In a society less self-conscious than our own there may be no awareness of the change. Granted self-consciousness, however, this type of contextual change may produce a reconsideration of the rule, particularly if the contextual change also produces an increase in the number of cases calling for the application of the rule and if there is a significant group in the society that wants the rule changed.

All these conditions seem to be filled in the case of the Church's marriage laws. Marriage today is not the same as it was 100 years ago; thus the Church's rules are being applied to a different phenomenon. A self-conscious society perceived that fact. Further, more marriages are unstable today than they were in the past. In the context of the canon law as it stood, this was bound to produce an increase in the number of applications for annulment. Further still, a significant group, those divorced civilly and remarried who wanted to return to the sacraments, desired a change in the rule. Not surprisingly, the rules are being reconsidered.

Reconsideration, of course, does not mean that there will be a formal change in the rule or a change in its administration. The outcome of the reconsideration is not as easy to predict as the fact of reconsideration. The process of reconsideration currently taking place in the Church, however, seems to fit into a pattern which may be of wider applicability.

Once change in social circumstances has forced reconsideration of

a legal rule, the rule itself usually cannot resist change of its own force. If formal change is not forthcoming, some way will be found to make it fit the "felt necessities" of the new circumstances.<sup>65</sup> In the case of the rule that consummated, sacramental marriages are indissoluble, "consummated," for obvious reasons, has not proved to be malleable, nor, for less obvious reasons, has "sacramental"; so the definition of "marriage" itself has been bent to the point where the definition of the canon law is now far from that of the secular law or of the man in the street.

What I am suggesting here is that the force of precedent alone cannot keep a legal rule intact in the face of perceived contextual change if there is a substantial group within the society that desires change in the rule. Now there may be other forces, such as groups whose interests are served by the rule, which can keep the rule intact. There may even be such groups within the Church, although given the uncontested nature of most marriage cases in the Church, the mechanism by which such groups might apply pressure to countervail that of the petitioners in the Church's courts must, at best, be indirect.<sup>66</sup>

To what extent can we say that if there is no social force keeping a legal rule in place that rule will change even absent an underlying contextual change? The question implies that legal rules have no force as such, and I am not sure that this proposition can be held as a general matter. Absent the catalyst of contextual change, a legal rule, even one supported by no substantial social force, may, at least in some legal systems, remain intact simply because it is a rule. The requirement in some of our states of a straw man to effectuate certain conveyances of real estate may illustrate this point.<sup>67</sup> Absent contextual change, then, the law can maintain itself either because of the conservatism of the people who are subject to it or, and perhaps particularly, if there is a specialized group whose function is to know and apply the law. Granted contextual change, however, my suggestion is that innate conservatism or a specialized

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65. The phrase, of course, is Holmes'; O.W. Holmes *The Place of History in Understanding Law*, in *THE LIFE OF THE LAW* 3 (J. Honnold ed. 1963).

66. I am aware, of course, that the Church courts appoint a "defender of the bond" in marriage cases whose function it is to argue in favor of the marriage, even if none of the parties are so arguing. See CODE, *supra* note 3, canons 1586, 1968-69. Since he has no personal interest in the case, however, and since he represents only an abstract proposition, "the bond of marriage," the statement in the text remains unaffected.

67. See 4A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 616, at 669-71 (P. Rohan ed. 1977).

group cannot maintain a legal rule, unless there is a substantial group in the society whose wishes the rule serves.

Nonetheless, legal rules do seem to have some force of their own. Indeed, if a rule involves a legal idea that is deemed fundamental, that idea will leave traces in the legal system, even if the rule is changed.<sup>68</sup> Without pausing to consider the implied actor in the passive "deemed," the meaning of the weasel word "fundamental" and the exact import of the metaphorical "traces," let us illustrate the workings of this proposition in the context of the modern canon law of annulment. The doctrine of psychic incapacity now being developed by the Church's courts is not the same, either formally or in result, as divorce for cause, much less divorce on the ground of irretrievable marital breakdown, still less divorce by consent. Many people are still denied annulments when they would have had divorces under any of these secular standards. Even if the church courts come to achieve the same results as the secular courts, the rule, we can confidently predict, will not be stated in the same way. Thus change has occurred, but it is a change in which the older rule has left its traces.

It might be objected that I have chosen a bad example; a legal change made by a conservative legal system and one made by way of case development, rather than by an institution specifically empowered to change the law. Surely there are instances where fundamental legal ideas have been swept away without a trace? Perhaps there are, but the phenomenon is rarer than one might think.

This is not the place to attempt to demonstrate the extraordinary durability of fundamental legal ideas, but perhaps a word is in order about three instances in which it might seem that such ideas can be obliterated: conquest, revolution and codification. Rare is the conqueror who totally supplants the legal system of the conquered country. Total supplanting normally occurs only where the conquering people absorb the conquered, but that is not an instance of a change in a legal system but its destruction. Perhaps revolution can also result in the destruction of a legal system, particularly if the revolutionaries follow Jack Cade's advice and kill all the lawyers. But when one searches for examples, the United States, France, Russia, and the former African colonies all seem to illustrate the staying power of the legal ideas which have prevailed before. Similarly, recent work with codifications would suggest that even those codifications which involve substantial imports of foreign ideas are shaped

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68. See L. FULLER, *supra* note 61, at 56-70; S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* xi-xii (1969).

in the process of their implementation by the fundamental legal ideas of the previous system.<sup>69</sup>

What I am suggesting, therefore, is that even if that marvelous continental creation, the legislator, can see his way clear to think in totally new categories, the people who must apply the law cannot. Thus, every legal change, at least as it is applied, is bound to bear the imprint of the fundamental ideas which underlay the old rule. "Historic continuity with the past," as Holmes said, "is not a duty; it is only a necessity."<sup>70</sup>

All of this, however, has carried us further than we had to go in order to explain the change in the Church's rules for annulment. A quite simple model will describe, if not explain, the phenomenon: contextual change in the form of an increasing number of secular divorces and remarriages and resultingly excommunicated Catholics puts pressure on the legal system for change. Once the contextual change forces reconsideration of the rule, change in the rule is likely if change is desired by a substantial segment of the society. In our case there is a change desired by petitioners (more annulments) that the forces in favor of the old rule do not seem to have been able to resist. But the force of the fundamental idea (the indissolubility of marriage) represented by the old rule limits the extent of the change (the petitioner must still show that something was wrong with the marriage at the time it was contracted) and determines the shape that the change takes (redefining marriage so as to characterize non-marriages as those unions which are going to [or, perhaps, are likely to] break down).

## VI.

Now all of this may be, and is intended to be, a bit shocking. We have suggested that the behavior of the Church's courts fits into a pattern which may be found in legal systems generally, including the most secular. Further, this pattern is one which is based on contextual change and the desires of pressure groups. Except for our suggestion of the peculiar staying power of "fundamental legal ideas," we have said nothing that would indicate that rules which embody values or principles prove any more resistant to change than those requiring straw man conveyances at common law. Further, our examples of contextual change have not included changes in the val-

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69. See generally A. WATSON, *LEGAL TRANSPLANTS* (1974).

70. O.W. HOLMES, *SPEECHES* 67 (1934).



ues of the people subject to the legal rules. Such a change may be taking place within the Church with regard to the indissolubility of marriage, but the behavior of her courts can be adequately explained without reference to it.

One would have expected, however, that where a moral principle, thought to be based on the words of the Divine Founder of the Church, was at stake, a secular theory of legal change such as that suggested above would not apply. One would also have thought that here, if any place, courts would have perceived the limits of the usefulness of modern psychology and psychiatry for the resolution of legal problems. Yet change seems to proceed in the Church's law much as it does in the secular, and the encounter with the psychological sciences produces the same all-too-familiar judicial reactions that it has produced in the Anglo-American criminal law.

Possibly these two phenomena are connected. Possibly the way the Church's courts have changed the law and the way they have reacted to psychological and psychiatric evidence both tell us something about the relationship between law and morality, although I must confess that this must be the most tentative of my "comparative reflections."<sup>71</sup>

We have emphasized above that the Church has a legal system—a body of legal doctrine separate from her moral code, law-making and law-applying institutions, and legal specialists, set apart by their training and function from the group as a whole.<sup>72</sup> We have tried to view the behavior of these specialists in the light of a theory of the way such specialists behave, and we have found that they conform to our expectations. An unstated assumption of this analysis has been that legal specialists come from the society in which they are performing their functions. Further, it is probably true of all specialized groups—and the probability is enhanced when we are dealing with an elite which is trained to be reflective and rational—that they will only perform their functions well if they believe that they are serving some useful function in the society of which they are members. I can think of no case in which a legal rule has been consistently applied by a specialized legal group that did not believe

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71. Recent literature concerning the relationship between law and morality in the context of the Church's marriage laws includes: *DIVORCE AND REMARRIAGE IN THE CATHOLIC CHURCH* (L. Wrenn ed. 1973); M. WEST & R. FRANCIS, *SCANDAL IN THE ASSEMBLY* (1970); *THE BOND OF MARRIAGE* (W. Bassett ed. 1968); V. POSPISHIL, *DIVORCE AND REMARRIAGE: TOWARDS A NEW CATHOLIC TEACHING* (1967).

72. See generally Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC. REV.* 217 (1974).

this. Even the prosecutors of heretics and witches in the late Middle Ages and Renaissance thought they were doing good, however difficult we may now find it to believe.

Now it is quite possible to conceive of a useful function for a rule that marriages are indissoluble. The harm that divorce causes both to the parties and particularly to their offspring is well documented. The fact that most western secular laws have come to the conclusion that rigid rules against divorce cause even more harm does not mean that no rational legal system could come out differently.

The problem for the Church's tribunals lies not so much in the rule itself as in the way it is enforced. In the vast majority of cases, the tribunals are not being called upon to decide whether a divorce should be granted but rather what should be done about people who are already divorced in fact and frequently are divorced according to some secular law as well. In virtually all the individual cases the tribunals are called upon to judge, the judges must have great difficulty seeing how an application of the no-divorce rule is going to do any good. At stake in these cases is not whether the parties to the original marriage could have made it work but the fact that there is nothing that can be done to make it work now.

It is possible to conceive of a legal system which justifies itself not in terms of the good that it is doing for the society which it controls in this world, but in terms of what it is doing for the members of that society in the next world. Divorce is a sin; those who divorce and remarry will be damned; therefore we will withhold from the divorced the sacraments of the Church until they leave their current spouses (who are not their spouses in the eyes of God) and either return to their former spouses or at least remain celibate.

It is just at this point that the evidence of psychologists and psychiatrists has its greatest effect. While they cannot pronounce for certain that the prior marriage was doomed to failure, they can and do cast doubt on the responsibility of the parties to the prior marriage for its failure and hence on the subjective sinfulness of its breakdown. This doubt reinforces a long tradition in the Church that only God can truly judge the subjective morality of an act and that, to the extent that such judgments must take place on earth, they are made in the internal forum of the confessional, not in the external forum of the courts. Thus, the ecclesiastical judge is faced with the certain knowledge that he can do nothing to save the prior marriage, grave doubts (which increase with the strength of the psychological

evidence) that he is making the right judgment about the moral situation of the petitioner, and considerable unease as to whether this latter judgment is even his proper role.

A possible justification for retaining the strict rule is its *in terrorem* effect. If the rule were relaxed, so the argument goes, people whose marriages could be saved would not make an effort to save them because they would realize that divorce was possible. The argument involves a kind of moral numbers game: the salvation of two souls is put in peril for the sake of the salvation of many. Further, it may be doubted whether the Church's canon law—as opposed to her moral code—has a significant deterrent effect today on couples whose marriages are in difficulty. This justification may explain why it is that some ecclesiastical judges continue to apply the old rule. The fact that the trend seems decidedly away from that rule would suggest that the justification is not sufficient for most.

It is tempting to generalize from the above: where the enforcement of a legal rule that incorporates a moral principle falls most heavily on those whose moral responsibility for violation of the rule is doubtful, and where enforcement of the rule in a given case will not rectify the evils that the rule was designed to prevent, the enforcers of the rule will modify it. It is not that hard cases make bad law; it is that hard cases demonstrate that the law is bad.

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Because the theory suggested here does not purport to be a general one, I may be excused from venturing any more than a few suggestions of the directions in which the Church's legal system is likely to go. I have suggested, however, that the fundamental difficulty that the Church courts are facing results from the fact that they are enforcing a legal rule that incorporates a moral principle and hence is peculiarly resistant to change and, further, a moral principle believed to be of Divine origin. Despite this fact, the Church's courts have responded, if only partially, to a "felt necessity" for change, although in so doing they have produced a body of doctrine that is neither consistent nor comprehensible. It may well be that the Church's courts have reached the limits of the capacity of any legal system and that no legal system can cope intelligently with the interplay of modern psychiatry and the concept of moral responsibility. If this is correct, we might venture the prediction that we will see marriage cases removed from the juridical sphere of the Church's

activities,<sup>73</sup> although powerful institutional forces would militate against such a move.<sup>74</sup> Certainly, if we may venture into the normative, it would seem that this is what ought to be done.

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73. See text at note 59 *supra*. The dejudicialization of the decision whether a divorced and remarried person is to be allowed to return to the sacraments has already occurred in the Anglican and Eastern Orthodox churches. See THE ARCHBISHOP OF CANTERBURY'S COMMISSION ON THE CHRISTIAN DOCTRINE OF MARRIAGE, MARRIAGE, DIVORCE AND THE CHURCH (1971).

74. See note 14 *supra*.