

## CURRENT THEOLOGY

### NOTES ON MORAL THEOLOGY: APRIL-SEPTEMBER 1974

The present survey will restrict itself to the following areas of moral concern: (1) the state of moral theology; (2) the understanding of moral norms; (3) divorce and remarriage; (4) questions in bioethics.

#### THE STATE OF MORAL THEOLOGY

Several areas of moral theology that have been the subject of discussion over the past years continue to receive attention. Just two examples: the specificity of Christian morality;<sup>1</sup> and the political mission of the Church and the Christian.<sup>2</sup> Furthermore, a new and important journal, *The Journal of Religious Ethics*, has made its appearance.<sup>3</sup> The stature of the editors and the quality of the articles published thus far are most promising. *Chicago Studies* has devoted an entire issue to a catechetical (question-answer format) summary of some key areas of Christian morality.<sup>4</sup> In addition to this mass of material, important individual statements on a variety of special moral questions have been published in the past few months.<sup>5</sup> Several well-known theologians have

<sup>1</sup> Michael Simpson, "A Christian Basis for Ethics?" *Heythrop Journal* 15 (1974) 285-97; Norbert Rigali, "The Meaning of Freedom: Dialogue with John Giles Milhaven," *Homiletic and Pastoral Review* 74 (1974) 61-68; Jordan Bishop, "Anthropology and Ethics: The Thomist Vision," *New Blackfriars* 55 (1974) 248-53; G. de Finance, "Morale e religione," *Rassegna di teologia* 15 (1974) 161-73; Ph. Delhaye, "S. Thomas, témoin de la morale chrétienne," *Revue théologique de Louvain* 5 (1974) 137-69; Eduardo Lopez Azpitarte, "El hombre como tarea y base de la moral," *Sal terrae* 64 (1974) 355-65; R. A. Iannarone, O.P., "Si può ancora parlare di una 'dottrina sociale' cattolica?" *Sapienza* 27 (1974) 159-75; Teodoro Lopez, "La existencia de una moral cristiana específica: Su fundamentación en Santo Tomás," *Scripta theologica* 6 (1974) 239-71; G. B. Sala, "L'Etica cristiana s'interroga sulla propria identità," *Scuola cattolica* 102 (1974) 24-49; Felix Gils, "Foi et morale chez saint Paul," *Spiritus* 15 (1974) 63-74; Hans Rotter, S.J., "Kann das Naturrecht die Moralthologie entbehren?" *Zeitschrift für katholische Theologie* 96 (1974) 76-96; J. Fuchs, S.J., "Esiste una morale non-cristiana?" *Rassegna di teologia* 14 (1973) 361-73.

<sup>2</sup> Dana W. Wilbanks, "The Church and Social Responsibility: Where Do We Go from Here?" *Christian Century* 91 (1974) 363-66; A. Tillet, "Chrétiens et églises dans la vie politique," *Esprit et vie* 84 (1974) 417-29; Pierre Le Fort, "La responsabilité politique de l'église d'après les épîtres pastorales," *Etudes théologiques et religieuses* 49 (1974) 1-14.

<sup>3</sup> *Journal of Religious Ethics*, CSR Executive Office, Waterloo Lutheran University, Waterloo, Ontario, Canada N2L 3C5. The editor is Charles Reynolds; associate editors are Arthur Dyck, Frederick Carney, and Roland Delattre.

<sup>4</sup> "An American Catechism. Part II: Moral," *Chicago Studies* 13 (1974) 229-350. Authors of the articles are John F. Dedek, Norbert Rigali, Cornelius J. van der Poel, Charles E. Curran, Bernard Häring, Joseph J. Farragher, J. Bryan Hehir, Thomas F. Sullivan, and Richard A. McCormick.

<sup>5</sup> *Principles to Guide Confessors in Questions of Homosexuality* (National Conference of

published new volumes of essays.<sup>6</sup>

This proliferation of moral writing could lead one to the conclusion that things were never better in moral theology. But if scientific interest is high, it is accompanied by an uneasy sense of confusion and crisis. Watergate is seen as the practical working-out of Fletcherian situationalism.<sup>7</sup> What Jacques Leclercq stated some twenty years ago about Christian morality strikes many as pervasively true today.<sup>8</sup> Gustave Ermecke, for example, feels the matter has assumed crisis proportions.<sup>9</sup> But his essay appears, in too many places, to confuse a moral crisis with certain disagreements with his own formulations. Thus the essay is too often an example of parenthesis rather than analysis.

Nevertheless there are many who believe we are faced with a genuine moral crisis. Thomas Dubay, S.M., may serve as the vehicle for this discussion. Writing in this journal in 1973, Charles Curran attempted a survey of the status of moral theology in the Catholic community.<sup>10</sup> It was, by and large, an optimistic report. Dubay does not share Curran's optimism.<sup>11</sup> Indeed, he believes that Curran's study, for all its knowledge of the trees, misses the major outlines of the forest. And the forest Dubay sees as dark and foreboding.

Since Dubay's response appeared in these pages, it will be unnecessary to detail its contents. His major concerns, I think it fair to say, were the following: a contradictory and destructive pluralism inconsistent with the magisterium's notion of pluralism; the disappearance of the prophetic element in moral theology for an unevangelical ethics of accommodation to the expectations of the majority; the inadmissible appearance of two magisteria in the Church (theologians, hierarchy); the failure of

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Catholic Bishops, 1973); *Declaration on Procured Abortion* (Sacred Congregation for the Doctrine of the Faith). At this time the text of this latter document is available in full only through wire-service releases etc.

<sup>6</sup> For instance, James M. Gustafson, *Theology and Christian Ethics* (Philadelphia: United Church Press, 1974); Charles E. Curran, *New Perspectives in Moral Theology* (Notre Dame: Fides, 1974); Bruno Schüller, *Die Begründung sittlicher Urteile* (Düsseldorf: Patmos, 1973); Stanley Hauerwas, *Vision and Virtue* (Notre Dame: Fides, 1974). This is but a sampling, but apologies are due to those authors whose names have been omitted from this sampling.

<sup>7</sup> Erwin W. Lutzer, "Watergate Ethics," *Christianity Today* 18 (1974) 26-27.

<sup>8</sup> "Im Unterricht in der Moral und in der sittlichen Bildung liegt in unseren Tagen das vielleicht heikelste Problem der Kirche" (Jacques Leclercq, *Christliche Moral in der Zeit* [Einsiedeln, 1954] p. 10).

<sup>9</sup> Gustav Ermecke, "Krise der Moral—Krise der Moralthologie," *Theologie und Glaube* 64 (1974) 338-56.

<sup>10</sup> Charles E. Curran, "Present State of Moral Theology," *THEOLOGICAL STUDIES* 34 (1973) 446-67.

<sup>11</sup> Thomas Dubay, S.M., "The State of Moral Theology," *THEOLOGICAL STUDIES* 35 (1974) 482-506.

moral theology to include in its concerns the ascetic and spiritual dimensions of Christian living. In the course of developing these objections against Curran—and to some extent against a large segment of the community of moral theologians—Dubay touches on a whole series of delicate and difficult theological themes: dissent in the Church, the existence of moral absolutes, the formation of conscience, etc.

I am glad Dubay composed his thoughtful critique and that THEOLOGICAL STUDIES published it. Moral theology does need criticism from outside its own ranks. Furthermore, and more importantly, Dubay has formulated his objections in a way that represents the attitudes and theological presuppositions of very many concerned and intelligent thinkers, Catholic and non-Catholic. Therefore the attempt to bring these issues into sharper focus at some length may throw light on matters that are a cause of concern and even division in the contemporary Church. Dubay has raised some very good questions. For instance, his insistence that the notion of *sensus fidelium* be made more precise is altogether salutary. However, I have very serious reservations about several of the substantial points in his study. The following remarks may be organized under three titles: pluralism, theologians and the magisterium, prophecy.

#### *Pluralism*

Dubay has some important things to say here. One certainly is the distinction between complementary and contradictory pluralism. The latter, which he attributes to Curran, he regards as inconsistent with scriptural insistence on unity, destructive of practical pastoral guidance, and deadening to the Church's commission to speak out authoritatively on important moral matters.

For instance, where unity is concerned Dubay writes: "Not by the widest stretch of imagination could we call that ecclesial community 'completely one' [Jn 17:23] if in it some members are at odds habitually and in important moral and disciplinary matters with those whose duty it is to articulate the faith and morals for and to the community. A pluralism in moral theology that fails to reckon with this New Testament insistence is failing to reckon with its sources."<sup>12</sup> Or again, with a contradictory pluralism "a secure knowledge of the moral implications of many acts becomes impossible."

Dubay is looking for unity in "important moral and disciplinary matters," a unity based on "a secure knowledge of the moral implications of many acts . . . ." Here I believe we must ask, what are these "important moral and disciplinary matters," what are these "basic matters or norms" confused by a contradictory pluralism? Are they

<sup>12</sup> *Ibid.* p. 486.

rather detailed and concrete conclusions representing the application of moral general norms? Or are they the more general norms themselves? His terminology ("basic matters or norms") suggests the latter, but I suspect he really is looking for unity and security at the level of application; for he speaks of "a secure knowledge of the moral implications of *many acts* . . ." So, how basic is basic?

Here three points. First, a past tradition easily led us to believe that "basic" had to do with matters such as self-stimulation for sperm-testing, removal of ectopic fetuses, actions that are *per se graviter excitantes*, co-operation in contraception, punitive sterilization, and a host of very concrete applications. We felt we ought to possess and did possess a kind of certainty and subsequent security in these matters, and that our certainty was founded on the natural law. These, I submit, are not "basic matters or norms," if by this term is meant material on which we must agree if our Christian unity is to remain integral. There is plenty of room for doubt and hesitation and change, even contradictory pluralism, at this level of moral discourse. And yet, because the magisterium did get involved in such detailed practical applications in the past (e.g., the moral allocutions of Pius XII, responses of the Holy Office), and in a way that was authoritative, it gave credence to the notion that our moral unity is or ought to be located at this level, and that disagreement or pluralism at this level is a threat to unity. It is unclear to me whether Dubay is insisting on unity at this level. But there are certainly many who are so insisting and who will use Dubay and the biblical texts he cites to support the necessity of such unity. If it is unity at this level that Dubay has in mind as necessary when he says "'In my opinion' is hardly going to be prophetic," it must be urged that the best way to eviscerate true prophecy is to attempt to be prophetic in areas where true prophecy cannot be objectively founded and persuasively argued.

Second, in the contemporary world we are faced with a great number of truly new moral problems. The scope and many-sidedness of these problems means that we must struggle our way through to new insights and a new vocabulary capable of conceptualizing new data within the value perceptions and commitments of the Christian tradition. To approach this task with an overriding concern for unity and a corresponding intolerance of pluralism is in some sense to suppose that we already have the answers. In other words, in many areas of contemporary moral concern unity is not a present possession but a difficult, often elusive, perhaps impossible goal.

Third, Vatican II reinserted the Church into the world, into history, and into Christendom, as the eminent editor of this journal is fond of saying. This insertion calls necessarily for a rethinking of certain moral formulations and pastoral practices. A process of rethinking, because it is

in human hands, is precisely a process—often halting, painful, imperfect. It requires a tolerance for the tentative and ambiguous. Many persons in the Church experience this as “confusion” because there has been very little in our past ways of doing things that educates to this tolerance.

### *Theologians Versus the Magisterium*

This theme runs throughout Dubay’s study. Only a few of the more important items can be raised here. First, he criticizes Curran for supporting a right to frequent and habitual dissent from authentic, noninfallible teaching. Dubay argues that this equivalently establishes two magisteria in the Church. I agree with this, but much more needs to be said. I have always been uncomfortable with the term “right to dissent.” We are concerned, as believers, with the behavioral implications of our being-in-Christ, with moral truth. The magisterium is a vehicle for this purpose and therefore subordinated to it. To isolate this vehicle from other sources of reflection and knowledge in the Church is to forget this purpose, to subordinate the vehicle to superior-subject relationships, and thus to juridicize the search for truth. To speak of a “right to dissent” tends to accept this juridical narrowing by establishing rights against the teacher or his authoritative teaching. Therefore it would be much better, I believe, to speak of a duty and right to exercise a truly personal reflection within the teaching-learning process of the Church, a duty and right that belong to all who possess proportionate competence. Bishops, as well as theologians, are not exempt from this arduous task. To reduce this duty to “supporting Rome,” “being loyal to the Holy Father,” is both to misconceive loyalty and to undermine the magisterium.

This personal reflection can end in inability to assent to the formulations of the magisterium, as any number of episcopal conferences have pointed out. How frequent and habitual this might be depends on several factors. First, if the magisterium is functioning in a healthy manner, such dissent ought to be relatively rare, a point made convincingly by Schüller.<sup>13</sup> Otherwise it would cease to be authoritative in any theologically acceptable sense of the word. Second, the notions of “difference” and “dissent” demand a distinction, clearly made by Pope John XXIII and Vatican II, between the substance of a teaching and its formulation. Dissent with regard to substance will be a rare phenomenon, though it might occur with regard to formulation somewhat more frequently. For instance, the substance of the Church’s teaching on abortion is one thing;

<sup>13</sup> Bruno Schüller, “Bemerkungen zur authentischen Verkündigung des kirchlichen Lehramtes,” *Theologie und Philosophie* 42 (1967) 534–51. Cf. also *Theology Digest* 16 (1968) 328–32.

its formulation by Pius XI and Pius XII or even the Sacred Congregation for the Doctrine of the Faith is not necessarily identical with that substance (e.g., where the life of the mother is at stake). Finally, how much qualification and dissent is present will likely depend on how detailed the documents of the magisterium become. There has been a real difference here in recent pontificates. Pius XII, in his many allocutions and discourses, went into some very detailed applications of medical ethics; this has not been the style of Pope John XXIII or Pope Paul VI. Indeed there are many theologians who believe that the detailed application of perennially valid moral principles should generally not be the concern of the magisterium, or that if the magisterium chooses to undertake this, it must do so with a tentativeness proportionate to the contingency of the material.

But Dubai's concern with the existence of two magisteria needs yet further comment. Speaking of the prophet as one who is sent, Dubai notes that a Catholic theologian is always sent, if not by diocesan faculties, then "at least through being in communion with the bishop and through the bishop with the Holy See." He then adds that "insofar as theologians are at odds with the sending magisterium, they are not sent." Being at odds with the magisterium, they constitute a second magisterium, a notion Dubai rejects.

I do too, but I believe he has not explored the possibility of a third alternative. If the magisterium can *per accidens* err in its authentic, noninfallible teaching (and it can), and if such error is detectable by someone other than the magisterium (and it could be), then it is clear that others in the Church do participate in the teaching-learning process of the Church without thereby becoming a second, competitive magisterium. By framing the matter as he has (either the hierarchical magisterium or the magisterium of dissenting theologians), Dubai has fragmented the teaching-learning process in the Church into camps of competitive interests and prerogatives. That is improper. We all have a part to play in a healthily functioning magisterium, and to view that part—even and especially when it takes the form of dissent—as a second and competitive magisterium, is to fail to see the teaching-learning function of the Church in appropriately processive and co-operative terms. It is to see one group in the Church in prior and independent possession of the truth. One need not hold that notion to treasure and support a genuinely authoritative teaching office in the Church and to locate that office in the person of the pope and the bishops in communion with the pope. For this reason I think it is simply false to say that theologians who disagree with the magisterium on a particular point "are not sent." They are honestly, even if very noninfallibly, making their contribution to the teaching-learning process of the Church. And that is

their proper task, that for which they "are sent." In this sense there are indeed two magisteria in the Church, but two that have different if not unrelated functions. When these two functions are confused and identified and the magisterium seen in either-or terms (either bishops or theologians), the response should not be denial of one magisterium, but a clarification of both.

### *Prophecy*

My most serious reservations on Dubay's study are in this area. First, in discussing theologians who have found themselves in a position of dissent, Dubay uses phrases such as "tailoring ethics to the expectations of majorities," "theologians who seem to begin with 'what modern man will accept,'" "the curious assumption . . . that Christian ethics should be acceptable to the majority." This Dubay sees as unworthy of the true prophet.

Since the theologian is human, there is always the danger that such tailoring will occur. But that being admitted, one could wish that such phrases with their motivational overtones would disappear from serious theological discourse. This or that theologian may be wrong—and the better the theologian he is, the more ready he is to admit this. But it is precisely rightness or wrongness that is his concern and should be the issue, not attitudes of accommodation and compromise alleged to be his point of departure by those who disagree with him.

Second, Dubay contrasts "prophetic" with "conformism." "The prophet of the Lord is never a slave to popularity or style." True enough. But there is a hidden and, I believe, false argument buried in such statements. It is this: all that is difficult is right; all that is not is conformism.

Third—and very similar to the above—Dubay, in speaking of moral prophecy, makes it appear that the more alone, isolated, and rejected a position, the more prophetic and true it is. Here great caution is required. Prophetic statements and actions, it is true, are often lonely ones. But the fact that prophetic statements are countercultural does not guarantee that every countercultural statement is truly prophetic.

Fourth, Dubay repeatedly warns that the prophet (i.e., prophetic theologian) is faithful to the gospel. "The full gospel has never been popular." He cites Stöger: "He who tampers with the teaching of Christ condemns himself." In the context of the discussion, one must wonder what Dubay has in mind. Disagreements on things like contraception, masturbation, direct-indirect killing, artificial insemination, sterilization, pastoral policies for homosexual problems are the areas of liveliest disagreement cited by Dubay. But if the gospel dictates one particular answer to these problems, I am not familiar with such an answer. Thus to

face these problems with appeals to the uncompromising and prophetic demands of the gospel is either to suggest that the gospel answers these questions or is overkill. In these areas the gospel informs reasoning processes; it does not replace them. Therefore in all of the above points Dubay seems guilty of *ignorantia elenchi*; he misses the point.

Fifth, Dubay insists that the prophet (and the prophetic theologian) proclaims absolute precepts. Hence theologians who question these absolutes are departing from the gospel and abandoning their own prophetic responsibility. In developing this, he states that "Scripture takes absolute moral norms for granted" and "there are so many absolutely worded precepts in both Testaments that I shall not mention one." He cites and supports Bright's study on apodictic prohibitions that bind always and everywhere. His conclusion: "It seems to me that the alternative to an ethics with some apodictic teaching is an ethics of exhortation."<sup>14</sup>

It would have been well if Dubay had become specific here, for the term "absolute" is treacherous when applied to biblical or any morality.<sup>15</sup> For instance, when speaking of "absolute moral norms," does one mean formal (e.g., never act unjustly) or material norms (e.g., never tell a falsehood)? Put somewhat differently, in discussing norms we must be careful to distinguish between parenetic discourse and explanatory discourse or moral reasoning.<sup>16</sup> Explanatory discourse deals with the pros and cons of a position, with argumentation, with the normative validity of a precept. Parenetic discourse is not concerned with the normative validity of a moral command. Such validity is taken for granted and then the precept is used to pass judgment on a person's behavior. A good instance is the Johannine pericope on the woman taken in adultery. The question is not whether adultery is right or wrong; all the participants agree that it is wrong. The validity of the command is acknowledged. The only question is whether the woman has committed the act and what should be done.

Thus parenetic discourse makes use of rules to accuse, convict, condemn, urge repentance. Positively, rules are used to praise, advise, implore, encourage, strengthen. Such discourse can succeed only if genuine agreement exists on what is right or wrong.

Because parenthesis supposes agreement on what is morally obligatory

<sup>14</sup> *Art. cit.*, p. 504.

<sup>15</sup> There is a sense, for instance, in which every moral norm is "absolute." That is, it is absolute because it imposes a categorical imperative in contrast to a mere prudential suggestion.

<sup>16</sup> I owe these remarks to Bruno Schüller's lectures at the Gregorian University in 1973. For some helpful remarks on parenthesis cf. Norman Perrin, *The New Testament—An Introduction* (New York: Harcourt Brace Jovanovich, 1974) pp. 20–21.



and what is not, its language can be very concise and clipped. For instance, in the commands "You shall not kill. Neither shall you commit adultery. Neither shall you steal" (Dt 5:17-19), the words "kill," "adultery," "steal" contain compressed and complicated value judgments. "Killing" (or better, "murder") must be defined in terms of what killing was regarded as morally licit by Israel. Similarly, "adultery" is understood only if one first understands the institution of marriage that prevailed in Israel. For example, a husband having intercourse with an unmarried woman was not considered an adulterer.<sup>17</sup>

Now the Decalogue presumes that all these matters are settled and contents itself with uttering the words "kill," "adultery," "steal," etc. Thus the emphasis falls on the "You shall not," an emphasis highlighting the absolute, unconditional character of the precept. But this absoluteness is that of parenetic discourse. It does not convey information about the specific content of various moral demands. That it takes for granted.

The upshot of these remarks is that Dubay's opposition between absolutes (apodictic teaching) and exhortation is a false opposition; for the precepts of biblical morality are themselves heavily parenetic—hortatory to what is presumed to be known and agreed on. One can hardly use their absolute and unconditional character to discredit the contemporary discussion of absolute moral norms; for this discussion is concerned precisely about what ought to count as "murder," "theft," "unchastity," etc., about what is the content of parenetic discourse. It is a discussion within the area of *moral reasoning*. So when Dubay says "When an ethics knows only a contradictory pluralism and/or a whole series of 'maybes,' it ceases to be interesting. It becomes quite unlike biblical morality. . .,"<sup>18</sup> he is identifying and therefore confusing in the term "ethics" two forms of discourse, parenesis and moral reasoning.

#### THE UNDERSTANDING OF MORAL NORMS

In 1971 Joseph Fuchs, S.J., published his important essay on the absoluteness of moral terms.<sup>19</sup> In this study Fuchs concluded that theoretically speaking "there can be no universal norms of *behavior* in the strict sense of '*intrinsece malum*.'" He concluded this on a twofold basis: (1) an action "cannot be judged morally at all, considered purely in itself, but only together with all the 'circumstances' and the 'intention'"; (2) we cannot foresee adequately all the possible combina-

<sup>17</sup> Dubay's rather sweeping statement about extramarital sex is, I believe, in error. He writes: "It [an ethics without absolutes] becomes quite unlike St. Paul, who terms extramarital relations fornication or adultery. . ." (p. 504). Cf. Bruce Malina, "Does *porneia* Mean Fornication?" *Novum Testamentum* 14 (1972) 10-17.

<sup>18</sup> *Art. cit.*, p. 504.

<sup>19</sup> Joseph Fuchs, S.J., "The Absoluteness of Moral Terms," *Gregorianum* 52 (1971) 415-58.

tions of circumstances and intention. Practically, however, there can be norms stated as universals "to which we cannot conceive of any kind of exception."

Gustav Ermecke has made Fuchs's careful study the object of a rather free-swinging theological attack.<sup>20</sup> Asserting that Fuchs's essay touches on most of the crucial points in moral reasoning, Ermecke lays out his own understanding of these points. For instance: there is a distinction between the unchangeable essence and core of man and his changeable incarnations; all norms are determined by the *humanum*; precisely because all men are men, there must be norms valid for all; never must man act contrary to his being as man; and so on. Such statements are footnoted by references to Fuchs's study, references in which Ermecke systematically associates Fuchs with a whole litany of errors and misunderstandings that either are or lead to pragmatism, positivism, functionalism, relativism, and a nominalism that is not all that far removed from heresy. Ermecke asserts that the stimulus behind Fuchs's study is the desire to legitimate certain changes in sexual morality. Therefore he refers to Fuchs's assertions as "*ad hoc* theories."

For instance, Fuchs had written that "the critical question, then, is not one of relativism but of objectivity, or the 'truth' of the action which must be in conformity with the whole concrete reality of man (of society)."<sup>21</sup> Of this Ermecke states: "What J.F. indicates here unavoidably approaches, in my judgment, relativism." Similarly, Fuchs had stated: "1) An action cannot be judged morally in its materiality (killing, wounding, going to the moon) without reference to the intention of the agent; without this we are not dealing with a human action, and only with respect to a human action may one say in a true sense whether it is morally good or bad; 2) the evil (in a premoral sense) affected by a human agent must not be intended as such, and must be justified in terms of the totality of the action by appropriate reasons." Ermecke brands this as "dangerous relativism."<sup>22</sup> Finally, Fuchs had written: "On the other hand, if there is question only of evil in the *pre*moral sense, such as death, wounding, dishonor, etc., the intention and the realization of a good can possibly justify the doing of an evil."<sup>23</sup> Ermecke rejects this as simply false, because when there is question of a freely caused evil, it is evil in a moral sense.

Behind many of Ermecke's criticisms of Fuchs stands a single dis-

<sup>20</sup> Gustav Ermecke, "Das Problem der Universalität oder Allgemeingültigkeit sittlicher Normen innerweltlicher Lebensgestaltung," *Münchener theologische Zeitschrift* 24 (1973) 1-24.

<sup>21</sup> *Art. cit.*, p. 439.

<sup>22</sup> *Art. cit.*, p. 19, n. 44.

<sup>23</sup> *Art. cit.*, p. 446.

agreement, a point hinted at by Ermecke himself.<sup>24</sup> It has to do with the *fontes moralitatis*. Ermecke feels that Fuchs has moved the emphasis away from the object to put more on the intention and circumstances. If the moral quality of the action is determined ultimately by the intention alone (Ermecke says: "eine letztlich *allein* entscheidende Bedeutung . . ."), then clearly we have moral relativism in Ermecke's judgment, because intentions of individuals vary limitlessly. And this variation makes universally valid moral norms impossible. Against this Ermecke argues that the action has its own inner sense or intentionality, what traditional theology refers to as the object of the act. For this reason he asks: "How will one judge a concrete action other than according to the founts of morality, among which there is in the first place the object, then the circumstances, finally the intention?"

Fuchs, somewhat perplexed and, I suspect, slightly aghast, responded to this vigorous and far-reaching attack with several clarifications.<sup>25</sup> First, Ermecke has misrepresented and falsified Fuchs's basic theses. Second, Ermecke's very general statements—which few would care to deny—simply do not come to terms with the true problematic of contemporary moral writing, nor with Fuchs's nuancing of traditional categories. Fuchs then painstakingly repeats his contention that a final moral judgment can be made only of the total concrete action, not of the individual components in isolation. Thus, when Ermecke talks about the inner sense ("metaphysischer Sinngehalt") of the action and states that this determines the morality of the action, Fuchs insists that this must be understood of the whole action, not simply of a single aspect; for it is the whole action, with circumstances and intention, that is the object of one's free choice.

Fuchs shrewdly notes that Ermecke accepts the principle that a lesser or less urgent value may be sacrificed for a higher or more urgent one. Thus, Ermecke agrees that not every killing is murder, not every taking of another's property is theft. This means that the inner sense and hence the moral judgment of killing and appropriation of another's property is drawn not simply from these factors alone—as object—but from additional elements of the whole action. Fuchs wonders why Ermecke is unwilling to apply this in other areas such as contraceptive behavior.

Fuchs flatly denies Ermecke's contention that he is putting heavier accent on the intention and circumstances, and above all that he is allowing to the intention *alone* a determining influence. He is insisting only that it is the entire action that is the basis for ethical judgment. This is not to give greater emphasis to circumstances and intention. Rather it

<sup>24</sup> *Art. cit.*, n. 31.

<sup>25</sup> Joseph Fuchs, S.J., "Sittliche Normen—Universalien und Generalisierungen," *Münchener theologische Zeitschrift* 25 (1974) 18-33.

is to assert that the object (as traditionally understood) is *never realized as such* but only as a whole. Since it is the whole action (including circumstances and intention) that is to be judged, and since concrete (Fuchs calls them "concrete-operative") norms cannot envisage and include all possible combinations of these factors, these norms have their limits. They are generalizations that hold most of the time (*valent ut in pluribus*).

In this rather remarkable exchange I agree with Fuchs. Ermecke has misinterpreted Fuchs and "responded" with a series of generalizations that simply bypass the problem raised by the eminent Roman moralist. What is at the heart of the discussion is the interpretation of the traditional *fontes moralitatis*. Ermecke contends in effect that prior to a consideration of the intention and circumstances the object has an inner sense and hence a decisive determining influence on the morality of the action—an influence, it is important to note, that resists specification by the intention and circumstances. In contrast to this, he accuses Fuchs—erroneously—of giving decisive determining influence to the intention *alone*. Fuchs does not do his. Indeed, if the intention were the only determinant of meaning, it is difficult to see how Fuchs could refer, as he does, to premoral *evil* in the object. Furthermore, Fuchs repeatedly insists that the premoral evil within the entire action must be proportionately grounded. If the intention alone had decisive influence, then any good intention would justify the causing or permitting of any disvalues. There is nothing in Fuchs that would lead to this conclusion. Rather Fuchs is insisting that the disvalues present in our conduct at times cannot receive an ultimate moral assessment until the action as a whole is weighed. In this I believe he is absolutely correct.

What, then, has Fuchs done? What nuancing has he brought to the traditional understanding of the *fontes moralitatis*? It seems to me that he has equivalently denied that the object can be an independent source of the moral quality of the action—independent, that is, of the intention and circumstances. In this sense, he has tightened the relationship between the traditional object-end-circumstances and argued that it is only the combination of the three that yields the total object of choice. The good intended in one's choice specifies the object without smothering it out of existence, and thus in a sense becomes an integral part of the total object. Manualist usage (e.g., Ermecke), though not the over-all tradition, attributed a moral quality to the object independently of the whole action, and a moral quality that at times would be uninfluenced by circumstances, including the end. Fuchs is arguing that we cannot cut up the action so finely and sharply, and that any element of the total act (whether object, end, or circumstance) remains abstract and therefore premoral when taken in separation from the other elements.

Two points. First, why did some within traditional usage treat the object as an independent source of the moral quality of the act? I suspect it was because frequently enough they smuggled the intention (or some circumstance) into the very description of the object. Take the case of one who takes food from another in order to save his own life. What is the object here? There are two possible descriptions: (1) taking another's food (property); (2) taking another's food in order to save one's life. Traditional usage equivalently used the second alternative to describe the object, for it defined theft as "taking another's property against the owner's reasonable will." But this definition obviously includes the intention and circumstances in a general way. Therefore a rather full moral quality could be attributed to the object so defined. In other words, what was included in the object or excluded from it depended on what one wanted to condemn or approve.<sup>26</sup>

Second, if it is only object-end-circumstances together that can yield a final moral evaluation, the implication is that it is a proportion within the entire action between the values and disvalues that justifies the causing or permitting of the disvalues. Thus, it is "saving one's life" that justifies "the taking of another's food (property)." It is precisely this emphasis on over-all proportion that Fuchs's study highlights. In this light it is not morally wrong to kill an innocent person directly regardless of the reason, but because the reasons we might have are, all things considered, disproportionate within the whole action.

It is the matter of proportion that Louis Janssens emphasizes in an important recent study on moral norms not previously reported in these pages.<sup>27</sup> Janssens first analyzes the Thomistic notion of the human act and points out that Thomas never abandoned the position that the inner act of the will must be considered the starting point. With this as the starting point, Thomas stresses that it is the end of the inner act of the will that determines the concrete structure of the action. *Finis dat speciem in moralibus*.

However, the human act is not simply the intent (*intentio*) of an end or goal. It also includes the choice (*electio*) of means. But the will of the end and the choice of means constitute only one act of the will, but an act that is a composite act. Since the human act is not restricted to the inner act of the will but also involves an exterior event or act, how is the inner act of the will related structurally to the external act? Janssens notes that for Thomas "the end which is the proper object of the inner act of the will is the formal element; the exterior act, as means to this end, is

<sup>26</sup> Cf. John R. Connery, S.J., "Notes on Moral Theology," *THEOLOGICAL STUDIES* 20 (1959) 591-92.

<sup>27</sup> Louis Janssens, "Ontic Evil and Moral Evil," *Louvain Studies* 4 (1972) 115-56.

the material element of the very same human act.”<sup>28</sup>

He then turns to the morality of the human action. Just as the inner act of the will (end) and the exterior act (means) are one and the same concrete act, so it is with the morality of the action.<sup>29</sup> Janssens notes: “For this reason he [Thomas] reacts sharply against those who are of the opinion that the material event of an act can be evaluated morally without consideration of the subject, of the inner act of the will or of the end . . . . This object-event becomes a concrete *human* act only insofar as it is directed towards an end within the inner act of the will. Only this concrete totality has a moral meaning.” This is the same point Fuchs correctly urged against Ermecke. Clearly, then, acts that have the same features as object-events can have a different morality “determined by the kind of end of the *will* towards which the matter-event has been directed.”

After showing that the end is the formal element that specifies the morality of the action, and that the object-event (external act) is the material element, Janssens argues that Thomas insisted that “not any kind of exterior action, however, can become the material element of a morally good end.” It must be material “apt” to this end. Since the exterior action is related as means to the inner act of the will (end), it must be adequately proportionate to this end. When it is, it participates in the moral goodness of the end. When is it “adequately proportionate” to the good end according to human reason? The answer given by Janssens: when there is no contradiction between the material (means) and formal (end) elements of the act. He puts it as follows: “Put into terms of the philosophy of values, this means that the means must be consistent with the value of the end. Or, according to a more abstract formulation, the principle which has been affirmed in the end must not be negated by the means.”<sup>30</sup>

Janssens illustrates this by several examples of actions involving what he calls “ontic evil” (Fuchs’s “pre-moral evil,” Schüller’s “nonmoral evil,” the manuals’ “physical evil”): self-defense, taking another’s property. Not every taking of another’s property is theft, but only that which undermines the very value of private property. Not every false statement is a lie, but only that which corrodes the meaning and purpose of human speech. Thus, when the means involving ontic evil is not proportionate, the ontic evil itself becomes the object of the will and is intended. But this may never be, since it vitiates the action.

<sup>28</sup> “Finis autem comparatur ad id quod ordinatur ad finem, sicut forma ad materiam” (1/2, q. 1, a. 4).

<sup>29</sup> “Actus interior et exterior sunt diversi secundum genus naturae. Sed tamen, ex eis sic diversis constituitur unum in genere moris” (1/2, q. 20, a. 3, ad 1m).

<sup>30</sup> *Art. cit.*, p. 142.

It is here that Janssens explains his notion of intending and not intending the ontic evil. He states: "Ontic evil should never be the end of the inner act of the will *if by end is meant that which definitively and in the full sense of the word puts an end to the activity of the subject.*"<sup>31</sup> Or again, it can be right to intend an ontic evil, to make it the end of one's inner act of the will, "if that end is not willed as a final end, but only as a *finis medius et proximus* to a higher end."<sup>32</sup> This is, in my judgment, identical with intending an ontic evil *in se sed non propter se*.

It is interesting to note how Janssens applies this to marital sexuality:

According to *Gaudium et spes* the marriage act must be ordered to conjugal love and to the human transmission of life, viz., to responsible parenthood. This must be the end of marital intercourse; each conjugal act must include a *debita proportio* to this end. Consequently, if the marriage partners engage in sexual intercourse during the fertile period and thereby most likely will conceive new life, the marital act may not be morally justifiable when they foresee that they will not have the means to provide the proper education for the child. The rhythm method, too, can be immoral if it is used to prevent the measure of responsible parenthood. But the use of contraceptives can be morally justified if these means do not obstruct the partners in the expression of conjugal love and if they keep birth control within the limits of responsible parenthood,<sup>33</sup>

In summary, then, Janssens with Fuchs is arguing that it is impossible to pronounce a final moral judgment on an exterior action containing ontic evil (e.g., a killing, falsehood, contraception) without attending to the end of the inner act of the will. For a true moral evaluation, two things must be considered: (1) the end of the agent, the moral goodness or badness of the end; (2) the *debita proportio* of the external action to the end. Because the action in its entirety must be evaluated morally, Janssens concludes, exactly as does Fuchs, that concrete moral norms (generalizations about such actions) *valent ut in pluribus*. They forbid only that ontic evil which exceeds the boundaries of the measure of means to the realization of good ends.

Janssens' study puts him unmistakably in the camp of Knauer, Schüller, Fuchs, and others who have attempted—successfully in my judgment—to re-examine and nuance the meaning of concrete moral norms.

For some years the compositor of these "Notes" has been struggling with this problem. I have learned much from Knauer, Schüller, Fuchs, and Janssens, as well as from those who disagree with these authors, e.g., Germain Grisez. I find myself at home with the conceptual directions

<sup>31</sup> *Ibid.*, p. 141 (emphasis added).

<sup>32</sup> *Ibid.*, p. 141.

<sup>33</sup> *Ibid.*, pp. 143-44.

being taken by Knauer, Schüller, Fuchs, Janssens, and others. In an attempt to avoid the misunderstandings too easily associated with the terms *finis operis*, *finis operantis* (misunderstandings laid bare very neatly by Janssens), I have repeatedly turned to the notion of the significance or meaning of an action as that which generates concrete moral norms and contains the seed of their limitations. In an interesting and thoughtful study, David Blanchfield passes these efforts in review.<sup>34</sup> Accepting the methodology as "basically sound," he suggests that it must be more flexible than I have allowed. This greater flexibility would allow the intention to "enter much more into the formulating of significance and meaning," but within limits. Blanchfield states the limits as follows: "the intention may not determine the significance when it would involve violating an absolute value."

Thus Blanchfield argues, in the now classic case of Mrs. Bergmeier (Soviet prison, away from family, etc.), the attempted pregnancy could be allowed under two conditions: (1) the absolute value of the welfare of the resultant child be protected; (2) the absolute value of the warden's dignity not be violated.

I fully accept Blanchfield's suggestion that the intention must have its appropriate place in the determination of over-all significance. This is what both Fuchs and Janssens argue. However, I wonder if Blanchfield has formulated the matter well.<sup>35</sup> He argues that the intention should enter much more into the formulation of significance, except when it would involve violating an absolute value.

Three points. First, if the intention ought to function in determining significance, it must function in the assessment of all actions. Therefore the question is not whether the intention may be allowed to function or not where certain values are involved, but whether the significance of the whole action (the intention having its appropriate function in determining this significance) involves an inner contradiction, a lack of *debita proportio* (Janssens) or proportionate grounding (Fuchs).

Second, I believe Blanchfield's emphasis on absolute values could easily be misplaced. It would seem that it is a disproportion between the exterior action (means) and *any* value (end) that renders an action involving premoral or ontic evil morally wrong.

Third, even when the intention has been granted its proper place in determining over-all meaning, it is far from clear how this would necessarily decide the Bergmeier case in the direction of Blanchfield's solution; for *debita proportio* within the action must consider all the

<sup>34</sup>David W. Blanchfield, "Methodology and McCormick," *American Ecclesiastical Review* 68 (1974) 372-89.

<sup>35</sup>This is undoubtedly due to the constraints imposed upon him by the unlikely subject he chose as the focus of his study!



values and disvalues. It might come out on Blanchfield's side, but it might not. After these footnotes on Blanchfield's study, I should add that the essay is helpful and—which is hardly to the point—flattering.

John R. Connery, S.J., has reviewed the work of Fuchs, Schüller, Knauer, and others and related it to the whole utilitarian school of thought.<sup>36</sup> Since his study appeared in this review, it will suffice to recall a few of the highpoints of his critique. Basically Connery sees these authors as representing a form of consequentialism, "a moral system that makes the judgment of an act depend solely on its consequences." After exposing and criticizing in highly knowledgeable fashion the two prevailing forms of consequentialism (act-utilitarianism, rule-utilitarianism), Connery judges both as vulnerable to allowing acts that go against common convictions, especially convictions about justice. He then associates Knauer, Fuchs, and Schüller with rule-utilitarianism in the sense that "all rules are subject in one way or another to the principle of consequences." The basic problem he finds in this is that "it seems to call for, or at least allow, exceptions which go against commonly held convictions."

When faced with this problem, rule-utilitarianism appealed either to hidden effects or to long-range effects. Connery's explicit conclusion is: practically, so-called secondary rules are more reliable guidelines than "the principle of consequences." Theoretically, such rules "cannot be explained entirely in terms of consequences." His implicit conclusion is that the arguments of Fuchs, Schüller, and Knauer are vulnerable to these same challenges, i.e., those urged against utilitarianism.

Bruno Schüller presents a long and careful reaction to Connery's study.<sup>37</sup> He agrees with Connery that utilitarianism as a theory of moral norms is untenable, but he insists that no one should conclude from the contemporary critics of utilitarianism that traditional moral theology has found new allies in its defense of its deontological norms; for the very critics of utilitarianism reject (as "naturalistic fallacy") the way traditional theology defends as exceptionless the prohibitions against, for example, contraception and homologous artificial insemination. Rather, a philosopher such as H. J. McCloskey suggests that such norms are prima-facie duties (or conditioned norms) much as Peter Chirico and Denis Hurley had done earlier but in different language.<sup>38</sup> So one need

<sup>36</sup> John R. Connery, S.J., "Morality of Consequences: A Critical Appraisal," *THEOLOGICAL STUDIES* 34 (1973) 396-414.

<sup>37</sup> Bruno Schüller, S.J., "Neuere Beiträge zum Thema 'Begründung sittlicher Normen,'" *Theologische Berichte* 4 (Einsiedeln: Benziger, 1974) 109-81. Schüller's review includes much more than a response to Connery. It surveys and critiques much of the literature on this entire subject, e.g., Curran's principle of compromise and Hurley's principle of overriding right.

<sup>38</sup> Cf. Denis E. Hurley, O.M.I., "In Defense of the Principle of Overriding Right,"

not move to utilitarian theory to hold different conclusions than traditional theology held on these points. Indeed, one need not enter the larger theoretical discussion of moral norms at all to contest such conclusions.

However, Connery has made his argument against Schüller, Fuchs, and Knauer by appeal to the critics of utilitarianism and by use of the arguments they make. The argument in substance is this: teleological grounding of norms = reductively utilitarian theory = untenable, as the long discussion in Anglo-Saxon philosophical circles has shown.

Schüller brings several objections against this. First, he objects to forcing the discussion into the logically elegant division deontological-teleological as defined by C. D. Broad. Broad had defined teleological theories as those that determine the moral character of an action exclusively by its consequences. Deontological theories, by contrast, are those that claim there are actions that are morally wrong whatever the consequences. Schüller protests the apparent neatness of Broad's division. It simply overlooks the vast differences between those who regard themselves as deontologists. For instance, Kant and W. D. Ross are regarded as being in this category; but there is a chasm between them. Kant held that the duty not to speak falsehood is absolute; Ross holds it to be a *prima-facie* duty (*bedingtes Erfüllungsgebot*). What is it, then, that divides Kant, Fichte, and the Catholic tradition from Ross, McCloskey, and other critics of utilitarianism? Schüller's answer:

Only Kant, Fichte, and the Catholic tradition assert that there are actions that are morally wrong without any regard for their consequences. W. D. Ross and the modern critics of utilitarianism, on the contrary, assert that for the moral rightness of an action consequences always play a determining role, but not alone. . . . In this light, only Kant and the Catholic tradition, but not the modern critics of utilitarianism, know deontological norms as defined by C. D. Broad.<sup>39</sup>

So, by accepting Broad's definition of deontologist and teleologist, Connery has made it appear that all teleological tendencies conform to Broad's model, and therefore can be faced with the standard arguments brought against utilitarian theory. Schüller rejects this.

Second, with many critics of utilitarianism, Connery asserts that an action's moral rightness or wrongness cannot be determined by the amount of good it does. He uses the example of a person who promises money to a young man to cut his lawn. Should he give the young man the money? If *that* action is morally right which does more good, then he should give it only if he finds no better use for the money. This type of

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THEOLOGICAL STUDIES 29 (1968) 301-9; Peter Chirico, S.S., "Morality in General and Birth Control in Particular," *Chicago Studies* 9 (1970) 19-33.

<sup>39</sup> *Art. cit.*, p. 177.

argument has led critics of utilitarianism to deny that only one principle determines the morality of any act. Thus Frankena calls for two principles: love (benevolence) and justice; David Lyons calls for three: love, justice, fairness. And so on.

Here Schüller says that the Christian theologian is perplexed by the notion of love implied in such fragmentation. "The Christian theologian who, under the influence of Romans 13:8-10, declares that love as benevolence and beneficence must be seen as the final criterion for the moral rightness of an action, does not understand under 'love' something next to justice and fairness. Rather he understands by this term the general root of all other particular principles."<sup>40</sup> It is a strange concept of love that has nothing to do with justice and fairness, as if these were separate and independent sources of moral rightness. Schüller accepts the identity of the principle of utility—when adequately understood—with love-as-beneficence.

Several examples are used by Connery and the critics of utilitarianism to show the impossibility of a teleological theory of norms. One concerns justice, the other fairness. Schüller speaks to both. The justice example is that of a sheriff in a Southern town faced with the alternatives in a rape case of framing a Negro suspect (whom he knows to be innocent) or carrying on a prolonged search for the real culprit. The immediate indictment and conviction of the suspect would save many lives and prevent other harmful consequences. If an action's moral rightness is determined solely by consequences, it is argued, the sheriff ought to frame the one innocent man—a conclusion that shocks our moral sensitivities, but one that a teleologist would be forced to draw.

Schüller argues that a teleologist would not be forced to draw any such conclusion. Overlooked completely is the fact that in the example not only is there question of the life of one versus the lives of many others; the entire institution of criminal law is at stake. The conclusion that the sheriff should frame the one to save others is only justified if this conclusion, raised to a universally acknowledged and practiced rule, would actually promote the common good. Since that is at least highly doubtful, such an exception must be judged contrary to the common good and unjust.

This is clearly a form of teleological argument and it is, Schüller contends, familiar to Catholic tradition. To illustrate this, he cites de Lugo's defense of the absoluteness of the confessional secret.

If it [revelation of sins] were allowed in some circumstances because of some extremely important need, this alone would be sufficient to make sacramental confession always difficult. Penitents would always fear that the confessor would

<sup>40</sup> *Ibid.*, p. 170.

reveal their sins because he would think this is an example of the exceptional instance. To avoid this evil, it was necessary to exclude any exception. That rare evil which would be obviated by revelation of sins is in no proportionate relationship to the perpetual evil and continuing harm which would be associated with the difficulty of confession if an exception were allowed.<sup>41</sup>

The example of fairness is that of a person who wants a certain candidate elected. He knows that the vast majority of his fellow citizens feel the same way and will vote for this candidate; so he himself stays home. Viewed in terms of consequences, his vote would be useless. Therefore, as useless, it is not morally right if it is viewed within a teleological framework. Yet it is unfair, for the stay-at-home enjoys the good of getting his candidate elected even though he spares himself the trouble of a trip to the polls. Therefore, it is asserted, beyond love (as usefulness, *beneficentia*) there is required a principle of fairness.

Schüller does not deny that fairness demands the person's vote. Rather he is amazed that one thinks such fairness has nothing to do with what we Christians call love of neighbor. Furthermore, he is perplexed at how narrowly the critics of utilitarianism interpret the term "useless." Of course, the vote is in one sense useless (it will not change results). But precisely because the vote is useless, it has the peculiar aptitude to be an expression of solidarity, much as the gesture of the woman who poured perfume over the head of Jesus (Mk 13:3-19) was seen as useless by some but was actually an act of love. One should not confuse the principle of utility (*beneficentia*) to one's neighbor and neighbors with mere efficiency.

In summary, then, Schüller leans heavily toward a teleological theory of moral norms if the term "teleology" is not too narrowly understood. Connery, he urges, can find justification for a deontological theory neither in traditional morality nor in the critics of utilitarianism; for the grounds on which these critics demand, in addition to love (*benevolentia* and *beneficentia*), principles of justice, fairness, etc. are mistaken. He summarizes as follows:

Traditional moral theology factually represents a deontological theory. Frankena does the same thing. But they do this from reasons that have nothing in common. Frankena believes he must hold a deontological theory because the necessary principle of justice is logically independent of the principle of love. Traditional moral theology states, on the contrary—so it seems to me—that the principle of justice is contained already in the principle of love. Therefore traditional moral theology must deny that Frankena has a legitimate ground for counting himself a deontologist. This theology itself represents a deontological theory, because it believes that there is, first, a class of actions that are morally wrong because of

<sup>41</sup> Cited in Schüller, p. 174, from *Tractatus de fide*, disp. 4, sect. 4, n. 57.

their unnaturalness (contraception). Second, there is a class of actions that must be seen as wrong because of a lack of divine permission (e.g., killing of the innocent). As far as I can see, Frankena, on the basis of the rest of his ethics, must contest that these two classes are justified. Therefore he could not admit that Catholic tradition has a legitimate ground for holding to a deontological theory. If one admits that Frankena is correct, yet if he holds with Catholic tradition that the principle of justice (and fairness) is contained in the principle of love, *then the result is a teleological theory of moral norms.*<sup>42</sup>

Because Connery's work is so economical, precise, and disciplined, and because the points he raises are so important to this entire discussion, I should like to attempt my own formulation of a few problems that seem to remain.

First, after noting that the Catholic authors discussed are all "tending toward consequentialism," Connery repeatedly describes this approach as "a morality based *solely* on consequences."<sup>43</sup> If we understand by consequences "intended consequences," we have here the same objection raised by Ermecke against Fuchs on the place of intention ("eine letztlich *allein* entscheidende Bedeutung..."). This is not what these authors are saying nor, in my judgment, what they can be forced to say. All would admit, for example, an inherent value in keeping secrets and an inherent disvalue in breaking them. The question is not that it is morally wrong to break secrets simply because of bad consequences. It is rather: when is it legitimate to bring about the admitted disvalue of breaking secrecy, and why? Schüller, Fuchs, Knauer, and Janssens insist that we are talking about an *evil* (nonmoral, premoral, ontic) where revelation of a secret is concerned. Therefore, as soon as the action involved is seen as containing such evil, it is no longer a matter of "consequences alone," but of the proportion between the evil involved and the good sought. If they regarded the action as "based on consequences alone," revelation of secrets would have to be seen as neutral in itself, not as an ontic evil.

Second, Connery notes that it is the position of Knauer—and actually of Fuchs also—that the intent (Fuchs) or commensurate reason (Knauer) is included in the moral object of the act. Apart from such a reason the act has only a physical object.<sup>44</sup> Thus, killing can be morally justified or not depending on the reason or intent behind the act. Of this Connery notes: "This presents no problem in regard to killing, which can be morally good or morally bad. But it does raise questions in regard to actions which have been traditionally regarded as wrong, e.g., adultery,

<sup>42</sup> *Art. cit.*, p. 176.

<sup>43</sup> Connery, *art. cit.*, p. 398.

<sup>44</sup> Schüller criticizes this language in his review of W. Van der Marck, *art. cit.*, p. 137-38. Killing, e.g., even when its moral evaluation is left totally open, is not merely a physical act; it is a kind of human action.

direct killing of an innocent person, etc., independently of whatever reasons the agent might have had.<sup>45</sup>

It is to be noted that Connery refers here to "direct killing of an innocent person." But it must be asked: where did such a qualified and circumscribed description come from? Why is only "direct killing of an innocent person" regarded as wrong at all times? Why is this not true of any killing? The only answer seems to be that in some instances of conflict<sup>46</sup> (self-defense, warfare) killing can represent the better protection of life itself, can represent the lesser evil when compared to the only other available alternative. Obviously such a conclusion roots in the weighing of the effects of two alternatives. It traces to a judgment about what would happen if some killing were not allowed. Now if such a calculus is necessarily implied in the sharpening of forbidden killing down to "direct killing of an innocent person," then it seems that this sharpened category itself must be similarly tested; otherwise we are inconsistent. So when one says that "direct killing of the innocent" is forbidden, he need not and should not imply that such killing is morally wrong "independently of whatever reasons the agent might have had." He may and ought to imply that the conceivable reasons for killing in such circumstances are, under careful analysis, not proportionate to the harm done; for if it was a weighing of alternatives that honed the rule to its present precision, it is a weighing of alternatives that must test its continuing viability.

In this regard Connery notes that "Fuchs would therefore have to attach a rider to every rule, e.g., killing is wrong except when there is a proportionate reason." Exactly so. But has traditional theology not done exactly this—and then gone about deciding which reasons are proportionate and which not? I believe so. Otherwise we would not have a theory of just warfare, a theory of self-defense, a theory of tolerable indirect killing.

Third, in supporting certain claims of justice (e.g., against direct killing of an innocent person in a situation where great good might seem to accrue as a result), Connery notes that one who develops and restricts his rules by considering the only alternatives (teleologist) and in this case prohibits the killing must appeal to hidden bad effects, "although this is often not very convincing." I agree that it is not always very convincing. But then the issue is one of clarity and certainty. How much clarity and certainty do we need? The underlying supposition seems to be that we must have rather exhaustive clarity to support a justice norm. Scholastic

<sup>45</sup> *Art. cit.*, p. 399, n. 7.

<sup>46</sup> For a much broader study of the notion of conflict, cf. H. Thielicke, "Anthropologische Grundtatbestände in individuellen Konfliktsituationen," *Zeitschrift für evangelische Ethik* 18 (1974) 129-45.

analysis supports this tendency of thought. However, even a strong suspicion that taking life in these circumstances may undermine rather than support (may be disproportionate to) the value of life seems sufficient to uphold the prohibition. The norms of justice and their limits, no more nor less than other norms, are the conclusions of a type of prudence that involves or can involve feared or suspected implications in alternative courses of action.

Finally, Connery concludes that Fuchs, Schüller, *et al.* "might be forced to acknowledge in the end that it would be better to rely, for instance, on considerations of justice than consequences in assessing certain classes of conduct." I do not see that the two are that distinct. It must be noted that "considerations of justice" involve an appeal to a certainty that is achieved only after another alternative has been, to the best of our ability, weighed. For example, why is not indirect killing a violation of the right (justice) of the one "only indirectly killed"—e.g., the innocents indirectly killed as I blast at the enemy's war machine? What do fish, so to speak, think of the morality of fishing?

Traditional moral formulations say that indirect killing need not be a violation of right, that it is morally legitimate when proportionately grounded. It can say this, I believe, only after having considered the alternative, *scil.*, what would happen in conflict cases if we did not allow such killing? Because the answer to that alternative possibility is more disvalue to life itself, more ontic evil, it was concluded that such killing may be tolerated, and is not therefore a violation of the right of the one indirectly killed. Therefore behind and before the ascription of what is just and unjust is a prudential judgment—in a world of conflict and tragedy—of where the lesser evil lies.

I address these questions to Connery because we have already learned so much from his work that his continuing attention to these problems promises only gain.

After stating in different words many of the same essential ideas, Daniel Maguire speaks of the "tools and faculties" that converge on the total moral object and "aid in the delicate task of weighing the values contained in that object."<sup>47</sup> Alongside inprincipled moral wisdom, he lists reason and analysis, moral *Gemüt* or feeling, and creative imagination. Of affective perception, for example, he writes: "Moral enquiry will go astray if it proceeds from either headless heart or heartless head. *Gemüt* is the *votum* of the heart. *Gemüt* may need to be corrected or overruled by reason, but it should always be heard."

This is important and is easily overlooked. James Gustafson has been

<sup>47</sup> Daniel C. Maguire, "Ethical Method and the Problem of Death," *Anglican Theological Review* 56 (1974) 258–79. This is an excerpt from Maguire's book *Death by Choice* (New York: Doubleday, 1974).

calling it to our attention for years in different language. Emotions and religious commitments do function in our value judgments in a way that is sometimes beyond reduction to reasoning processes or analytic arguments. In pursuit of this point, Maguire refers to the sense of profanation. His example: the rounding up and slaughtering of civilians in wartime in reprisal for a sniper-killing. Some moralists, he notes, would condemn this in terms of "a calculus of the short and long term effects." Maguire believes this is true as far as it goes; but it does not go far enough. "At this point the sense of profanation enters." It is a reaction of moral shock, a sense of profanation of the sacred, not a reaction born of discursive reasoning. "It is an experience that is by its nature prior to ethical deliberation which might or might not follow from it."

Maguire is correct in pointing up the sense of the sacred (and its profanation) as a key source of moral knowledge. But here it could be suggested that rather than being in contrast to an assessment of proportion, moral shock is itself a way whereby the basic disproportion of certain actions is revealed to us.

This discussion of the meaning of moral norms may seem to many an abstract, academic affair. Actually it is at the heart of many polarizations between men of good will inside and outside the Catholic community. It is the core of contemporary discussions on abortion, sterilization, contraception, capital punishment, warfare, etc. This commentator's participation in the discussion in these "Notes" is particularly perilous, for he attempts objective reviewing at the very time his own leanings are rather apparent. To admit this is not to neutralize its effect; it is more in the nature of an apology.

#### DIVORCE AND REMARRIAGE

The problem of divorce and remarriage is one of the most difficult and urgent tasks of the contemporary Church. It has been estimated that there were 120,000 valid Catholic marriages that ended in civil divorce in the United States in 1971.<sup>48</sup> The divorce rate among Catholics—to say nothing of Christians more generally—is close to that of the population at large. We have been groping and struggling with this problem for some years. The literature continues to abound. Here I will review just a few of the articles that give a good idea of the tone and direction of the literature.<sup>49</sup>

<sup>48</sup> Taken from Lawrence G. Wrenn, "Marriage—Indissoluble or Fragile?" in *Divorce and Remarriage in the Catholic Church*, ed. Wrenn (New York: Newman, 1973) pp. 144-45.

<sup>49</sup> Some further entries on this problem: Anastasio Gutierrez, "Matrimonii essentia, finis, amor conjugalis," *Apollinaris* 66 (1973) 394-445, 97-147, and 67 (1974) 92-130; William J. LaDue, "Conjugal Love and the Juridical Structure of Christian Marriage," 34



Joseph Mac Avoy notes that in face of the many marital tragedies of our time the Church has a double mission to propose the ideal day in and day out, and to save a world of sinners in imitation of her Master, the Good Shepherd.<sup>50</sup> After reviewing some recent canonical and theological attempts to render the Church's pastoral mission more adequate (especially attempts focusing on the widening of dispensing powers and admission of the divorced and remarried to the sacraments),<sup>51</sup> Mac Avoy raises the three questions he believes are the directions of the future (1) What foundation and obligational value is to be attributed to indissolubility? (2) When love is irremediably dead, is there a power that can relieve the spouses of their marital commitment? (3) Very many marriages apparently fail to fulfil the conditions of a sacramental marriage. In what does a true sacramental marriage consist?

In discussing the first question Mac Avoy simply raises another. If the Church allows, for example, the remarriage of widows, is this not to admit that the marital project ceases when mutual presence is sundered by death? And if this is so, is it impossible to conceive of a sundering of mutual presence when love is irremediably dead, when there is a radical affective separation?<sup>52</sup>

Mac Avoy's answer to the second question is an extremely interesting affirmative. He first states that the power in question is not exactly a power to dissolve a bond, rather it is declaratory. The marital commitment emerged from the depths of free human choice. There is really no power that can reach in and nullify what the partners have done. "To destroy an irreversible act, it would be necessary that the Church, in God's name, accord to the spouses the faculty of taking back their word. But this vicarious power has no biblical foundation." Therefore, dispensing or dissolving power is really not that at all, it is a legal fiction that is declaratory in nature. "The couple being dead by the total disappearance of the bond of love that was generated, it pertains to an

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(1974) 36-67, *ibid* (no author given), "Remarriage after Psychic Incapacity" pp 107-11, Klaus Demmer, M S C, "Decisio irrevocabilis? Animadversiones ad problema decisionis vitae," *Periodica* 63 (1974) 231-42, B Primetshofer, "Zur Frage der psychischen Eheunfähigkeit," *Revue de droit canonique* 24 (1974) 203-22, Francis G Morrisey, O M I, "The Incapacity of Entering into Marriage," *Studia canonica* 8 (1974) 5-21, *The Future of Christian Marriage (Concilium* 87 [1973]), *Perspectiva theologica* 4 (1972) 225-87 *Theologische Quartalschrift* 151 (1971) 1-86

<sup>50</sup> Joseph Mac Avoy, S J, "Mariage et Divorce," *Etudes*, Aug-Sept 1974, pp 269-89

<sup>51</sup> Mac Avoy admits his heavy reliance on several articles in *Recherches de science religieuse* 62 (1974), especially Joseph Moingt, "Le mariage des chrétiens," pp 81-116 and Pierre Nautin, "Divorce et remariage dans la tradition de l'église latine," p 7-54

<sup>52</sup> Karl Lehmann has adverted to the "extremely problematical category" of the definitively dead marriage, for such a category seems to include what is, from a Christian point of view, something of an impossibility—the inability to forgive (as cited in Schuller *art cit*, p 121)

authority officially to declare this demise, with a view to permitting the spouses a new start. Its role is not to break the bond, but to notarize the fact that its juridical effects have ceased." Behind such a legal fiction, such a gesture of authority, is the return of the spouses to their own consciences, then the legal endorsement of their separation.

Once this is realized, two things follow. First, not only does the Church have this power (for she has been "dissolving marriages" for centuries) but her use of it must mean that for centuries she has been declaring marriages dead with freedom to remarry implied. The Church's limitation on the use of this power must, therefore, be for educational reasons above all. That is, her purpose in narrowing dispensing power to a rather tight list of indications or situations was to prevent spouses from being tempted by a wide-open door before them—an opening that would destroy their efforts at mutual support during crises. The limitation did not originate with and is not tied to a well-elaborated doctrinal thought.

Second, the state also has this power; for since marriage is a fundamental unit of human society, its protection belongs to all authority charged with the protection of the common good.

Third, Mac Avoy accepts the fact that very few marriages are sacramental. A sacramental marriage is not just a human marriage solemnized with Christian trappings; it is a commitment to being a witness to the world of the covenant of God with the world through His Son. In this perspective spouses accept a true lay ministry, complementary to priestly ministry consecrated by ordination. Such a commitment can be undertaken only by a relatively few of the baptized. For the vast majority of Christians, religious marriage does not go beyond an *officium naturae*. The Church in her pastoral ministry must distinguish between these two levels.

In light of this, Mac Avoy draws several concrete conclusions. First, civil marriage must be recognized by the Church as an authentic marriage. This means suppression of the requirement of form. The Church will leave to the couple the decision as to whether they wish to celebrate the marriage religiously. Second, if the couple wish to celebrate their marriage religiously in the presence of a priest, this must be able to remain catechumenal, i.e., nonsacramental. Finally, there is the last level, that of sacramental marriage, corresponding to the real level of faith of the couple, a couple capable and desirous of making their lives a prophetic statement to the world of God's unending love.

Mac Avoy claims no answer to the enormous problem of marital failure. His emphasis falls on the Church's need to adapt her pastoral procedures constantly to the changing times.

Charles Robert treats of the admission of divorced and remarried

persons to the sacraments.<sup>53</sup> Several factors constitute a new context for the discussion. For instance, there is a new sensitivity to the right of conscience decision. Second, public opinion about what is scandalous has changed (85% of French people polled believed that “under certain conditions” a remarried Catholic should be allowed to receive the sacraments). Then there is the fact of the departure of priests and religious who are dispensed and remain in full communion with the Church. These and similar events have qualified the consciousness of the faithful on the problem of sacramental practice for the remarried.

Robert then reports the answer given by Cardinal Hoeffner (Cologne): every divorced and remarried person lives in a permanent state of grave sin. To the objection that there could be a conflict of values leading the individual to conclude that he/she is obliged to remain in the second marriage, Hoeffner replies that if the Church took account of such conscience judgments, she would abdicate all control over the reception of the sacraments. Robert rightly criticizes this on two grounds: it injudiciously attributes to the Church a diagnostic power where formal sin is concerned, and it caricatures the notion of a conflict of values.

Robert then turns to his own analysis. The heart of the discussion is the state of serious sin. It is Robert’s thesis that there are divorced-remarried persons who are convinced they are not in a state of serious sin. Robert believes such conscience convictions can be well founded in objective conflicts, e.g., breakdown of a marriage accompanied by the impossibility of remaining single or of abandoning a second union already contracted.

When faced with such conscience convictions grounded in objective conflict, what should the Church do? The answer is one of pastoral prudence. Robert uses the analogy of *communicatio in sacris* to enlighten the function of pastoral prudence. In its decree on Eastern churches (*Orientalium ecclesiarum*) Vatican II noted that where the Eastern brethren are concerned “various circumstances affecting individuals should and can be taken into consideration.” Concretely, the Council concluded that “in view of special circumstances of time, place and personage, the Catholic Church has often adopted and now adopts a milder policy, offering to all the means of salvation and an example of charity among Christians . . .”<sup>54</sup>

This represents a compromise between the two basic functions of common worship as detailed in the Decree on Ecumenism: signification

<sup>53</sup> Ch. Robert, “Est-il encore opportun de priver des sacrements de la réconciliation et de l’eucharistie indistinctment tous les divorcés remariés?” *Revue de droit canonique* 24 (1974) 152–76.

<sup>54</sup> No. 26 (*Documents of Vatican II*, ed. Walter M. Abbott, S.J., p. 384).

of the unity of the Church and sharing in the means of grace. Balancing these two finalities in our times, the Council concluded that "the fact that it should signify unity generally rules out common worship. Yet the gaining of a needed grace sometimes commends it."<sup>55</sup> Robert sees in these texts a dialectical oscillation between the two finalities of the sacraments. Neither finality can erase the other. Not being able in the concrete circumstances to realize fully the two finalities, the Church feels obliged within limits to admit a compromise. She softens the demands of full integration that she proposes in principle. Why not afford a similar favor to the divorced-remarried who remain within the unity of the Church?

Robert admits that the direction of pastoral prudence does not impose itself with the insistence of theoretical evidence. He admits the dangers and problems. We must, for example, grant that the divorced-remarried would share an incomplete integration in the Church. But this is the mark of the pilgrim Church, a Church that will always be characterized by the unachieved and imperfect, as the Council noted so accurately. Robert urges the hierarchy to put their confidence in the faithful. "In a community of faith this confidence rests on the relation that, in their intimate consciences, is established between the faithful and the Lord. It is a matter of constant catechesis to recall to the faithful that they walk before the face of God."<sup>56</sup>

In September 1970 the *Association de théologiens pour l'étude de la morale* (A.T.E.M.), which includes the vast majority of professors of moral theology in France and priests knowledgeable in matrimonial problems, met to discuss the problem of divorce and remarriage. The meeting evinced a virtually unanimous consent that the Church had to re-examine the reasons for excluding the divorced and remarried from full sacramental participation in the life of the Church. A commission was charged with drafting a document to be sent to all the French bishops on this matter, accompanied by a request for a personal reaction and suggestions. During February 1972 all the bishops of France received the document, but efforts were apparently made to dissuade the bishops from responding. Hence *Vie spirituelle: Supplément* decided to publish a slightly modified version of the document because of its inherent importance and the stature and number of the signatories.<sup>57</sup>

The French theologians begin by admitting that all agree on two points: the indissolubility of marriage is clearly taught by Christ and Catholic tradition; the Church has the duty to aid all the baptized to live

<sup>55</sup> No. 8 (*ibid.*, p. 352).

<sup>56</sup> *Art. cit.*, p. 174.

<sup>57</sup> "Le problème pastoral des chrétiens divorcés et remariés," *Vie spirituelle: Supplément* 109 (May 1974) 125-54.

the life of the children of God. However, the Church sees no way of honoring these two charges except by renunciation of the second marriage or withdrawal from full participation in the sacramental life of the Church. This position (which the group calls the "official position of the Church") translates into a variety of theoretical and practical attitudes constitutive of what the French theologians call an "urgent and grave question." The good of the faith is at stake.

For example, there are widespread differences and practices. Some in the Church see the death of the first spouse as the only answer. Others want to attack the first marriage—a situation that leads to use of the letter of the law against its spirit (scil., canonical dispositions considered as supports of the permanence of marriage are used to nullify it). Still others see the only solution in abandonment of the second union. Then there is the brother-sister approach. The upshot of all of this is a practice incoherent and disconcerting, which leads to a confusion deeply threatening to the faith.

How is one to explain, for instance, a policy that denies sacramental participation to the divorced and remarried but allows the sacraments to one who has killed his spouse, repented, and remarried? How explain, ask the French theologians, the policy of denying the sacraments to the divorced and remarried when there is no problem with priests and religious who have been dispensed from their vows and have married?

When faced with such problems, some want to challenge the teaching on indissolubility, a view the French theologians reject, not least because such a challenge supposes that this doctrine can lead to only one pastoral implementation. Similarly, they see an approach that concentrates on more controlled administration of the sacrament and on annulments and dissolutions as valid but inadequate.

The document analyzes the problem as involving Christians whose situation has these three characteristics: (1) the first union seemed to have all the guarantees and supports one would expect of a sacramental marriage; (2) the first marriage broke up and a second, apparently stable one followed—so stable that the Church would rather see the couple deprived of the sacraments than broken up; (3) these couples want to live their faith and the Church wants them to.

Such couples, by official policy, are advised not to receive the sacraments. The A.T.E.M. document sees this as full of contradictions. For instance, if brother-sister living is the condition for sacramental participation, the Church is equivalently advising the couple to remain together, deepen their life together, without really living a conjugal life. Or again, some pastors urge the couple to receive the sacraments privately. This clandestinity contradicts a profound aspect of the meaning of sacrament. Moreover, the very diversity of pastoral practice

puts the faithful in a position of inequality before the law.

The two main problems with a change in pastoral approach are the doctrine of indissolubility and the notion of "the state of sin." As for the first, the French moral theologians note that historically the absolute demand of indissolubility has issued in a variety of pastoral implementations. There is nothing, they argue, in the New Testament to indicate that violation of the absolute demand of indissolubility is an unforgivable sin. Both Scripture and tradition yield not only indissolubility as an absolute demand of Jesus' teaching, but also the fact that the Church has the power to decide to which unions this demand should be applied. Therefore the French see the problem not as a questioning of indissolubility but rather whether "the consequences one draws from this demand apropos of divorced and remarried Christians are or are not favorable to the good of the faith."<sup>58</sup>

If one thinks that readmission of divorced-remarried to the sacraments denies indissolubility, it is because one concludes that whatever the state of the second marriage, the first still endures. The document regards this as strange reasoning. Before a thing can be indissoluble, it must exist; this cannot be said of a marriage that has lost all its other properties. Furthermore, such a notion of indissolubility contradicts the actual pastoral practice of the Church, a practice that urges the couple in the second union to nourish conjugal affection for each other, to be good parents, to fulfil their duties to each other (with reservations about a sex life), etc. Apropos of reservations about a sex life, the authors find it absurd to say that the principle of indissolubility is not threatened by a second marriage without a sexual life and with sacramental participation, while it would be threatened by a second marriage with a sexual life and sacramental participation.

The second problem is the "state of sin" characterization of the second union. This does not make sense to the authors, since the Church acknowledges that the couple often have the human and Christian duty to live their second union and fulfil its responsibilities. How can the couple (according to actual practice) not be in the state of sin with reference to their human and Christian duties to each other and the family, and yet be in it with regard to reception of the sacraments?

In conclusion, the A.T.E.M. statement urges a cautious policy of readmission of divorced-remarried to the sacraments. The stability of the second union and the couple's faith and over-all responsibility should be the focus of discernment. The only ones who can establish such a *policy* are the bishops—a point made also by Mac Avoy. Therefore the document pleads with them to act now. It insists repeatedly that such a

<sup>58</sup> *Art. cit.*, p. 141.

solution does not change the doctrine of indissolubility, because it is a pastoral solution. And where a variety of pastoral implementations are possible, it is the good of the faith that dictates what the pastoral practices ought to be. Thus the authors note:

There is no question of saying that henceforth sacramental marriage does not imply absolute indissolubility, nor that the rupture of such a marriage is not objectively what Christ called adultery. The Church cannot be involved in the least compromise on this point. Rather it is a question of knowing if the good of the faithful involved and that of the Church does not render it preferable to readmit these faithful to the sacraments . . . .<sup>59</sup>

Charles M. Whelan, S.J., argues for the readmission to the sacraments of the divorced-remarried under four conditions: (1) the first marriage is irretrievably lost; (2) present methods of official reconciliation are unavailable; (3) the parties to the second marriage have demonstrated by their lives that they desire to participate fully in the life of the Church; (4) there are solid grounds for hope that the second marriage will be in all other respects a Christian marriage, scil., stable.<sup>60</sup> Whelan sees only two reasons to support present official policy: Christ's denunciation of divorce and remarriage, and the high social interest in preserving the stability of marriage. But these do not, he argues, prevent a change in discipline.

Whelan sees the Church faced with two values: the rights of individuals and the common good (the stability of marriage). In the past four centuries pastoral policy has put too much emphasis on the common good, too little on the rights of individuals. Thus he proposes a middle ground.

The Church can avoid the dilemma of being unfaithful to Christ's teaching or of violating the rights of individual second-marriage Catholics by taking a middle ground between denunciation and blessing. In its necessary concern for fidelity to Christ's teaching and for the common good involved in the stability of marriage, the Church can refuse to give official blessing to the second marriage as such until the first marriage has been certainly dissolved or proven invalid. In its necessary concern for the rights of the individuals involved, the Church can rely on the present dispositions and good consciences of those second-marriage Catholics who meet the four conditions I have described.<sup>61</sup>

In a rather unusual move, the editors of *America* editorially endorsed Whelan's proposal and urged that it be adopted promptly.<sup>62</sup>

<sup>59</sup> *Ibid.*, p. 148.

<sup>60</sup> Charles M. Whelan, S.J., "Divorced Catholics: A Proposal," *America* 131 (1974) 363-65.

<sup>61</sup> *Ibid.*, p. 365.

<sup>62</sup> *Ibid.*, p. 362.

Karl Lehmann briefly but accurately summarizes the standard conclusions drawn from the doctrine of indissolubility (break-up of second union or live as brother-sister) and the strong objections raised against them.<sup>63</sup> Present practice he views as inadequate. The way out of this irreconcilable opposition of attitudes is to be found in fundamental dogmatic considerations.

In the scriptural evidence Lehmann sees both an absolute precept (not just an ideal or goal) and the awareness of Paul and the Matthean church that they are authorized to make certain concessions. This same duality of outlook is found in tradition. In finding ways of escape for distressing cases "they were always aware of the contradiction to Scripture, and saw in this action the possibility of avoiding even greater evil (in other words, they applied the principle of the lesser evil)."<sup>64</sup> The tension between the precept of indissolubility and human failure always remained.

Lehmann next turns to the Tridentine formula wherein it is stated that the teaching and practice of the Western Church are "in accordance with (*juxta*) the teaching of the gospel." The Western practice is not simply *the* teaching of the gospel; therefore it is left open whether there are other modes of response "in accordance with" Scripture. Anyone who fails to admit this possibility is untrue to the established facts of history.

Lehmann insists that the two lines of unbroken certainty (Jesus' absolute requirement, the practice of toleration) are not simply parallel, as if they were "equally justified." Rather the principle of indissolubility claims an inherently higher normative force, while the concessions are viewed as "not entirely without foundation." Thus the concessions have the function of drawing attention to the obligatory character of Jesus' directive. From this Lehmann concludes a key principle: "The concession of milder practice must not turn into an independent system, relatively or at least in fact indifferent to the principle of indissolubility. For it is outside the limits of what in faith indubitably ought to be the case, and consequently there is no place for it *purely and simply in itself*. There is, therefore, fundamentally no intrinsic 'right' to divorce, remarriage and eventual subsequent readmission to the sacraments."<sup>65</sup> To legitimize exceptional situations by general legal dispensations is to destroy marriage before it is contracted, for to put into a regulation what ought not to be is to give it a normative character. The concession becomes too easily preponderant and hides the original sense of Jesus'

<sup>63</sup> Karl Lehmann, "Indissolubility of Marriage and Pastoral Care of the Divorced Who Remarry," *Communio* 1 (1974) 219-42.

<sup>64</sup> *Ibid.*, p. 229. Schüller cites J. Ratzinger as narrowing indissolubility as follows: "The Church can in clear situations of distress allow controlled exceptions in order to avoid still worse evils" (*art. cit.*, p. 124).

<sup>65</sup> *Art. cit.*, p. 234.



requirement. Therefore Lehmann totally rejects pastoral concessions that come to constitute a self-contained system or a separate set of guidelines. This would simply legalize a rejection of indissolubility. Only on the basis of Jesus' original precept can something that ought not to be regulated.

What, then, does he propose? "In situations of obvious distress and difficulty the Church can in principle admit clearly delimited exceptions to avoid worse evils."<sup>66</sup> But what Lehmann is opposed to is establishing a *general norm* which would make generally possible what is "in itself" impossible. The distress instances are a matter of pastoral counseling at the individual level. Lehmann details with care and prudence some of the conditions to be weighed in arriving at judgments of toleration.

In summary, I think it can be said that for Lehmann toleration of second marriages and admission to the sacraments linked to it is to be pastorally approached in terms of the principle of the lesser evil applied to the individual person(s). This cannot be and should not be codified, though pastoral guidelines are called for.

Charles Curran has written an excellent survey of recent literature on divorce and remarriage.<sup>67</sup> The article first correctly criticizes the shortcomings of the present legal approach (tribunal system) to marriage problems, even with the new simplified procedures. Curran next turns to the internal-forum solutions. He properly distinguishes two different situations of broken marriages: first marriage arguably null from the beginning, first marriage rather clearly a true Christian marriage, at least in terms of existing criteria.

Before continuing with a résumé of Curran, a personal aside is in place. The first instance is relatively easy to handle, both with regard to reception of the sacraments once a second marriage exists and more radically with regard to entrance into this second marriage. The moral right to marry is a basic right and should not be denied to an individual unless it is certainly clear that he is morally not free. This point was successfully argued by the CTSA committee report,<sup>68</sup> has been repeated by Charles Whelan, and represents a theological consensus in recent literature.

It is the second instance (clearly a Christian marriage from the beginning) that constitutes the truly difficult problem. It has two dimensions. The first is reception of the sacraments by a couple in a second marriage. There are reasons—and good ones, I believe—for arguing with the literature cited above that such a couple may receive

<sup>66</sup>*Ibid.*, p. 238.

<sup>67</sup> Charles E. Curran, "Divorce: Catholic Theory and Practice in the United States," *American Ecclesiastical Review* 168 (1974) 3-34, 75-95.

<sup>68</sup> Cf. *America* 127 (1972) 258-60.

the sacraments if they are in other respects properly disposed. The arguments proposed in some of the earlier literature—imperfect but genuine symbolization in the second marriage, second marriage “under the sign of forgiveness,” etc.—were very incomplete and vulnerable; for the same arguments could be made for a third, fourth, and fifth union. However, we have moved beyond such arguments.

The second and really thorny issue is entrance into a second marriage. Here Curran believes one might argue (though he does not do so, as will be immediately clear) the permissibility of entering a second marriage by appeal to the forgiveness of God. “The forgiveness of God is offered for whatever failures brought about the breakdown and separation of the first marriage. This forgiveness is extended to the recognition that the forgiven but frail person needs a new marriage.”<sup>69</sup> Curran does not develop systematically this suggestive line of thought. He simply states that it “has its weaknesses, but it appears to be the best argument that can be made for justifying such a second marriage without disagreeing with the Catholic teaching on the indissolubility of consummated, sacramental marriages.”

Curran then turns to his own position on this difficult case. After reviewing in knowledgeable fashion the scriptural, historical, and theological evidence, he concludes that they will not support absolute indissolubility. It is his contention that permanency is a radical demand of the gospel that must be viewed as a goal but not as an absolute norm. Therefore he concludes that “the Roman Catholic Church should change its teaching and practice on divorce.”

Why? As I read him, Curran would answer: (1) the evidence does not support an absolute precept; (2) the internal-forum solutions now used are incongruous, scil., are themselves a remove from the traditional understanding of indissolubility; (3) dissolution as now practiced is really a legal fiction, i.e., it is not dissolution properly so called, because the marriage bond is not a juridical entity existing apart from the marital relationship. Thus “dissolution” is but a recognition and acknowledgment that the marriage has broken down and that remarriage is possible.

Curran pursued his thought in more positive form at a recent meeting of the Canon Law Society of America.<sup>70</sup> He drew upon five major reasons which when “taken cumulatively . . . call for a change in the teaching on indissolubility.” This change will mean that “indissolubility of marriage in such perspective can only be the goal which is imperative for all . . . but which without their own fault, might at times be unobtainable.”

The first reason Curran appeals to is the “signs of the times.” The

<sup>69</sup> *Art. cit.*, p. 31.

<sup>70</sup> Charles E. Curran, “Divorce from the Perspective of Moral Theology.” Curran very kindly forwarded me a copy of this study, which at this writing remains in manuscript form.

most important of these is the enormous interest in and prolific writing on the subject of divorce in recent years. Much of this writing defends the possibility of a return to the sacraments by a couple living in a second and irregular marriage. Curran believes that such a pastoral step is only a middle step. Earlier when Catholics divorced, they often did not remarry because they thought it would mean their exclusion from the sacramental life of the Church. "If they know such an exclusion is not necessary, then there would be less reason for them to abstain from entering such a second marriage in the first place." Furthermore, many of the very arguments proposed to allow readmission to the sacraments of the divorced-remarried can be used to allow the second marriage itself.

Curran then appeals to the proper understanding of Scripture, a new historical consciousness, a new personalism in the understanding of marriage, and eschatology. With regard to this last factor, he argues that the Christian understanding of the world views it as between the two comings of Jesus—short, therefore, of the fulness of the final coming. "This side of the fulness of the eschaton, the perfection of Christian love cannot always be attained. . . . Christian marital love in this world remains the love of pilgrim Christians who have not yet come to the fulness of love." The limitations stemming from this fact require more than just "toleration of a pastoral practice." They affect our objective understanding of what marriage is. How? They force us to see its indissolubility as a goal. This "calls for a changing in the teaching on indissolubility."

Curran's argument stands or falls with the notion of goal or ideal (*Zielgebot*) as contrasted with absolute precept (*Erfüllungsgebot*).<sup>71</sup> In his long monograph Bruno Schüller addresses this subject and finds the notion of goal-commandment as applied to such things as marriage simply insupportable. First, the notion of a goal-commandment (ideal) originally applies to moral dispositions and basic attitudes such as selflessness, courage, forbearance. Were Schüller in conversation with Curran, he might, I believe, argue that the fact that married Christians do not achieve but only grow toward the "fulness of love" (Curran's constant phrasing) in this world does not immediately touch the question of the indissolubility of marriage.

Second, Schüller cannot understand how a moral precept which

<sup>71</sup>For the following remarks of Schüller, cf. *art. cit.*, pp. 129-35. Bernard Häring describes the distinction as follows: "The prohibitive precepts (contained essentially in the decalogue) lay down the minimum requirements. They fix the boundaries which all must respect (prescriptive precepts). The Sermon on the Mount determines the ideals and goals toward which we must strive (purposive precepts). Unlike the prescriptive precepts of the external law, these purposive precepts emerge and clearly reveal their obligatory boundaries only as one progresses interiorly in the new life" (*The Law of Christ* 1 [Westminster, Md., 1960] 403-4).

cannot be fulfilled under certain conditions *thereby* becomes a goal-commandment or ideal. Take the case of falsehood. The fact that it is sometimes necessary and licit to speak falsehoods must be traced primarily to the priority of human life (for example) over the prohibition of falsehood, not to the growth or lesser moral maturity of the individual who uses speech in this way. For this reason Schüller argues that we should speak of presumptive precepts (*prasumptiven Erfüllungsgeboten*) rather than goals or ideals. One does not speak of the fifth commandment as an ideal, even though there are times when killing is justified.

Finally, Schüller believes that it cannot be argued that precepts such as that about indissolubility must be interpreted as ideals because we live in an imperfect world (Curran's "between two comings of Jesus"). Why? Because it is only in such a world that a deontological or deontological-sounding precept makes any sense at all. If such precepts fully applied only in a perfect world, a married couple who are living a healthy marriage would, for that very reason, have no existential sense of the indissolubility of marriage as traditionally understood. In a totally healthy world it is, for example, merely academic luxury to say "Do not oppose evil with force"; for by definition there is no force in a perfect world.

Therefore Schüller does not admit the notion of goal-commandment as a defensible way of facing the enormous problem of divorce in the contemporary world. Everything in his writing suggests that he would approach the problem through some form of value-ordering.

This literature is extremely interesting and rich. A sense of tension pervades it, that grows out of and reflects the tragic and contradictory character of reality itself. It seems to me that the literature is in some sense still groping to ask the right question. My own deepening understanding and consequent modification of opinion over the past seven or eight years suggests that the following personal reflections must be viewed as highly tentative and exploratory, very much in the category of a thought-experiment. They will be organized around four ideas, all present in the literature in one form or another: (1) indissolubility as precept; (2) dissolution of marriage *in favorem fidei*; (3) dissolution as declaratory; (4) the social nature of marriage. In developing these ideas, I am concerned with a first marriage now broken down that was, as far as we can judge, a true Christian marriage.

First the notion of indissolubility must be examined. For many centuries this was understood in a highly juridical sense, not least of all because marriage, as a basic human institution, needs legal supports and controls. When a marriage was sacramental and consummated, a *vinculum* was said to come into existence which no human power, neither

the pope (extrinsic indissolubility) nor the marriage partners themselves (intrinsic indissolubility), could untie. Thus one form of pastoral accommodation was "dissolution of the bond." Once indissolubility is conceived in this way, it dictates inexorably certain practical conclusions. Modification of these conclusions is then seen as inconsistent with and a departure from the teaching on indissolubility. Furthermore, in facing contemporary marital breakdown the only alternative is seen to be the treatment of indissolubility not as an absolute demand but as an ideal, or as a demand that allows exceptions.

But should indissolubility be conceived in such juridical fashion? Perhaps not. Here I suggest that indissolubility is an absolute moral precept, a *moral ought* inherent in the marriage union. Because marriage represents the most intimate union of man and woman and is inseparably bound to procreation and education of children, it ought to be one and permanent. That is, from the very beginning there is a most serious obligation upon the couple to support and strengthen this marriage. They are obliged not to let the marriage fall apart and die. This is particularly binding on those who have made their union a sacrament to the world because they have undertaken a true ministry to the world: to mirror Christ's love for and fidelity to his Church.

Some marriages, of course, are mistakes from the beginning and should never have been attempted. The Church has always recognized this in her diriment impediments and her declarations of nullity. There still remains a place, and a necessary one, for such procedures.

Indissolubility as a moral ought implies two things: (1) the couple must strengthen and support their union and not allow it to die; (2) when the relationship has fallen apart and separation occurs, they must resuscitate it. A too quick conclusion that the marriage is dead is itself a violation of this ought, much as a premature pronouncement of death in a heart donor is a violation of his life. Furthermore, the Christian is especially slow to pronounce the death of a marriage, because he believes that behind God's ought is His generous grace. What appears "impossible" to men God's grace will often supply. The Church lives in this hope. Thus the very concept of a "dead marriage" is somewhat problematical to the Christian. A second marriage is a kind of nail in the coffin of the first, an act of despair about its resuscitation. For this reason I do not believe the Church through her juridical structures should undertake to pronounce a marriage dead. She could say that it never existed, that separation is justified—but not that the marriage is dead. That judgment is the responsibility of the couple, and when they make it they are before God. It is they who must accept the responsibility of saying that there is no hope of resuscitation.

But a marriage, like a human body, can die without any hope of resuscitation. When it is the couple's decision that this has happened, several things can be said. First, it seems clear that at least one of the partners (whether through weakness or sinfulness can be left, indeed must be left, to God's merciful understanding) has failed to live up to the precept of indissolubility. What ought not to be has come to be. Because what ought not to be has come to be, a serious disvalue has occurred. This disvalue is both personal and social, because marriage is both personal and social.

When marriage is truly dead, then it seems meaningless to speak of the moral ought of not letting the marriage die. If indissolubility is conceived in highly juridical fashion, the unbreakable *vinculum* continues and subsequent remarriage is in violation of this *vinculum*, is an objective state of sin, must not be allowed, etc. If, however, indissolubility is viewed as an obligation, an ought on the couple, the obligation continues to urge resuscitation of the relationship as long as this is possible.

When the couple has made this decision before God, the Church only notarizes it; for marriage is also a social institution with social effects. I say "only" because "dissolution" must be viewed as declaratory, as public notification of what the couple has concluded.

Is one free to remarry when the marriage is dead? Here I believe the answer must be no.<sup>71a</sup> At least this must be the first response. Marriage is both a personal and a social reality. Its death is, therefore, both a personal and a social disvalue. It represents a failure to achieve and live the permanence Christ enjoins. Similarly, every remarriage after such a breakdown contains elements of disvalue. Why? Because as a *second* marriage it continues and memorializes the failure of the first marriage and thus tends to blunt the radical character of Christ's demand. In doing this it tends to undermine the stability of marriage itself. This is paradoxically all the more so the more successful the second marriage is.

<sup>71a</sup> Häring presents a point of view very similar to the one outlined here: "In past centuries the church has justified separation of spouses on various grounds. The separation, however, excluded remarriage. One reason for this was the hope of future reconciliation. In a patriarchal family system the separated or abandoned spouse was reintegrated in the original family. In today's urban society with its nuclear family, the abandoned spouse is often left alone, exposed to many frustrations and temptations. This has led many Christians to think that, for some divorced people, it would be better to remarry than to 'burn.' The issue is under theological, pastoral and canonical investigation, and sharply divides the different currents in the church. All agree that divorce must be avoided wherever humanly possible. There seems also a consensus that the abandoned spouse *should try to live a celibate life* if reconciliation is impossible. Many would, however, apply here the word of the Lord: 'Not everyone can accept this teaching, only those to whom it is given to do so. . . . Let him accept this teaching who can' (Mt 9:11-12)" ("Human Sexuality," *Chicago Studies* 13 [1974] 306, emphasis added).

Thus out of consideration for others and their stability in marriage one ought not to remarry. But this ought is an implication not of the indissolubility of the first marriage but of the indissolubility that others are trying to live. It is an implication of the social character of marriage—the neighbor as the self, so to speak.

How strong is this “ought not remarry”? It is here that I see the possible relevance of dissolution *in favorem fidei*. If dissolution must be viewed as declaratory, then the above practice suggests that the Church accept freedom to remarry after marital breakdown only on the grounds of a truly proportionate reason—in this instance, the spiritual good of the individual. In other words, if divorce is a disvalue and if subsequent remarriage necessarily contains elements of disvalue (undermining of the stability of marriage), then it seems clear that one must have a proportionate reason for introducing this disvalue into the world. Underemphasis of marriage as a social institution could lead one to overlook this dimension of the divorce-remarriage problem and conceive it one-sidedly in too personal terms. However, if one judges that remarriage is called for by the over-all good of his Christian life (“qui potest capere capiat”), then this would justify the threat a second union would visit on the institution of marriage.

If the Church’s dissolution in cases of the Pauline Privilege is merely declaratory, then it is a structure similar to the one I have outlined that is revealed. But if her action is merely declaratory, two things follow. First, it is the couple alone who can decide that the first marriage is dead. Second, it is the individual alone who can decide before God whether a second marriage is justified by the over-all good of his/her faith, whether there is in his/her case a truly proportionate reason. This judgment, by its very nature, can be made only by the individual, since it is his/her faith that is involved, his/her strength, his/her proportionate reason. The Church in the public sphere must respect this decision of the individual, though for over-all educational purposes it is understandable that she would refuse to witness to this second marriage.

I am suggesting, therefore, that the Church’s policy would be to respect the conscience decision of the individuals in question even as she attempts to enlighten this decision. This does not mean she is tolerating second marriages—at least no more so than in her past pastoral practice, if my understanding of dissolution *in favorem fidei* is accurate. It means only that the Church asserts that freedom to remarry after the death of a marriage is something essentially related to individual strengths and biographies and that therefore such freedom must be left to the individual before God.

This approach transfers a great deal of responsibility to the individual

couple. But that is where I believe it belongs. To expect the Church to institutionalize and make laws for exceptions is to operate within a framework that says that the Church in her policy must cover and control all human relationships. This could easily represent an excessively juridical approach. It is to desire that laws carry the responsibility that properly belongs to individuals. The Church can all too easily think she stands in the place of the individual before God. She does not.

The reflections above are merely probes. They need far more attention and criticism than can be given here. But in light of the general outlines suggested, I should like to reapproach Curran's formulation. He has drawn the conclusion that when a marriage breaks down, is dead, the individuals are free to remarry, and on this basis he has called for a change in Church "teaching and practice on divorce."

I am ill at ease with this formulation of the matter. The root of my discomfort is Curran's possible neglect of the social dimension of marriage. If marriage is not only a personal reality but also a social one, surely this social aspect must be taken into account in developing a pastoral practice. The social aspect of a pastoral practice concerns above all the stability of marriage as an institution. Concretely, what response the Church adopts in the face of the contemporary instability of marriage will either strengthen or undermine marital stability. It must, I believe, be calculated to strengthen it. I do not see how Curran's formulation does this. In other words, by institutionalizing exceptions would not the Church take a long step toward introducing reservations as couples enter marriage, and weakening resolve as they face crises? I am afraid so.<sup>72</sup>

If there is in Curran's formulation a neglect of the social aspect of marriage, it is traceable possibly to a false polarity. He says that divorce and remarriage must be seen not in "juridical and ecclesiological perspective" but in "moral and personal perspective with ecclesial overtones." Thus Curran contrasts moral and personal with the juridical. This strikes me as a false contrast or opposition. The personal is not contrasted with the juridical; it is contrasted with the social. Thus marriage is both a personal and a social reality, with this or that type and number of juridical controls, supports, etc. By opposing personal to juridical, Curran makes the social dimension of marriage all but disappear from his analysis. He does not want this, but I believe it happens—and it appears in his conclusion that when a marriage is dead, the individuals are *without further qualification* free to marry. Does not the social aspect of marriage demand that we consider the over-all stability of marriage as an institution before that freedom is asserted?

<sup>72</sup> On this point cf. James Hitchcock, "Family Values and Moral Revisionism," *Communio* 1 (1974) 309-16.



In summary, then, where marriage is concerned the Church has a double mission: to be a prophetic teacher, to be a healing reconciler. She must mediate to the world both Christ's demanding challenges and his merciful forgiveness and understanding—and she must perform both tasks without undermining either. Her response to the contemporary problem of divorce does not, I believe, call for a change in her teaching. This response must remain essentially at the pastoral level. What form such a pastoral response takes depends on many factors, chief of which is, of course, the integrity of the teaching itself. In our time I suggest that the appropriate form is to turn over much more responsibility to the individual(s) involved.

#### QUESTIONS IN BIOETHICS

My original intent was to conclude this survey with a section on bioethics. Yet the literature is so large and intractable<sup>73</sup> that both wisdom and fairness suggest that only a narrow and quite arbitrary sampling be attempted, to point up the direction of some of the concerns in this field.

Several years ago Paul Ramsey published *The Patient as Person*,<sup>74</sup> in which he correctly argued that there comes a time when the shape of moral responsibility is *only* accompanying with the dying in their final passage. He then discovered that altogether too many people were agreeing with him and that he was caught up in a social trend that used as its model "death with dignity." As a self-styled "generally happy prophet of the doom facing the modern age," Ramsey returned to the

<sup>73</sup> A few examples: James J. Gill, S.J., "Euthanasia: A Reflection on the Doctor and the Hospital," *Catholic Mind* 72 (1974) 25-30; Michael Hamilton, "Medical Research: Some Ethical Issues," *Christian Century* 91 (1974) 744-46; J. Card. Villot, "La médecine et la protection de la vie," *Documentation catholique* 71 (1974) 60-61; Friedrich Tennstädt, "Euthanasie im Urteil der öffentlichen Meinung," *Herder Korrespondenz* 28 (1974) 175-77; Markus von Lutterotti, "Der Kranke denkt anders über den Tod als der Gesunde," *ibid.*, pp. 393-99; James B. Reichmann, "Planned Death and Professor Fletcher," *Homiletic and Pastoral Review* 74 (1974) 50-56; Norman D. West, "Terminal Patients and Their Families," *Journal of Religion and Health* 13 (1974) 65-69; Merle Longwood, "Ethics and the Taking of Life," *Lutheran Quarterly* 26 (1974) 64-76; Guy Bourgeault, "Expérimentation humaine et manipulation de l'homme," *Relations* 34 (1974) 240-44; Marcel Marcotte, "Le droit des mourants à la vérité," *ibid.*, pp. 142-47; W. Ross Yates, "Toward a New Morality of Death," *Religion in Life* 43 (1974) 79-91; Roger Mehl, "La signification éthique de la mort," *Revue d'histoire et de philosophie religieuses* 54 (1974) 249-60; F. Böckle, "Euthanasia: Riflessioni sugli equivoci di un termine," *Studia Patavina* 20 (1973) 455-63; J. Moltmann, "L'Influence de l'homme et de la société sur le progrès bio-médical," *Vie spirituelle: Supplément* 108 (Feb. 1974) 27-45; Joseph Fletcher, "Medicine, Morals, Religion," *Theology Today* 31 (1974) 39-46. Cf. also the useful bibliographies provided by the Report of the Hastings Center and the many helpful articles in *Linacre Quarterly*.

<sup>74</sup> Paul Ramsey, *The Patient as Person* (New Haven, 1970).

subject and stated his thesis in the provocative title "The Indignity of 'Death with Dignity.'" <sup>75</sup> Here Ramsey argues that we do not keep human company with the dying if we interpose between them and us most of the current notions of death with dignity. These notions are shallow and crass, often implying that death achieves dignity when tubes are withdrawn, respirators stopped, and heart-thumping omitted. These are only preludes to a dignified death, a term Ramsey rejects under any circumstances. According to Ramsey, our notion of "death with dignity," if it is to go beyond such technological preludes, must include and encompass the final indignity of death itself. Death itself is the final indignity. There is no way around this. Attitudes that attempt to beautify death, to make it a rhythm of nature or a part of life, are simply false. So while we can keep company with the dying, we can never make death itself dignified.

Ramsey's essay is responded to by two formidable thinkers, Robert Morison and Leon R. Kass. <sup>76</sup> Kass's study is particularly enlightening, since it advances in much more detail and with many more arguments the point also made by Morison. Noting that Ramsey's basic thesis really is "The Indignity of Human Mortality," Kass first analyzes the notion of dignity, then sets out several arguments why we may not view death as an indignity in itself. For instance, many instances of heroism and martyrdom show that "death can be for some human beings the occasion for the display of dignity, indeed of their greatest dignity." Moreover, human mortality is a spur to human excellence. It is Kass's contention that death is indeed a natural thing, a necessary part of the life cycle. Ramsey's view he sees as stemming from Ramsey's faith, rooted in this matter on the doctrine of original sin and its wages as found in St. Paul. On the Aristotelian, Jewish, and modern scientific views (especially with the theory of evolution), death is "natural" and "proper to man." On the basis of the arguments he raises in support of this contention, Kass suggests that the dread of death may be but one form of Christian humanism, and that, therefore, accompanying with the dying need not view death as an indignity in itself to remain truly human.

Ramsey returned to this discussion using Marya Mannes' *Last Rights* and Stewart Alsop's *Stay of Execution* as his vehicles. <sup>77</sup> Behind the remarkably different attitudes toward death in these books Ramsey sees a whole philosophy of life. Mannes endorses rationalized or administered

<sup>75</sup> Paul Ramsey, "The Indignity of 'Death with Dignity,'" *Studies* (Hastings Center) 2 (1974) 47-62.

<sup>76</sup> Robert S. Morison, "The Last Poem: The Dignity of the Inevitable and the Necessary," *Studies* 2 (1974) 63-66; Leon R. Kass, "Averting One's Eyes, or Facing the Music?—On Dignity in Death," *ibid.*, pp. 67-80.

<sup>77</sup> Paul Ramsey, "Death's Pedagogy," *Commonweal*, Sept. 20, 1974, pp. 497-502.

dying. She argues that those who “opt for life on any terms have never known life in its fullest terms.” Commenting on that, Ramsey notes that her illustrations are mainly drawn from those whose passion for a full life turns suddenly into an embrace of death. To which he says: “That’s a fair proof that neither true life nor real dying has been the instructor.” Behind the counsels of Mannes Ramsey sees a sterile, antilife elitism that has nothing to do with *the human*. If death is truly dreadful, if it is the last indignity, then the term “euthanasia”—“good death”—“should be wholly jettisoned from all our talk about death and dying.” “Death with dignity” only adds cosmetics to the dubious rhetoric of “euthanasia.”

Contrarily, in Alsop’s moving book Ramsey sees death as it ought to be thought of. “Death is nothing but dreadful to any human being; it is not a fact of life negotiable or manageable like other facts of life.” It is Ramsey’s conviction that what we have done with sexuality we are doing with death. We hoped to improve matters, he contends, by chatting about sex all day for three decades. All we have managed to accomplish is “calisthenic sexuality.” Without a sound understanding of the *humanum*, we will do the same thing with death. We will have “calisthenic dying”—that is, deliberate and administered death.

Ramsey is making an extremely important point. Our actions, our care for the dying (ourselves as well as others), our ethical judgments of various alternatives are but extensions of our attitude toward death and life. And the attitude of our culture is one that turns “mysteries to be contemplated and deepened altogether into problems to be solved.” This is gross submission to the requirements of “instrumental social rationalism,” as he puts it. On the other hand, I believe, one need not take sides on the Ramsey-Kass disagreement about whether death is natural or is rather the last indignity; for we find both themes (death as natural, death as enemy and wages of sin) suggested in the New Testament. So I believe that both Ramsey and Kass are right if their emphases are read in a way that is not mutually exclusive. Some hint of this is found in the fact that at the level of policy with respect to the dying there is little difference between them. Moreover, it must be remembered that as above all a person with normative concerns, Ramsey is primarily concerned not with whether we call death natural, part of life, and so on, but with what people judge they are warranted to do with such a notion. There is no *necessary* connection between “death as natural” and the type of administered death Mannes promotes. Once again, the practical identity of the positions of Ramsey and Kass at the policy level indicates this. Nor is there any *necessary* connection between “death as indignity” and the type of medical vitalism Ramsey would certainly reject.

If attitudes toward life and its meaning shape attitudes toward death and its meaning, and if these attitudes largely determine the type of support and care that is extended to those who are ill or dying, it is reasonable to think that these attitudes will also influence the care a society provides for disadvantaged infants. John Fletcher reports the literature on attitudes toward defective newborns.<sup>78</sup> The attitude is at first one of rejection; it then evolves very often into feelings of anger, guilt, self-rejection on the part of the parents. After a lapse of time and given proper interchange between health professionals and parents, a kind of "re-presentation" of the child often occurs leading to acceptance and care.

The advent of amniocentesis and selective abortion is likely to affect this attitude in a pronounced way. As Fletcher puts it, "The basic question is, will the initial proclivity to reject the child, which we studied earlier, be reinforced by the obvious conclusion that the child might (or 'should have') been prevented? . . . Will parents of defective newborns be more inclined to abandon them because they feel more guilty than ever because of omitting an opportunity to diagnose?" Fletcher suspects that the feedback from amniocentesis will be more negative than positive where defective children are involved.

With the availability of advanced and sophisticated life-support systems, it is possible to keep many newborns alive who in earlier years would have died shortly after birth. Instances of this kind raise extremely delicate moral problems. David Smith weighs carefully the various options (neonatal euthanasia, withholding treatment).<sup>79</sup> He rejects euthanasia. Turning to withholding of treatment, he concludes that it is wrong "unless (1) it can be argued that the action is necessary to protect the personal life of at least one specifiable other person or (2) the infant cannot receive care in any other form." Practically this amounts to a prohibition of "letting infants die" in the case of the vast majority of newborns.

Perhaps Smith is right, but I should like to raise a problem with the form of argument he uses. At one point he states: "The error we want to avoid is the notion we should solve our limited resource problem simply by assessing the 'quality' of the output." In other words, Smith feels it necessary to stay a long arm's length from "quality of life" judgments. Yet in another place he argues: "I do not want to argue for an obligation on physicians and families to use extraordinary means on all newborns. In the course of care-cure of some babies it *may* become clear that additional therapy will cost the baby more than he can gain." It seems

<sup>78</sup> John Fletcher, "Attitudes toward Defective Newborns," *Studies* 2 (1974) 21-32.

<sup>79</sup> David H. Smith, "On Letting Some Babies Die," *Studies* 2 (1974) 37-46.

difficult to maintain consistently both of these statements. Take the phrase "cost the baby more than he can gain." What does this mean except to impose on the baby survival and a *quality of life* judged unacceptable? His life can be saved but it costs him too much. That "cost," and that "gain," it would seem, can refer only to a quality of life, much as that rendering is associated with some other objectionable practices.

I have attempted to face this problem by unpacking the terms "ordinary" and "extraordinary" as applied to lifesaving procedures.<sup>80</sup> It has always been acknowledged that these terms are highly relative to time, locale, and many circumstances of the patient. They are really code words to summarize several other value judgments. The two basic value judgments constituting a means extraordinary are hardship to the patient and hope of benefit. Thus, if a certain procedure (surgical, medicinal, etc.) *either* imposed too great a hardship on the patient *or* offered no reasonable hope of benefit, it was said to be extraordinary and per se nonobligatory. Thus, in the case of a comatose terminal-cancer patient, it has been concluded that artificial life-sustainers such as oxygen and intravenous feeding need not be used *because there is no reasonable hope of benefit for the patient*, not because there would be grave hardship in obtaining or using these supports.

Once one grants that in such instances artificial life-sustainers could actually prolong the physical life of the patient (for a day, two days, a week, etc.) and yet that there is no reasonable hope of benefit for the patient (he stands to gain nothing), it is clear that one is talking about the *kind of life* the patient would have in those remaining days or weeks. This is, in my judgment, a quality-of-life statement. And it has been decisive in determining whether oxygen is ordinary or extraordinary.

On the basis that quality-of-life judgments are packed into the distinction ordinary-extraordinary and are often decisive in the way these terms are applied, and on the further basis that in Christian perspective the meaning, substance, and consummation of life is found in human relationships, I have proposed that the quality-of-life criterion that ought to be applied to these decisions is "potential for human relationships." In the Christian tradition, life is not a value to be preserved in and for itself. It is a value to be preserved precisely as a condition for other values and therefore insofar as these other values remain obtainable. Since these other values cluster around human relationships, it seems to follow that life is a value to be preserved only

<sup>80</sup> Richard A. McCormick, S.J., "To Save or Let Die," *Journal of the American Medical Association* 229 (1974) 172-76, and *America* 130 (1974) 6-10. Cf. also the correspondence in *America* 131 (1974) 169-72.

insofar as it contains some potentiality for human relationships. On this basis I concluded, with several important caveats, that "when in human judgment this potentiality is totally absent or would be, because of the condition of the individual, totally subordinated to the mere effort for survival, that life can be said to have achieved its potential." In other words, it may be allowed to die.

Reactions to this study were—it can be said in the cozy confines of these "Notes"—interestingly disproportionate to the modest claims of the author and the essay.<sup>81</sup> Actually the position proposed is quite traditional, or at least in tight continuity with traditional categories, if only the implications of traditional terms are examined carefully.

Thomas J. O'Donnell, S.J., states his "substantial agreement" with my proposal, "except perhaps whereas he says that I had 'hinted at' the same solution in my book, I thought I had pretty well arrived at and explored it, in the course of some twenty pages."<sup>82</sup> The only difference O'Donnell sees in his formulation and mine is one of mode of expression and vocabulary. Perhaps that is so. But O'Donnell continues to talk in terms of extraordinary means in these instances, whereas the thrust of my remarks involved a move beyond the language of ordinary-extraordinary means to the quality-of-life judgments so clearly indicated in them.<sup>83</sup>

O'Donnell's interesting and thoughtful comment continues as follows:

There is one other dimension of the matter that perhaps Father McCormick did not explicate sufficiently, and it is this: when we begin to identify means as ordinary and extraordinary in relation to the condition of the patient, then moral clarity demands the introduction of another category of means which I have chosen to call "minimal means" and *which must always be used, irrespective of the condition of the patient*. By such minimal means I understand basic sustaining and hygienic measures such as normal feeding, resting and other usual assistance (such as clearing the air passages of the newborn). The human composite is a dependent dynamism, and the neglect of such minimal means would be equivalent to an act of positive destruction.

This proposal is also endorsed by Frank J. Ayd, Jr., editor of the *Medico-Moral Newsletter*.<sup>84</sup>

<sup>81</sup> E.g., an editorial in the *Priest* (Oct. 1974) was titled "Nazi Morality." The editorial is unfortunately and embarrassingly uninformed about the medical and moral dimensions of this problem.

<sup>82</sup> Cf. *Medical-Moral Newsletter* 11 (1974) 5-8.

<sup>83</sup> Marc Lappé writes: "Clearly the question of non-treatment in these cases cannot hide behind an arbitrary distinction between ordinary and extraordinary care since both cases require the same intervention. It is rather a case of who deserves that care. Where 'medical indications' based on an understanding of physiology begin to be laced with 'social indications' of whom to treat, it is crucial that we consciously and judiciously deal with the question of assigning values to human lives" (*Tufts Medical Alumni Bulletin* 33 [1974] 27).

<sup>84</sup> Cf. n. 82 above.

Here I believe a distinction is in order. While I agree in substance with the notion of "minimal means," the matter could be formulated more precisely. When it is judged morally justifiable not to extend certain life-sustaining measures to a patient (whether adult or neonate), the obligation is then to care and comfort. What form this care and comfort takes can vary. There are instances, e.g., where what O'Donnell calls "normal feeding" could cause great discomfort or even (in some neonatal problems) kill the patient. In such cases these minimal means must *not* always be used.

Andre Hellegers, M.D., director of the Kennedy Institute (Georgetown University) is in basic agreement that some such criterion as I suggested does indeed function behind the relativity of the terms "ordinary" and "extraordinary."<sup>85</sup> His concerns are more at the level of application. First, he fears that mindsets about individual cases easily become social policies, with all the abuses inseparable from such generalization. Second, as for "potential for human relationships," there are great differences in what people set as the criteria for whether such relating is going on. Finally, "how do you ever *not* have a doubt in a newborn's case?" These are good questions and continued attention to them is likely to prove the usefulness or uselessness of the criterion I proposed.

In summary, these decisions are being made, sometimes perhaps abusively. And they are being made in terms of human judgments expressed by the medical profession in a variety of ways: e.g., "viable baby," "no realistic human future," "functionally incompetent," "meaningful life," and so on. It is clear that such terms contain a whole value system. It is the task of contemporary theologians, in interdisciplinary dialogue, to lift up those value systems and test them in the light of the value perceptions of the Christian tradition.

The attitudes one brings to research on fetuses and children (and the unprotected in general) are not discontinuous with those shaping moral judgments on the support of infant life. In 1970 the British Government established a special Advisory Group on the Use of Fetuses and Fetal Material for Research. This group, under the chairmanship of Sir John Peel, published its report in May 1972. In 1973 (Nov. 16) an interagency study group within the Department of Health, Education and Welfare (DHEW) published in the *Federal Register* a long document containing proposed guidelines for the protection of special subjects in biomedical research. Among these special subjects were "the fetus" and "the abortus." In an excellent study LeRoy Walters critiques these two documents and in the process raises some of the more fundamental moral

<sup>85</sup> Andre Hellegers, "Relating Is the Criterion for Life," *Ob. Gyn. News*, Oct. 15, 1974.

issues involved.<sup>86</sup> For instance, where there is question of use of a dead fetus (after an induced abortion), Walters concedes that most observers would see less serious ethical problems than those involving live fetuses. However, he raises the ethical issue of co-operation as being possibly relevant. "Ought one to make experimental use of the products of an abortion-system, when one would object on ethical grounds to many or most of the abortions performed within that system?"

Walters sees several fundamental presuppositions operative in the documents and in discussion of this matter in general. One is that the results of fetal research will be *medical* and *good*. He argues that serious *social* consequences will follow and that they will be *mixed* at best. Another presupposition is that prematurity (an admitted major cause of infant death in this country) must be stopped; otherwise those who could have prevented it (by any means?) are responsible for these deaths. A premise behind these and similar questions of Walters is the inherent value of fetal life. On the basis of the Judeo-Christian tradition, Walters contends that "it is at least not *implausible* to argue that fetal life ought to be highly valued." If that is the case, certain moral conclusions apropos of experimentation flow rather spontaneously from such an evaluation. An enlightening analysis.

In this connection I should like to call attention to a thorough, carefully reasoned study by Paul Ramsey to appear soon.<sup>87</sup> After a scathing denunciation of the secrecy surrounding the production of the DHEW proposed guidelines mentioned above, Ramsey turns his attention to the substance of the two documents Walters had commented upon. He likens the living previable human fetus to an unconscious patient. Furthermore, the previable fetus (in cases of spontaneous or induced abortion) resembles a dying patient. Finally, the human fetus resembles, in cases of induced abortion, the condemned. Accepting the fetus as a human being, Ramsey then approaches nontherapeutic experimentation on the fetus by asking whether it is morally appropriate to experiment on the dying, the unconscious, the condemned. Anyone familiar with Ramsey's thought can guess rather accurately where he stands on these issues. Which is not to say that his study is unenlightening; quite the contrary. It is a helpful and disciplined piece of moral reasoning.

One interesting point Ramsey makes is that the question of fetal

<sup>86</sup> LeRoy Walters, "Ethical Issues in Experimentation on the Human Fetus," *Journal of Religious Ethics* 2 (1974) 33-75.

<sup>87</sup> Paul Ramsey, *The Ethics of Fetal Research*, to be published soon in paperback by the Yale University Press. Ramsey kindly forwarded me a copy of the manuscript. See also Gary L. Reback, "Fetal Experimentation: Moral, Legal, and Medical Implications," *Stanford Law Review* 26 (1974) 1191-1227.



experimentation is different from that of abortion. He writes:

Unavoidably the morality of abortion converges with and diverges from other appropriate themes or considerations in any discussion of our question. Indeed this ought to be the case. Still I suggest that someone who believes that it would be wrong to do non-therapeutic research on children, on the unconscious or the dying patient, or on the condemned may for himself have settled negatively the question of the morality of fetal research, while someone who believes that most abortions performed today are wrong may be tending but he has not yet arrived at an ethical verdict upon that question.

In other words, even if the abortion is morally justifiable, nontherapeutic research on the living abortus is really research on the dying. And that is a question different from the morality of the abortion itself.

Here a comment. There is an almost irresistible tendency to argue here that *qui potest maius, potest et minus* (he who is empowered to do the greater thing is also empowered to do the lesser). That is very often true. Concretely, if one has the right to perform the ultimate harm (abortion), it would seem that one has the right to perform the lesser harm (harmful nontherapeutic experimentation). However, the application of this to the abortion and experimentation problems needs a distinction. If one believes that abortion is justifiable *because the fetus is not human* (or need not be treated as such), *is only maternal tissue*, etc., there is no problem with any kind of experimentation on "it" at any time, providing maternal health is safeguarded. *Qui potest maius, potest et minus*. If, however, the fetus must be seen as human, then the issues are separable, as Ramsey notes. Ramsey's insistence that they are different issues reflects his acceptance of the protectable humanity of the fetus. I agree. But that is the key issue. Interestingly, the restrictions on fetal experimentation (the *minus*) in the documents studied by Walters and Ramsey may stimulate our culture to a return to sanity where abortion (the *maius*) is concerned.

At this point a word about the "Declaration on Procured Abortion" issued Nov. 18, 1974 by the Sacred Congregation for the Doctrine of the Faith and ratified by Pope Paul VI himself.<sup>88</sup> This is the most detailed and authoritative utterance on abortion in some years. It seems rather obviously occasioned not only by the liberalization of abortion law throughout much of the world, but also by the heavy theological literature of the past few years. For instance, the document notes of the right to life that "it is not recognition by another that constitutes this right. This right is antecedent to its recognition; it demands recognition

<sup>88</sup> At this time I am reliant on the text kindly forwarded by Msgr. James McHugh, Director, Family Life Division, United States Catholic Conference.

and it is strictly unjust to refuse it." Somewhat later we read (of the fertilized ovum) that it "would never be made human if it were not human already." These statements are rather obviously aimed at the *Etudes* dossier published in January 1973.<sup>89</sup>

Two further theological points in this otherwise splendid Declaration call for comment. Speaking of the immorality of abortion, it states: "It may be a question of health, sometimes of life or death, for the mother. . . . We proclaim only that none of these reasons can ever objectively confer the right to dispose of another's life, even when that life is only beginning." If this wording states—as it clearly seems to—that abortion is morally wrong even when the only alternative is to lose both the mother and the child, then it would find itself in disagreement not only with a great number of theologians, but even with a number of bishops.<sup>90</sup>

Further, "From a moral point of view this is certain: even if a doubt existed concerning whether the fruit of conception is already a human person, it is objectively a grave sin to dare to risk murder." This statement is based on the traditional axiom "*idem est in moralibus facere et exponere se periculo faciendi*" (In moral matters it is one and the same thing to do a thing or to expose oneself to the danger of doing it). The quite traditional example used to illustrate this is the case of the hunter who shoots into the brush at a moving object, uncertain as to whether it is a man or animal that moved. I believe it can be convincingly shown that the above axiom must be restricted to two instances: (1) acting with an uncertain *conscience*; (1) *rash* (scil., unjustified) exposure to the danger of doing harm.<sup>91</sup> Thus, in the example above, if the hunter were a dying (starving) hunter and his last chance for food was in that brush, his shot would not necessarily be rash. Something similar could be argued with regard to abortion. In the Declaration's words, "it is objectively a grave sin to dare to risk murder"; yes, if that risk is capricious and not justified by a truly proportionate reason.

Ramsey's position on fetal experimentation roots in his position on nontherapeutic experimentation on children. We may not, he argues, submit a child to procedures that involve any measure of risk of harm or to procedures that involve no harm but simply "offensive touching." "A

<sup>89</sup> "Pour une réforme de la législation française relative à l'avortement," *Etudes*, Jan. 1973, pp. 55-84.

<sup>90</sup> The Belgian bishops note: "The moral principle which ought to govern the intervention can be formulated as follows: since two lives are at stake, one will, while doing everything possible to save both, attempt to save one rather than to allow two to perish" (cf. *THEOLOGICAL STUDIES* 35 [1974] 350).

<sup>91</sup> Cf. my *The Removal of a Fetus Probably Dead to Save the Life of the Mother* (Rome, 1957).

subject can be wronged without being harmed.”<sup>92</sup> This occurs whenever he is used as an object, or as a means only rather also as an end in himself. Parents cannot consent to this type of thing regardless of the significance of the experiment.

Why is this so? Ramsey argues as follows: “To attempt to consent for a child to be made an experimental subject is to treat a child as not a child. It is to treat him as if he were an adult person who has consented to become a joint adventurer in the common cause of medical research. If the grounds for this are alleged to be the presumptive or implied consent of the child, that must simply be characterized as a violent and a false presumption.” Thus he concludes that no parent is morally competent to consent that his child be submitted to *any* nontherapeutic experimentation. In other words, proxy consent to purely experimental procedures is without moral warrants.

I have attempted to argue not a contrary position but a modified one that would allow for nontherapeutic experimentation on children where there is no discernible risk or undue discomfort.<sup>93</sup> The heart of the argument is this: if we analyze proxy consent where it is accepted as legitimate—*scil.*, in the *therapeutic* situation—we will see that parental consent is morally legitimate because, life and health being goods for the child, he would choose them because he *ought* to choose the good of life. In other words, proxy consent is morally valid precisely insofar as it is a reasonable presumption of the child’s wishes, a construction of what the child would wish could he do so. The child would so choose because he *ought* to do so, life and health being goods definitive of his flourishing.

Once proxy consent in the therapeutic situation is analyzed in this way, the question occurs: Are there other things that the child *ought*, as a human being, to choose precisely because and insofar as they are goods definitive of his well-being? As an answer to this question I have suggested that there are things we *ought* to do for others simply because we are members of the human community. These are not precisely works of charity or supererogation (beyond what is required of all of us) but our personal bearing of our share that all may prosper. They involve no discernible risk, discomfort, or inconvenience, yet promise genuine hope for general benefit.

<sup>92</sup> Cf. *The Patient as Person*, pp. 27–40. Ramsey has also continued his discussion of this matter in *Biological Revolution: Theological Impact* (proceedings of a conference [April 1973] of the Institute for Theological Encounter with Science and Technology [ITEST]).

<sup>93</sup> Richard A. McCormick, S.J., “Proxy Consent in the Experimentation Situation,” *Perspectives in Biology and Medicine* 18 (1974) 2–20. Charles Curran has arrived at a conclusion very close to the one I defend: “Some would argue that children and those who cannot consent on their own should never be used in experimentation. I would maintain that children can be used in experimentation if there is no discernible risk to them, and their parents consent” (“Human Life,” *Chicago Studies* 13 [1974] 293).

In summary, if it can be argued that it is good for all of us to share in these experiments, and hence that we *ought* to do so (social justice), then a presumption of consent where children are involved is reasonable and proxy consent becomes legitimate.

William E. May, in a carefully wrought study, reviews fully and accurately this exchange between Ramsey and the author of these "Notes."<sup>94</sup> The position I have summarized above he sees as "attractive at first reading" and "it seems quite reasonable." Yet he finally disagrees with it because it must regard the subject in whose behalf consent is given as a moral agent. An infant or child, however, is not a moral agent. When he analyzes the diagnostic-therapeutic situation, May insists that proxy consent is legitimate not because of any constructed moral obligations the child has, but simply because a good is at stake in the child, a need is there, and the parents and medical profession are in a position to meet this need. In the purely experimental situation, however, the child is not in any need. Therefore proxy consent is not justified.

May's point is persuasively argued. I shall leave to others the task of refereeing the exchange. Before doing so, however, two points can be made to help the referees. First, I do not believe the position I presented must necessarily regard the infant as a moral agent. Nor need it imply that he has obligations. It need only suggest that what it is reasonable and legitimate to do experimentally with youngsters might be constructed off what others who are moral agents *ought* as humans to do; for though they are not yet moral agents, infants are humans in the fullest sense.

Second, at some point this discussion must come to grips with the fact that Ramsey's position ("offensive touching")—the one preferred by May—could not allow any nontherapeutic experimentation whatsoever, even the most trivial such as a buccal smear or routine weighing. This is the logical and necessary conclusion to Ramsey's argument. However, most theologians and researchers with whom I have discussed this matter see this as unreasonable and at variance with common sense.

Completion of these "Notes" is always accompanied by a sense of incompleteness and regret. So much has to be bypassed that one's only recourse is to acknowledge the fact and call the reader's attention to the material neglected.<sup>95</sup>

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<sup>94</sup> William E. May, "Experimenting on Human Subjects," *Linacre Quarterly* 41 (1974) 238-52.

<sup>95</sup> Albert R. Di Ianni, "Is the Fetus a Person?" *American Ecclesiastical Review* 168

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