I

Catholics and Protestants

It is paradoxical that we must begin a history of divorce in Western society with a discussion of Roman Catholic teaching about marriage and divorce, for it was (and remains) Catholic doctrine that a validly contracted marriage cannot be dissolved and that divorce is therefore prohibited. This doctrine underlay the ideology and law of marriage in Europe for centuries before the Protestant Reformation (and for centuries after it in some countries), so that the history of divorce since the sixteenth century has been, for the most part, a progressive rejection of the Catholic position. By the end of the twentieth century we have reached a point where civil divorce laws, popular attitudes toward divorce, and mass practices in respect to divorce owe virtually nothing to the Roman Catholic doctrines that were dominant only five centuries earlier.

If we think of the history of divorce as being, on one important level at least, the abandonment of Catholic teaching on marriage, we must begin with a clear understanding of that teaching and its development. This first chapter discusses these issues, together with the most significant single challenge to Catholic matrimonial doctrines, namely the Protestant teachings on marriage and divorce that were articulated in the sixteenth century, during the Reformation.

The Catholic church's position on divorce, as it was when the Protestants rejected it, can be stated with deceptive simplicity: Divorce was forbidden because a validly contracted Christian marriage could be dissolved only by the death of the wife or husband. It was a corollary of this that a married person could not enter into another marriage while his or her spouse was still alive. Yet we can immediately note potential exceptions to what seems an absolute bar to divorce. The first, known as the Pauline Privilege (found in the New Testament in Paul's Letters to the Corinthians [1 Cor. 7:15]), appeared to allow remarriage by a Christian who had been deserted by his or her non-Christian spouse. The second potential exception to divorce concerned a marriage that had not been sexually consummated and where the husband or wife wanted to enter a religious order. In both cases the

marriage might be dissolved in "favor of the faith." Despite such qualifications (and the circumstances must have been rarely encountered), it is adequate to describe Catholic doctrine, as it had developed by the thirteenth century, as simply forbidding divorce.

This doctrine, eventually set down in canon law by the Council of Trent in the 1560s, was achieved only after centuries of debate within the church. But before we discuss the development of the doctrine, we must note various meanings of the word *divorce* itself, for its variety of meanings and contexts has led to confusion about the history of the concept.

In this book *divorce* will be used in the restrictive sense of a total dissolution of a validly contracted or celebrated marriage. In the Catholic church's Latin documents it was often referred to as a *divortium a vinculo matrimonii* (divorce from the marriage bond), and it is this sort of divorce that enabled (or would have if the church had allowed it) men and women to remarry. Confusion has arisen, however, because the words *divorce* and *divortium* were also used in two other senses with respect to marriage: annulment and separation. Annulments (or nullifications) of marriage are discussed in some detail later, and here it is enough to note that the difference between a divorce and an annulment is that a divorce dissolves a marriage that exists, whereas an annulment is a declaration that a marriage had never existed between a specific man and woman. The crucial difference between a divorce and a separation, on the other hand, is that a divorce dissolves a marriage and permits the former spouses to remarry (although specific laws might limit that right), whereas a separation does not destroy the marriage bond, although it permits wife and husband to live apart and to lead separate lives.

In its developed form, Catholic doctrine made provision for annulment and separation but not for divorce. It has often been argued, however, that the church circumvented its own doctrine of marital indissolubility by allowing annulments to be used as if they were divorces, so that many annulments in name were divorces in intent. In other words it has been suggested that spouses who wanted to free themselves from their marriages exploited the provisions for annulment, and that the judges of the church courts connived in the practice.

The provisions for annulment rested upon the impediments to marriage that the church laid down. Some of these impediments, called *diriment* or *nullifying* impediments, were a bar to marriage unless the couple obtained a dispensation from them. The best-known such impediments were those of consanguinity and affinity, the relationship of two people by blood or marriage, respectively, such that close relatives could not marry one another. The specific degrees of relationship within which marriage was prohibited were drawn directly from the

Bible, but the list was extended by the church. By the twelfth century marriage was forbidden to the seventh degree, which meant that a man could not marry a woman who was his sixth cousin or more closely related. Jean-Louis Flandrin describes the practical implications of this rule in this way: If in each generation each couple married off one boy and one girl, then a marriageable youth would soon be in a position of being unable to marry all the marriageable girls he could possibly know, together with many he did not know.

Perhaps because of the inconveniences caused by these rules in a society where geographical mobility was limited, and where most marriages united men and women from the same parish, the Fourth Lateran Council (1215) reduced from seven to four the range of degrees within which marriage was banned. This reform permitted the marriage of men and women who were more distantly related than third cousins.

Strict consanguinity and affinity were only two kinds of diriment impediment to marriage. Another was illegitimate affinity (*affinitas illegitima*), which was the relationship formed by sexual intercourse. Under the rules set down in 1215, a man was prevented from marrying the sister, first, second, or third cousin of, or any woman more closely related to, a woman with whom he had had sexual relations. A further bar to marriage was spiritual affinity, which was the relationship between the members of a family and any of the active participants at one of its baptisms or confirmations. An example is the case in the English town of York in the fourteenth century where a man, a widower, was forbidden to marry the woman who had stood as godmother to one of his children by his first marriage.

Catholic doctrine raised yet other impediments to a valid marriage. A prior matrimonial engagement (precontract) to one person prevented an individual from marrying another, as did, of course, an existing marriage. There were impediments of age in that a boy had to be twelve and a girl fourteen before marrying. Impotence – the inability to complete sexual intercourse – was an impediment preventing a valid marriage. And because consent was an essential element of marriage in Catholic doctrine, lack of consent was also a diriment impediment. Yet additional impediments existed where one of the parties had taken religious vows or where one of the parties had attacked the sanctity of the previous marriage of the other (by killing the first spouse or by committing adultery with a promise to marry as soon as the accomplice was free to do so). Finally, marrying clandestinely could be a bar to a marriage being recognized as valid.

Clearly, forming a valid marriage was far from straightforward, and such impediments must have prevented many marriages from taking place. Some couples obtained dispensations in order to marry despite the existence of impediments. The church recognized the difficulties

of finding a marriageable partner of acceptable social status in small localities where everyone seemed to be related and would sometimes allow marriages between relatives as close as uncle and niece. Yet it is clear that marriages also took place where there were impediments and without a dispensation having been granted. These were marriages that were technically invalid and were susceptible to being annulled – being declared nonmarriages – if evidence of the impediment were brought to the attention of the ecclesiastical authorities.

The question we must ask is whether medieval men and women abused the rules of marriage by seeking out impediments when they wanted to escape from their marriages, thus using annulments as substitutes for divorce. Some historians have argued that they did. The great medievalist Frederick Maitland, for example, writes that "spouses who had quarrelled began to investigate their pedigrees and were unlucky if they could discover no diriment impediment." Similarly, in his history of divorce and the church A. R. Winnett refers to the "undermining of the indissolubility of marriage by the expediency of annulments." No doubt the impression that annulments were cynically misused has been reinforced by the popular image of Henry VIII, annulling the marriages to wives of whom he apparently had no more use.

However, more recent research on the operations of the medieval church courts has tended to support the view that there was little amiss in their disposition of matrimonial cases. R. H. Helmholz's fine study of marriage litigation in medieval England shows that only a small proportion of cases regarding marriage involved annulment: They comprised twelve out of eighty-eight matrimonial cases in one set of court records and ten out of ninety-eight in another, with an overall representation of between 10 and 20%. Not only were suits for annulment quite rare, but the ecclesiastical judges demanded rigorous proof of an impediment before annulling a marriage, and the evidence of more than one witness was required to establish facts.

Helmholz cites the petition for annulment of the marriage of Richard Broke and his wife Joan because a certain Peter Daneys claimed, first, that he was related to Richard in the second degree of consanguinity, and second, that he had had sexual relations with Joan before her marriage to Richard. If the allegations were true, Richard and Joan would have been related to each other by their respective blood and sexual relations to Peter, the third party, and their mutual though indirect relationship would have been a diriment impediment from which they had not been dispensed before marriage. The evidence brought forward in the case was that of one witness who stated that Richard and Peter "sprang from two sisters" and that it was a matter of public knowledge, though the witness had no firsthand knowledge,

that Peter and Joan had had a sexual relationship. In this case the impediment was declared not proved and the marriage was upheld. On balance, Helmholz concludes from his study of annulment petitions that rather than grant annulments easily, the church courts operated on the principle "that it was better to risk allowing consanguineous unions than to risk separating couples God had legitimately joined together."

The church did not seem to operate differently elsewhere. Between 1384 and 1387 the bishop's court in Paris (the most important church court in France) heard almost 500 matrimonial cases, but annulled only 10 marriages. One annulment was based on consanguinity, one on the husband's impotence, and eight on the ground of bigamy (where the second marriage was declared void). As in England, the ecclesiastical courts in France appear to have been reluctant to annul marriages, although they did not hesitate when presented with convincing grounds. One such case was heard by the bishop's court at Troyes in 1530. There a man demanded the annulment of his son's marriage because it was "incestuous"; the son's uncle had had a sexual relationship with the wife before the marriage and had thus created the impediment of illegitimate affinity between husband and wife. The court ordered the husband kept in prison while it deliberated (presumably to prevent further possibly illicit sexual relations) and finally decided that the union should be annulled.

The evidence suggests not that marriage was easy to escape through the apparent loopholes of the rules of annulment, but that marriages were rarely annulled. Perhaps this explains why couples were careful about marriage and anxious to ensure that their future marriages were canonically valid. The church courts were often asked to rule on such questions as whether a precontract existed. In other instances betrothals were nullified at the joint request of the parties, sometimes on the ground that consent was lacking (as when children had been betrothed by their parents), sometimes on the ground that the parties had been young and irresponsible at the time of their betrothal. At other times the misconduct (usually sexual) of one of the parties justified canceling the betrothal. These petitions for release from betrothals, often met with a sympathetic response from the ecclesiastical judges, were altogether different from the suits to have marriages annulled; the latter were less indulgently received.

All this is not to suggest that annulments could not be used as divorces. What are we to think of cases where a wife or husband presented a petition to have her or his marriage annulled because of a recently discovered impediment? On the face of it we should have to conclude that the applicant was so troubled about breaching the church's rules (and by implication God's law) that she or he was

prepared to surrender a happy marriage. Whether we think of these cases – rare as they were – as genuine expressions of conscience or as cynical exploitations of the law depends on the motivations we attribute to the petitioners. No doubt some annulment petitions were motivated by religious scruples, whereas others were provoked by an unhappy marriage. In other cases there might have been a happy conjunction of marital unhappiness and the discovery (perhaps a result of a search motivated by the discontent) of an impediment. What is clear, however, is that the image of the Catholic church's courts as corrupt divorce mills is not accurate.

It is quite possible, even so, that the exploitation of annulments was more common in the higher social ranks. Apart from the case of Henry VIII, which is discussed later in this chapter, there is the example of Eleanor of Aquitaine and Louis VII. After many disagreements, Eleanor had their marriage annulled on the ground that she and Louis were within the prohibited degrees. The annulment was agreed to by French bishops in March 1152, and Eleanor married Henry Plantagenet (later Henry II) two months later. Again, though, such cases were rare, and they reflected the tendency for the church to grant social and political elites greater flexibility in marital matters than the common folk were permitted.

But if most annulments cannot be regarded necessarily as attempts by men and women to free themselves from marital misery, separations can. Husbands and wives were obliged by law to live together, and unauthorized separation – whether it was by mutual consent or the refusal of one spouse to live with the other – was a sin punishable in the ecclesiastical courts. In the twelfth century canon law recognized separations (*separationes a mensa et thoro*, or separations from table and bed), which could be granted in circumstances where the principles of true religion were threatened or where the spiritual or physical well-being of one of the spouses was at risk. In practice these guidelines established three main grounds for separation: adultery, cruelty, and heresy or apostasy.

As we have noted, a separation did not dissolve a marriage but simply permitted husband and wife to live independently. The persistence of the marriage bond meant that they were obliged to remain sexually faithful to each other, although each was freed of the obligation of sexual intercourse (the conjugal debt, in Catholic doctrine). But even given these limitations, the church courts were reluctant to agree to separations. Helmholz found that the judges tried hard to reconcile spouses in conflict and allowed separations only when there was evidence of extreme cruelty. Even then the ecclesiastical judges shared the contemporary toleration of extensive violence against a married woman by her husband. One husband was said to have attacked his wife with

a knife and forced her to flee and on another occasion to have stabbed her in the arm and broken a bone, but the judges described his actions as reasonable, honest, and done for the purpose of "reducing her from errors." They decided that the assaults did not justify a separation and instead imposed a bond of good behavior on the man and ordered the couple to remain together. In other cases judges bowed to the apparently inevitable. In the 1442 case of John and Margaret Colwell, who declared that they would prefer to die in prison than to live together, the judge conceded that a separation was the safer course of action.

Suits for separation, like those for annulment, seem to have been rare in the church courts of medieval Europe. In the Belgian city of Ghent there were three to six separations a year between 1349 and 1390 out of some 12,000 existing marriages. There were eight a year in Brussels in the fifteenth century. But even though the Belgian courts accepted grounds such as incompatibility for separations, one historian notes that magistrates discouraged separation and preferred couples to reconcile. In general, writes Barbara Hanawalt of marriage litigation in medieval Europe, the clerical magistrates were "more like marriage counselors trying to arrange amicable settlements, than judges."

As few as they were, some of the actions for annulment or separation would almost certainly have been actions for divorce had the Catholic church recognized divorce. Why divorce was not permitted in the doctrine of the medieval church can be understood only in terms of such issues as celibacy, marriage, remarriage and sexuality, and in terms of the evolution of biblical interpretation.

We must first appreciate that in Catholic doctrine celibacy – the state of being not married – was preferable to marriage. This view was institutionalized in the celibate priesthood by the fourth century. Marriage, according to this doctrine, was provided for those who could not remain sexually continent, the key biblical text being that of Paul (1 Corinthians 7:8–9): "I say therefore to the unmarried and widows, it is good for them if they abide even as I [i.e., celibate]. But if they cannot contain [sexually], let them marry: for it is better to marry than to burn." In the eyes of the church, marriage and sexuality were inseparable, such that the prime purpose of marriage was deemed to be procreation. Its second purpose was to prevent fornication by providing a stable sexual relationship for sexually active men and women. The intimate connections between marriage, sexuality, and procreation in Catholic doctrine go a long way to explaining why an unconsummated marriage might be dissolved in some cases and why impotence was a ground for annulment.

One might have thought that because marriage was considered an inferior state, divorce could have been welcomed as a sort of return to celibate status (albeit a tarnished celibacy) as long as it was not

followed by remarriage. But not so. Several biblical texts were interpreted by most ecclesiastical authorities as meaning that a validly contracted marriage could not be dissolved. There was an apparent conflict between the New Testament divorce texts of Mark and Luke on the one hand and Matthew on the other, and this led to some uncertainty within the church. According to Mark, Christ asserted that "whosoever shall put away his wife, and marry another, committeth adultery against her. And if a woman shall put away her husband, and be married to another, she committeth adultery" (Mark 10:11–12). Luke's version of this runs: "Whosoever putteth away his wife, and marrieth another, committeth adultery: and whosoever marrieth her that is put away from *her* husband committeth adultery." Matthew, however, seems to make an exception for adultery, reporting Christ as saying that "Whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery" (Matthew 5:32). The same qualification, "except it *be* for fornication," is found in Matthew 19:9.

Other biblical texts stress the indissolubility of marriage. Matthew 19:4–6 has Christ reply to the Pharisees' question "Is it lawful for a man to put away his wife for every cause?" with "Have ye not read, that he which made *them* at the beginning made them male and female. For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh? What therefore God hath joined together, let no man put asunder." Paul, we have noted, introduced a potential exception (the Pauline Privilege) to the rule of marital indissolubility by sanctioning remarriage by a Christian deserted by an unbelieving spouse: "But if the unbelieving depart, let him depart. A brother or a sister [i.e., a Christian] is not under bondage in such *cases*" (1 Corinthians 7:15).

What came to be interpreted as the Christian doctrine of marital indissolubility was at odds with Jewish and Roman law at the beginning of the Christian Era. Contemporary Jewish law gave the husband extensive authority to repudiate his wife if "it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her" (Deuteronomy 24:1–2). Even so, there were limitations on the husband's powers in this respect, so that he could not divorce his wife if he had maliciously and falsely accused her of premarital fornication or if he had been forced to marry her after having raped her as a virgin. There were, moreover, contemporary trends in Jewish law toward giving women greater rights in initiating divorce.

The Roman law of divorce had itself evolved. In the early republic, mutual or unilateral divorce was possible because marriage required the mutual consent of the parties, but under the emperor Justinian divorce was restricted to cases where there was just cause. Acceptable

grounds included the wife's adultery, a husband's falsely accusing his wife of adultery, and the husband's taking a concubine.

Quite clearly, the embryonic Christian position against divorce in any circumstances departed dramatically from prevailing Roman and Jewish doctrines and practices. Although the New Testament references to divorce were ambiguous enough to prevent a rapid consensus within the church that divorce was wholly unacceptable, it is notable that the Christian debate for and against divorce drew on the biblical texts and tended to ignore contemporary Jewish and Roman laws. The main problem Christian theologians had to face was how to reconcile the apparently irreconcilable differences between the texts that prohibited divorce and those that seemed to allow divorce where the wife was guilty of adultery. Some of the early church fathers (such as Hermas, Justin Martyr, Athenagoras, Tertullian, and Clement of Alexandria) suggested that the divorce texts of Matthew allowed a man to dissolve his marriage with an adulterous wife but allowed neither to remarry. Later theologians such as Ambrose, Justinian, and Augustine rallied to the indissolubilist position, and it was endorsed by various church councils, among them those of Arles (314), Mileve (416), and Hereford (673).

Other church councils, however, allowed remarriage after divorce for reason of adultery. The Council of Vannes (465) did so, as did the Council of Verberie (752), although the latter limited the right of remarriage to the husband and only in certain circumstances. The confusion of divorce doctrines was echoed, too, in the penitentials. The seventh-century Penitential of Theodore prescribed seven years' rigorous (or fifteen years' lighter) penance for a man who repudiated his wife and remarried, but only one year's penance if the man remarried after his wife had deserted him. Significantly, in light of the divorce text of Matthew, this penitential permitted a man to repudiate his adulterous wife and remarry and also allowed the wife to remarry as long as she waited five years and did a penance. Finally, the Eastern church allowed divorce for reason of adultery.

Beyond the ambivalence within the early Christian church on the matter of divorce, there were striking variations among contemporary secular legal codes, although the great majority allowed divorce in one form or another. The Roman law of divorce fluctuated and underwent several modifications in the sixth century under Justinian and Justinian II. Germanic legislation from the fifth to the ninth centuries allowed divorce by mutual consent or unilaterally, though the latter generally favored the husband. Frankish law did not permit a wife to initiate a divorce, and Burgundian law provided that a woman who tried to divorce her husband should be smothered in mire. Anglo-Saxon law,

similarly, permitted marriages to be dissolved at the request of both or either spouse.

Even though there was no unanimity on divorce within the Catholic church, the weight of authority lay on the indissolubilist side. The perceptible divergence was increasingly between this emerging indissolubilist consensus in the church and the dissolubilist doctrines entrenched in secular laws, but during the eighth century the Catholic position began to achieve dominance. Paradoxically, the key figure in this process was a secular ruler, the emperor Charlemagne, who extended the ecclesiastical doctrine of marital indissolubility to the secular courts throughout his empire. Even then, several church councils in the ninth century demurred. For example, the Roman synod convoked by Pope Eugenius in 826 decreed that divorce was permitted in the case of adultery and that the innocent spouse could remarry.

Despite this, however, the consensus against divorce hardened. One of the first to experience the effects of the policy was Lothar II, king of Lotharingia, who in 858 attempted to rid himself of his wife to marry his concubine. Lothar battled two successive popes for more than ten years before he finally conceded defeat to a papacy that had demonstrated a new determination to enforce marriage.

The victory of the nondissolubilist doctrine within the Roman Catholic church was hard won, and its consolidation by the thirteenth century was associated with other developments within the church. Canon law and the system of ecclesiastical courts were developed, and throughout Europe the church successfully claimed jurisdiction over matrimonial matters. Marriage itself was more clearly defined, and there was agreement on the principle that the consent of the parties was an essential precondition of marriage. Finally, the sacramentality of marriage was accepted as part of church doctrine (although it did not enter canon law until the sixteenth century). Thus the doctrine of marital indissolubility, the doctrine that forbade divorce, was an integral part of a sweeping reformulation of marriage that took more than a millennium of debate and dissent, and that crystallized in the eleventh and twelfth centuries.

It was, of course, one thing for the church to proclaim its matrimonial doctrines. It was quite another thing for it to enforce them in populations that traditionally observed divergent customs and regulations. There is abundant evidence of customary rituals of marriage coexisting with the evolving procedures laid down by the church. In many cultures marriage might be contracted by an exchange of food and drink, as in this 1483 French case (documented by André Burguière) that involved Jean Binet and Henriette, the widow Legouge, whom he had asked to marry him: