

ARTICLE: THE NATURE OF MARRIAGE AND ITS VARIOUS ASPECTS

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Text

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I am pleased to offer these reflections for consideration and dialogue in response to the honor accorded me by the Ave Maria Law Review. Such reflections represent a general overview of some aspects of marriage and various related problems emerging today as true challenges to the institution. Working in the Holy See, one develops a general understanding of what is happening in various parts of the world - not only the theological, pastoral, and legal aspects, but also the changes and various perspectives common today that have caused the truth of marriage and the currency of its values to be questioned. The human element of marriage is in itself a response to God's design and to the inherent necessity in the nature of man and woman, invited by God himself, to form a very special unity, "one flesh," that has an irreplaceable value for local communities, states, and societies. ¹ The questioning of this truth demonstrates the importance of determining whether irreplaceable human values are being progressively eliminated, and if so, which ones. The anxiety surrounding the topics of marriage and family, which I perceive everywhere, illustrates the urgent need to put marriage back in its place as a natural institution.

I. The Nature of Marriage

The truth about marriage is solidly rooted in God's plan, which seeks the integral well-being of man and humanity. Therefore, to respect, with a grateful heart, this creative plan *ab initio* is to investigate and emphasize the immense value of the natural institution of marriage. ² The value of marriage cannot simply be [*298] explained by evolving and changing historical-cultural factors as if marriage were a product of the human will submitted to all kinds of transformations. A serious anthropological consideration of marriage and the family is currently and urgently needed in light of the confusion that has raised a number of questions about the true nature of marriage. A series of introductory clarifications will be useful in developing an understanding of this complex, delicate matter full of consequence for society.

A. Natural Marriage: Its Value and Currency

¹ Genesis 2:24. All English-language Biblical quotations and translations are from the New Revised Standard Version (Catholic Edition).

² *Ab initio autem non fuit sic.* Matthew 19:8 (Vulgate) ("From the beginning it was not so.").

A mutual gift, the reciprocal donation of man and woman, gives origin to marriage and the family, which are natural realities. Marriage is a natural institution which precedes the sacrament. ³ Marriage's elevation to the high dignity of a sacrament inundates the whole of its value with a new brilliance and depth and with a more demanding commitment. The dignity of the person, the fact of being "the only creature on earth which God willed for itself, [and which] cannot fully find himself except through a sincere gift of himself," is the great truth of the family. ⁴ This truth is at the same time contained and revealed by the family itself.

The truth of the family does not differ basically from the nucleus of the Gospel. Moreover, the Gospel, which can also be called the Good News, sums up God's design for marriage and the family in the order of Creation. ⁵ According to this understanding, the family, founded in the conjugal pact, is a divine institution ⁶ called to constitute the "primordial sacrament," that is to say, the intimate mystery of God, manifested across the centuries. ⁷

[*299] The truth of marriage as a divine institution has also been expressed with the Biblical definition repeated by Jesus Christ: "what God has joined together, let no one separate." ⁸ It constitutes a principle of natural law to which Christians of all times have had access for the inculcation of revealed truth and the slow, but effective, transformation of the cultures in which they have lived. Yet, not only do Christians have access to it, but so do all men who are moved by a sincere and true love, that contemplate the natural reality of marriage and the family. For this reason, the truth of the family is a truth that is at the same time found in one's self and revealed by the family to all.

Marriage and the family are natural in the sense that they hold and reveal the truth coming "from the beginning" (ab initio). All civilizations, in the sense that they are truly civilized, recognize, in large or small degree, this truth in principle. It is present in some manner in the cultures developed by men and women in all times, enlightening them from within and, at the same time, transcending them. In this sense, "natural" means not only what emerges spontaneously as a fruit of the human inclination toward the good, and that which is lived by all men in all epochs and on all continents, but, above all, what is worthy of the personal nature of man. This link between nature and the dignity of the human person is what permits us to discover the manner in which the concepts of nature and culture, natural law, and positive law relate to each other.

Man is a social being and is naturally oriented toward the family. As such, the organization of the family is not a simple occasion of human evolution such that, once reaching a certain point in evolution, man can dispose of the family. Nevertheless, the various historical attempts to eliminate the family as a natural institution have perhaps contributed to the decline, apparent now more than ever before, of the proper understanding of the "natural character" of the family. Such attempts have been produced particularly in countries following a Marxist ideology, in

³ Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution of the Church in the Modern World] P 48 (1965), reprinted in *The Sixteen Documents of Vatican II* 513, 561 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*].

⁴ *Id.* P 24.

⁵ See Pope John Paul II, *Familiaris Consortio* [Apostolic Exhortation on the Family] P 51 (St. Paul ed. 1981) [hereinafter *Familiaris Consortio*].

⁶ See *Gaudium et Spes*, supra note 3, P 48.

⁷ See Pope John Paul II, General Audience (Oct. 6, 1982), http://www.vatican.va/holy_father/john_paul_ii/audiences/1982/documents/hf_jp-ii_aud_19821006_it.html. The union of Adam and Eve constituted "from the beginning" a sign of the union of God with man. *Id.* In this sense, one could speak of marriage in general as a "sacrament" or sign of God's love for man. Nevertheless, in general, the term "sacrament" tends to be reserved only for the union of two baptized spouses, this being one of the seven sacraments of the New Covenant instituted by Christ. The reference to a "sacramentality" of the union of the non-baptized is appropriate, but it is usually accompanied by the adjective "primordial" or "originating" or "from the beginning," to distinguish it from the sacramentality, in its strict sense, of the marriage of the baptized as a sacrament of the New Covenant. See 1983 Code c.1055, §1 (Canon Law Society of Great Britain & Ireland trans., 1983).

⁸ Matthew 19:6.

a world pursued by various totalitarianisms, and by the post-modern version of secularization, as well as the enormous transformations that the family has suffered in the West.

Nature and culture are two intimately related concepts, even to the point that they cannot be considered in isolation from one [*300] another.⁹ The life of man is necessarily developed in a culture, but it is not exhausted by it, since the very progress of a culture demonstrates that in man there is something that transcends culture. That "something" is precisely the nature of man; it "is itself the measure of culture and the condition ensuring that man does not become the prisoner of any of his cultures, but asserts his personal dignity by living in accordance with the profound truth of his being."¹⁰ This relationship presented by Pope John Paul II allows us to explain the following:

(a) No culture can exhaust the truth of the principle regarding the family. In the same moment that a jurist might want to assert the universal validity of a partial concrete historical realization of the family, regardless of how sublime and useful it might be, he would make himself guilty of having "encaged" human nature in a concrete cultural context. All of the attempts made in this sense throughout history have turned out to be failures, because nature always succeeds in "avenging itself" of these unjust pretensions of decadent cultures. It does so by transcending them, renewing once again the complete truth that the family contains in itself.

(b) At the same time, it is equally important to assert that the family cannot disregard the cultural vehicle in which it has to express itself: "Man comes to a true and full humanity only through culture, that is through the cultivation of the goods and values of nature. Wherever human life is involved, therefore, nature and culture are quite intimately connected one with the other."¹¹ The fact that human speech is realized in a multitude of languages, that is to say, in partial cultural systems, without any of them exhausting the complete communicative capacity of man, is often put forth as an example of this correlation.

This double correlation between nature and culture permits the understanding that the first of these two realities (nature) is what fills cultural values with sense and meaning. Consequently, cultural values are measured by their greater or lesser appropriateness in relation to human nature. This correlation between nature and culture has a direct influence on the understanding of both natural [*301] and positive law as elements that are necessarily present in every legal system or order.¹² Two orders do not exist, one natural and one positive, but a single legal system in which the demands of justice "coming from" the family (nature) are integrated with the necessary historical determinations derived from positive law (culture). This relation is deducible from every legal order.

The legal order of the Church has a greater sensibility toward those elements belonging to natural law. It conceives of the mission of the positive order as a service offered to families, with the purpose that they might fulfill their evangelizing function.

Indeed, the fundamental structure and properties of natural marriage do not cease but acquire greater importance and breadth in the New Covenant. Marriage is not a kind of "Christian property" but a patrimony of humanity that affects believers and non-believers. Marriage involves man in his human reality. This expression, "patrimony of humanity," need not be understood as a venerable treasure of the past that must be preserved as in a museum but as something forever written in the profundity of the being of man and his history. Because of this profundity, the 1983 Charter of the Rights of the Family presented by the Holy See makes no reference to the reality of the Catholic marriage sacrament in any of its twelve articles. The Charter was meant to be an instrument for dialogue with all peoples, and especially politicians, legislators, and educators.¹³

⁹ See generally Hector Franceschi & Joan Carreras, *Antropologia Juridica de la Sexualidad: Fundamentos para un Derecho de la Familia* (2000).

¹⁰ Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church's Moral Teaching] P 53 (St. Paul ed. 1993) [hereinafter *Veritatis Splendor*].

¹¹ *Gaudium et Spes*, supra note 3, P 53.

¹² See Javier Hervada, *Natural Right and Natural Law: A Critical Introduction* 179 (Alban d'Entremont trans., 2d ed. 1990).

¹³ The Holy See, *Charter of the Rights of the Family* 3-4 (Oct. 22, 1983).

I have returned many times to the Nicomachean Ethics to show how Aristotle's valuable reflections on marriage and the family, made three hundred years before Christ, were possible even then because marriage and the family are something prior to and greater than the state. They are not a simple recognition or concession of the state. ¹⁴ As this article will show, one of society's greatest current challenges lies precisely in making marriage an agent for cultural transformation. This would provide a foundation for addressing expanding notions of the family, such as the various forms of de facto unions, including those forms most in conflict with human dignity and sound legal principles. ¹⁵

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B. A Mutual Gift of Self

Marriage is a mutual gift, a free and mutual giving of the spouses, a reciprocal donation of self, with the value of a total surrender - the resultant faithfulness and stability last forever. ¹⁶ The Pastoral Constitution of Vatican Council II teaches the following about conjugal love:

This love is an eminently human one since it is directed from one person to another through an affection of the will; it involves the good of the whole person, and therefore can enrich the expressions of body and mind with a unique dignity, ennobling these expressions as special ingredients and signs of the friendship distinctive of marriage... . Such love, merging the human with the divine, leads the spouses to a free and mutual gift of themselves, a gift providing itself by gentle affection and by deed; such love pervades the whole of their lives: indeed by its busy generosity it grows better and grows greater.

... Sealed by mutual faithfulness and allowed above all by Christ's sacrament, this love remains steadfastly true in body and in mind, in bright days or dark. It will never be profaned by adultery or divorce. ¹⁷

The Church has always considered it necessary that this mutual giving in marriage be expressed through the free consent of the will. ¹⁸ During the initial development of the Christian marriage ceremony in the Jewish, Greek, and Roman environments, practices of those cultures were adopted that were consistent with the faith. The doctrine of Christian marriage in the first centuries "forcefully reaffirmed the content of the original divine plan for marriage and introduced new elements derived from its sacramentality, but there was no shame in following the traditional customs about the formation of marriage." ¹⁹ One must remember that the Church has always sought to manifest the consent the spouses give to one another in the various forms of the Christian wedding celebrated throughout **[*303]** the centuries. The axiom in Roman jurisprudence, "Nuptias non concubitis sed consensus facit," ²⁰ has been endorsed by the Church in its doctrine on the sacrament of marriage. ²¹

The Catechism of the Catholic Church emphasizes the importance of the consent of the spouses when it asserts:

¹⁴ See Aristotle, *Nicomachean Ethics*, Bk. 8, Ch. 12, (W.D. Ross trans.) in 2 *The Complete Works of Aristotle* 1729, 1836 (Jonathan Barnes ed., Princeton Univ. Press 1984) [hereinafter *Nicomachean Ethics*].

¹⁵ See Pontifical Council for the Family, *Family, Marriage, and "De Facto" Unions* P 1 (July 26, 2000) [hereinafter *Family, Marriage, and "De Facto" Unions*], http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001109_de-facto-unions_en.html.

¹⁶ See 1983 Code c.1056.

¹⁷ *Gaudium et Spes*, supra note 3, P 49.

¹⁸ See 1983 Code c.1057, §1.

¹⁹ Antonio Miralles, *Il Matrimonio: Teologia e vita* 51 (Cinisello Balsamo ed., 1996). I will discuss natural marriage below.

²⁰ Consent, not relations, brings about the marriage."

²¹ See Miralles, supra note 19, at 51-61.

The consent by which the spouses mutually give and receive one another is sealed by God himself. From their covenant arises "an institution, confirmed by the divine law ... even in the eyes of society." The covenant between the spouses is integrated into God's covenant with man: "Authentic married love is caught up into divine love" ²²

Pope John Paul II, in the Apostolic Exhortation *Gratissimam Sane* (the Letter to Families), also reflects on one's sincere gift in marriage. Consistent with what is expressed in *Gaudium et Spes*, man "cannot fully find himself except through a sincere gift of himself." ²³ This is not a contradiction but reflects the call to serve truth in love. Without this gift, "marriage would be empty." ²⁴ This mutual gift of self creates the appropriate space for the reception from God of the gift of a new child - a gift for the parents, the givers of life, and a gift for society. And, at the same time, "the newborn child gives itself to its parents by the very fact of its coming into existence. Its existence is already a gift, the first gift of the Creator to the creature." ²⁵

The husband and wife are persons, and because of this, the mutual gift of self must be in the quality of a person. The other person cannot be converted into a "thing" or an "object." Pope John Paul II reminds us:

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Consequently, sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such The total physical self-giving would be a lie if it were not the sign and fruit of a total personal self-giving ²⁶

The child as well, fruit of this mutual personal gift between the spouses, is also a person in all the phases of his existence, from the moment of conception until death.

Marital consent is not a mere initiating act of a man and woman's life together, nor the mere acceptance of the arrangement or its simple legalization. It is the "human act whereby spouses mutually bestow and accept each other." ²⁷ It is an act of mutual self-giving between husband and wife that creates a completely new situation with respect to the relationship between the two people, different than what was present before the act of consent. What was previously an encounter becomes unity, what was free becomes duty, what was, or could be, merely a development, a simple fact, becomes a pledge. Consent is the efficient cause of marriage, what gives birth to it. Nevertheless, the marriage bond cannot be referred to exclusively as the consent of the two who marry. With their free will they make what was a potentiality in their nature, the generic natural arrangement of man to woman and vice versa, a concrete reality in the manner that a reciprocal obligation is made. Because of this, the bond that comes from it is not strictly speaking a consensual bond. It could be better called a natural bond, more precisely still a bond established by God through nature and the will of the spouses. As Jesus said, *Deus coniunxit*: it is God who

²² Catechism of the Catholic Church P 1639 (2d ed. 1997) (footnotes omitted). The Catechism continues in paragraph 1640:

Thus the marriage bond has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable, and gives rise to a covenant guaranteed by God's fidelity. The Church does not have the power to contravene this disposition of divine wisdom.

Id. P 1640.

²³ *Gaudium et Spes*, supra note 3, P 24 (emphasis added).

²⁴ Pope John Paul II, *Gratissimam Sane* [Letter to Families] P 11 (St. Paul ed. 1994) [hereinafter *Gratissimam Sane*].

²⁵ Id.

²⁶ *Familiaris Consortio*, supra note 5, P 11. The Pope continues, emphasizing that such a personal gift, "including the temporal dimension, is present: if the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally." Id.

²⁷ *Gaudium et Spes*, supra note 3, P 48 (citation omitted).

has united the spouses. ²⁸ Because of this, the Second Vatican Council, speaking of natural marriage, qualifies the bond as sacred and independent of the decision of man. ²⁹

The lack of recognition of the faithfulness and stability of marriage found in certain areas of the present world leads to the [*305] depersonalization, and then, to the dehumanization of the relationships between spouses and with their children. A relativization of marriage occurs, producing a kind of "thingification" of the husband and wife, as well as of the children, that is, converting these persons into objects or things. Love is not true love anymore but is only a simple means of gratifying the emotional "needs" or passions. Children begin to be treated as if they were products of a laboratory, such as when they are conceived through the process of in vitro fertilization. In other cases, children that have already begun the path of life are eliminated with total arbitrariness as if they were simply masses of cells or tissue that invaded the body and autonomy of the mother. Such a treatment of children is a clear sign of the dehumanization that results from a lack of recognition of the faithfulness and stability of marriage.

There cannot be marriage if the family does not exist contemporaneously with marriage. The moment of the nuptial pact not only constitutes the first family relation but also, and necessarily, the beginning of the family community. The children themselves do not constitute the family, but the family constitutes the opening to and ordering toward children that exist in the parents' mutual gift. ³⁰

The conjugal pact, which gives birth to the family, purifies the impoverished vision that reduces the family to biological or sociological limits. It is, in effect, the consent of the spouses that creates the family. Marriage, therefore, lights the path for us and introduces us to the legal nature of the family precisely because the efficient cause of both marriage and the family is the same: the marital consent, that free act of giving by which the contracting parties "become" spouses.

The Church has always emphasized the human values of marriage and their agreement with the eminent dignity of the spouses and the truth of that dignity, especially as it relates to natural marriage. Marriage has a certain sacramentality in the broad sense. If, in the strict sense and in an eminent manner, the great mystery of which St. Paul speaks with reference to Christ and the Church refers to the Christian sacrament of marriage, ³¹ then the text of Genesis, "Therefore a man leaves his father and his mother and clings to his wife, and they become one flesh," ³² can also be understood in [*306] this way. It is common to allude to the goods of marriage, which represent a necessary interpretation of marriage. One can speak of a certain primordial sacrament of marriage. ³³ The good of faithfulness is inherent, in its full and finished form, in Christian marriage and is present in some form in every marriage or relationship due to its orientation to the Christian supernatural order. Thus, the specifically Christian character of marriage invigorates and reinforces the foundational properties of natural marriage, unity, and indissolubility, consequently imposing duties on the spouses with more force than in the natural institution. ³⁴

St. Augustine says that "all these are goods for which nuptials are good: the offspring, the faith, and the sacrament."

³⁵ The Bishop of Hippo presents this splendid synthesis with the following words:

²⁸ Matthew 19:6 (Vulgate); Javier Hervada, *Escritos de Derecho Natural* 462 (1986).

²⁹ Miralles, *supra* note 19, at 60-61 (citing *Gaudium et Spes*, *supra* note 3, P 48); see also Hervada, *supra* note 28, at 454-56.

³⁰ See Franceschi & Carreras, *supra* note 9, at 226-30.

³¹ Ephesians 5:29-32; see also Matthias Joseph Scheeben, *The Mysteries of Christianity* 600-01 (Cyril Vollert, S.J. trans., 2d impression 1946).

³² Genesis 2:24.

³³ See *supra* note 7 and accompanying text.

³⁴ Francisco Gil Hellin, *El Matrimonio y la Vida Conyugal* 40-41 (1995).

³⁵ Augustine, *de bono coniugali* [Of the Good of Marriage], in 41 *Corpus Scriptorum Ecclesiasticorum Latinorum* [The Body of Ecclesiastical Latin Writings] 187, 218 (Johnson Reprint Corp. 1979) (1900) ("haec omnia bona sunt, propter quae nuptiae bonum sunt: proles, fides, sacramentum"). Translations by the Ave Maria Law Review unless otherwise noted.

In the faith it is foreseen that outside of the conjugal link there is no union with another; the offspring are sheltered lovingly, nurtured kindly, educated religiously; in the sacrament that marriage is not dissolved, and that the abandoned, not even for the children, will not unite with another. This is the rule of nuptials by which the fecundity of nature is ennobled and dishonesty and incontinence are regulated.³⁶

Pope Pius XI has analyzed these ends with clarity and in all their importance in the encyclical *Casti Connubii*.³⁷

[*307] Finally, the original properties of marriage must also be seen in the light of total giving. They compose part of the original and creational design of God "from the beginning."³⁸ They do not remain subject to human arbitrariness or the transformational projects of parliaments which often follow the changing phenomena of cultures separated from ethics and justice.³⁹ Rather, the original properties of marriage are woven irreplaceably into marriage. This is how the Code of Canon Law presents it: "The essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament."⁴⁰

In light of the unchanging nature of marriage, the Second Vatican Council welcomes what the Church has always taught about the unity of marriage and defends monogamy as linked to the complete faithfulness of the spouses. The Council explains: "As a mutual gift of two persons, this intimate union and the good of the children impose total fidelity on the spouses and argue for an unbreakable oneness between them."⁴¹ It is worth remembering that requirement for the equality of rights between men and women, and for recognizing polygamy as a system that is detrimental to the dignity of women. In Islam, advances have been made in the interpretation of the Koran that recognize the importance of monogamy by limiting or questioning the possibility of contracting marriage with four women.⁴²

Also, from the logic of a total giving, the indissolubility of the conjugal bond must be seen more deeply. Marriage, like conjugal love, is a commitment that lasts a lifetime. Miralles astutely comments on this point:

The mutual personal gift of the spouses also demands the indissolubility of the mutual bond that they have established with their gift. It is total and therefore excludes any provisional nature or temporary gift... . On the contrary, the conjugal bond presents a definitive character since it comes from an integral gift which also recognizes the temporality of the person. Giving oneself with the **[*308]** reservation of being able to disconnect oneself would mean an incomplete gift, contrary to that which gives rise to marriage.⁴³

A demand required by a total gift of self is not inhuman, but possible, as proven by so many marriages.⁴⁴ "A gift of self made with any reservations would not," adds Miralles, "be a marriage according to the divine plan, with all the riches of humanity."⁴⁵

³⁶ Augustine, *De Genesim ad Litteram Libri Duodecim* [The Literal Meaning of Genesis in Ten Books], in 28 *Corpus Scriptorum Ecclesiasticorum Latinorum* [The Body of Ecclesiastical Latin Writings] 3, 275-76 (Academiae Litterarum Caesareae Vindobonensis 1894) (emphasis added) ("in fide adtentitur, ne praeter uinculum coniugale cum altera uel altero concumbatur; in prole, ut amanter suscipiatur, benigne nutriatur, religiose educetur; in sacramento, ut coniugium non separetur et dismissus aut dismissa nec cause prolis alteri coniungatur. haec est tamquam regula nuptiarum, qua uel naturae decorator fecunditas uel incontinentiae regitur prauitas."). Hellin's book *El Matrimonio y la Vida Conyugal*, supra note 34, is very authoritative. One can study the coherent development, contrary to what is sometimes thought, between the thought of St. Augustine and St. Thomas Aquinas. Hellin's work lays a firm foundation for a conciliatory treatment that does not focus on highly technical aspects.

³⁷ Pope Pius XI, *Casti Connubii* [Encyclical Letter on Christian Marriage] PP 8, 23, 39, 43 (St. Paul ed. 1930).

³⁸ Matthew 19:4, 8.

³⁹ See *Gaudium et Spes*, supra note 3, P 48.

⁴⁰ 1983 Code c.1056.

⁴¹ Id.

⁴² See John L. Esposito & Natana J. DeLong-Bas, *Women in Muslim Family Law* 135-36 (2d ed. 2001).

⁴³ Miralles, supra note 19, at 87-89.

C. Identity of Marriage

Several notions are fundamental to the proper conception of marriage: giving and the mutual gift, the total giving of the spouses and genuine conjugal love, as well as the total communion of life (*totius vitae*) and love, "the intimate partnership of married life and love"⁴⁶ between a man and a woman. The Code of Canon Law describes marriage as a covenant:

The marriage covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.⁴⁷

The observations corresponding to exclusivity, fidelity, stability, and openness to life are best understood precisely in the light of the totality of this reciprocal giving, of this mutual gift. The definition of marriage in Justinian's Digest is attributed to Modestinus: "Marriage is the union of a man and a woman, a partnership for the whole life involving divine as well as human law."⁴⁸ In the Council's definition, the specific characteristics of the community of life between a man and woman are intimacy and conjugal love. In the Code, these **[*309]** characteristics order each spouse's entire life and being toward the good of the spouses, procreation, and the education of the children.

Miralles keenly comments on the notion of a communion for a lifetime:

In saying community for a lifetime, the stability[*su'[]*]⁴⁹[*su'[]*] and also the intimacy and exclusivity of the relation between two persons is effectively expressed. With this expression, the life of a couple is seen as one that demands the total co-participation of the two spouses because they share a common life project, common aspirations, common desires, etc., but especially because their life reaches the intimate sphere of sexuality and because it is extended across their entire existence. Other personal relationships like those based on friendships, social roles, cultural interests, etc., might reach high levels of intensity, however, they can never build a community for a lifetime because such a community will always be exclusive to those participating in the reciprocal gift of masculinity and femininity. Because of this, the definition "community for a lifetime" should be included in any suitable description of marriage.

To say that the community of life is characterized by love synthesizes that said above about consent into the being of the conjugal unity. Such a union, since it implies the mutual gift of the spouses, must emanate from love. It is a total gift that includes the most intimate aspects of the person, and only love can make it respect its quality as a subject without being depersonalizing, as if it were a gift of objects simply to be used and enjoyed. Because of this, the conjugal community is essentially ordered to the good of the spouses; to say it that way implies that it is a community founded on and made alive by love.⁵⁰

This life-long community, unique to marriage, is something that offers a beneficial anthropology. Despite the legal and ethical relativism so much in vogue, this understanding of marriage does not permit marriage to be viewed as a

⁴⁴ See generally *id.* at 88-89.

⁴⁵ *Id.* To study the development of the Second Vatican Council, see Hellin, *supra* note 34, at 93-122. For a detailed examination of the text of *Gaudium et Spes*, see Francisco Gil Hellin, *De Dignitate Matrimonii et Familiae Fovenda [On Promoting the Dignity of Marriage and Family]* (1982).

⁴⁶ *Gaudium et Spes*, *supra* note 3, P 48.

⁴⁷ 1983 Code c.1055, §1.

⁴⁸ Dig. 23.2.1 (Modestinus, Rules), 1 *The Digest of Justinian* (Alan Watson ed., Univ. of Penn. Press rev. ed 1998) (n.d.).

⁴⁹ "Stability" is not found in the Council's formula because it is expressed in other words a few lines later where it asserts that marriage is *institutum ordinatione divina firmum* [a natural institution that precedes the sacrament]. *Gaudium et Spes*, *supra* note 3, P 48.

⁵⁰ Miralles, *supra* note 19, at 38.

simple contract. It is not rescindable at the free and arbitrary will of the contracting parties and the complacent acceptance of legislators, seduced by legal positivism.

Marriage is not something that the contracting parties capriciously invent or that legislators choose without the recognition **[*310]** due to a natural institution. Rather, the institution of marriage has its foundation in the very being of man, in his profound aspirations, and in the natural law. The natural law orders the relationship of dignity with freedom in the communion between persons, man and woman. In the mutual gift and in being one flesh, man and woman find their complementarity. ⁵¹ In *Familiaris Consortio* the Holy Father states:

The first communion is the one which is established and which develops between husband and wife: by virtue of the covenant of married life, the man and woman "are no longer two but one flesh" and they are called to grow continually in their communion through day-to-day fidelity to their marriage promise of total mutual self-giving. ⁵²

This communion, and its ultimate manifestation in the family, constitutes the cornerstone for society. As *Gratissimam Sane*, the Letter to Families, explains:

The family has always been considered as the first and basic expression of man's social nature. Even today this way of looking at things remains unchanged. Nowadays, however, emphasis tends to be laid on how much the family, as the smallest and most basic human community, owes to the personal contribution of a man and a woman. The family is in fact a community of persons whose proper way of existing and living together is communion: *communio personarum*. Here too, while always acknowledging the absolute transcendence of the Creator with regard to his creatures, we can see the family's ultimate relationship to the divine "We." Only persons are capable of living "in communion." The family originates in a marital communion described by the Second Vatican Council as a "covenant," in which man and woman "give themselves to each other and accept each other." ⁵³

Pope John Paul II goes on to explain the role of marriage in the development of this family community, stating:

I have spoken of two closely related yet not identical concepts: the concept of "communion" and that of "community." "Communion" has to do with the personal relationship between the "I" and the **[*311]** "thou." "Community" on the other hand transcends this framework and moves towards a "society," a "we." The family, as a community of persons, is thus the first human "society." It arises whenever there comes into being the conjugal covenant of marriage, which opens the spouses to a lasting communion of love and of life, and it is brought to completion in a full and specific way with the procreation of children: the "communion" of the spouses gives rise to the "community" of the family. The "community" of the family is completely pervaded by the very essence of "communion." On the human level, can there be any other "communion" comparable to that between a mother and a child whom she has carried in her womb and then brought to birth? ⁵⁴

Thus, the communion of love between husband and wife in marriage is naturally expressed in the community of the family, which is itself the very foundation of our society. For this reason, it is crucial to maintain the identity of marriage, since this identity is put to such a difficult test. The revolution in culture, with its focus on subjectivity and autonomy in relation to every norm, seriously disturbs the vocation of marriage. As Pope John Paul II says, "This identity consists in the capacity to live in truth and love; even more, it consists in the need for truth and love as an essential dimension of the life of the person." ⁵⁵

⁵¹ Genesis 2:24.

⁵² *Familiaris Consortio*, supra note 5, P 19 (citing Matthew 19:6; Genesis 2:24).

⁵³ *Gratissimam Sane*, supra note 24, P 7 (quoting *Gaudium et Spes*, supra note 3, P 48).

⁵⁴ *Id.*

⁵⁵ *Id.* P 8.

As man is the only creature on earth loved by God as a reflection of himself, and "cannot fully find himself except through a sincere gift of himself,"⁵⁶ the spouses must consider each other's entire human dignity when entering their interpersonal relationships in conjugal love. If they do not, they risk treating each other as instruments, objects, or things. Without a doubt, in marriage the pact of love between the spouses is brought to ruin primarily when one spouse is lowered to the level of an "object" in the eyes of the other. This occurrence destroys the mutual gift between the spouses as persons. Conjugal love, therefore, becomes a caricature of itself. It fails to make human existence "an existence called to serve the truth in love."⁵⁷ This objectification of one's spouse is an obstacle to happiness and to the fulfillment of the spouses: "Love causes man to find fulfillment through the sincere gift of self. To love means to give **[*312]** and to receive something which can be neither bought nor sold, but only given freely and mutually."⁵⁸

To prevent this destructive objectification in marriage, it is necessary to get to the bottom of the profoundly human values of marriage and the family. One must follow very closely the teaching of the Second Vatican Council about conjugal love:

This love is an eminently human one since it is directed from one person to another through an affection of the will; it involves the good of the whole person, and therefore can enrich the expressions of body and mind with a unique dignity, ennobling these expressions as special ingredients and signs of the friendship distinctive of marriage.⁵⁹

That "eminently human" love is directed to the person with affectus voluntatis located in the will. This does not mean "affection," but rather a loving act of the will. Its root, observes Miralles, is not in emotion or sentiment, which can be manifested phenomenologically and permeate all the relations between man and woman, although emotion or sentiment is not excluded.⁶⁰ Rather, the human authenticity of love demands the intervention of the will.

Emotional attraction, with its components of sex and masculinity or femininity as well as affection, reaches a fully human level when the person is loved for his innate value in a benevolent love that focuses on the good of the person. A benevolent love does not arise in concupiscent love,⁶¹ which desires the good not in itself but for another reason. The good of benevolence is present when the good of the person is loved and the person is not seen as a simple object or instrument, because God loved the person for himself.⁶² Such benevolence results in a loving friendship. St. Thomas Aquinas writes,

Not every love has the character of friendship, but that love which is together with benevolence, when, to wit, we love someone so as to wish good to him... .

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Yet neither does well-wishing suffice for friendship, for a certain mutual love is requisite, since friendship is between friend and friend: and this well-wishing is founded on some kind of communication.⁶³

Prior to St. Thomas Aquinas, we also know that Aristotle had already called conjugal love "friendship."⁶⁴

⁵⁶ Gaudium et Spes, supra note 3, P 24.

⁵⁷ Gratissimam Sane, supra note 24, P 11.

⁵⁸ Id.

⁵⁹ Gaudium et Spes, supra note 3, P 49.

⁶⁰ See Miralles, supra note 19, at 39.

⁶¹ Thomas Aquinas, Summa Theologica, Pt. I-II, Q. 26, Art. 4 (Fathers of the English Dominican Province trans., Christian Classics 1948) (1911) [hereinafter Summa Theologica].

⁶² Gaudium et Spes, supra note 3, P 24.

⁶³ Summa Theologica, supra note 61, Pt. II-II, Q. 23, Art. 1.

⁶⁴ See Nicomachean Ethics, supra note 14, Bk. 8, Ch. 3, at 1828.

As Miralles emphasizes, what characterizes loving friendship as conjugal love is intimacy and totality.⁶⁵ As a result of that intimacy, the spouses constitute "una caro" (one flesh), a giving of each other mutually in sexual union for the transmission of human life. Other kinds of friendship, distinct from conjugal love, do not have the characteristic of totality. This totality comes from the gift of the person; man "cannot fully find himself except through a sincere gift of himself."⁶⁶ The physical gift of sexuality has a human sense only if the gift of the person is integrated with it.

We find a successful and provocative synthesis of the importance of a total self-giving in conjugal love in the Apostolic Exhortation *Familiaris Consortio*:

As an incarnate spirit, that is a soul which expresses itself in a body and a body informed by an immortal spirit, man is called to love in his unified totality. Love includes the human body, and the body is made a sharer in spiritual love.

Christian revelation recognizes two specific ways of realizing the vocation of the human person, in its entirety, to love: marriage and virginity or celibacy. Either one is, in its own proper form, an actuation of the most profound truth of man, of his being "created in the image of God."

Consequently, sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such. It is realized in a truly human way only if it is an integral part of the love by which a man and a woman commit themselves totally to one another until death. The total physical self-giving would be a **[*314]** lie if it were not the sign and fruit of a total personal self-giving, in which the whole person, including the temporal dimension, is present: if the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally.

This totality which is required by conjugal love also corresponds to the demands of responsible fertility. This fertility is directed to the generation of a human being, and so by its nature it surpasses the purely biological order and involves a whole series of personal values. For the harmonious growth of these values a persevering and unified contribution by both parents is necessary.

The only "place" in which this self-giving in its whole truth is made possible is marriage, the covenant of conjugal love freely and consciously chosen, whereby man and woman accept the intimate community of life and love willed by God Himself which only in this light manifests its true meaning. The institution of marriage is not an undue interference by society or authority, nor the extrinsic imposition of a form. Rather it is an interior requirement of the covenant of conjugal love which is publicly affirmed as unique and exclusive, in order to live in complete fidelity to the plan of God, the Creator. A person's freedom, far from being restricted by this fidelity, is secured against every form of subjectivism or relativism and is made a sharer in creative Wisdom.⁶⁷

The absence of a total and personal gift of self in conjugal love is a treason against love. A mere physical gift "would be a lie."⁶⁸ Marriage is, therefore, the only "place" that can make the gift of self possible "in its whole truth."⁶⁹ The totality of surrender implies that conjugal love will be faithful and exclusive.⁷⁰

The Papal encyclical *Humanae Vitae* describes the necessary characteristics of the gift of self in conjugal love. In the first place, as a free act of the will instead of simply instinct or sentiment, the gift of self is a fully "human" love.

⁶⁵ See Miralles, *supra* note 19, at 44-47.

⁶⁶ *Gaudium et Spes*, *supra* note 3, P 24.

⁶⁷ *Familiaris Consortio*, *supra* note 5, P 11.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Pope Paul VI, *Humanae Vitae* [Encyclical Letter on the Regulation of Birth] P 9 (St. Paul ed. 1968) [hereinafter *Humanae Vitae*] (citing *Gaudium et Spes*, *supra* note 3, P 50).

This love is also "total"; it is a very special form of personal friendship, in which the spouses generously share everything without undue reservations or selfishness. Consequently, their love is faithful and exclusive until death. **[*315]** Faithfulness can sometimes be difficult, but one cannot deny that it is always possible and always noble and meritorious. Pope Paul VI emphasized the importance of faithfulness in marriage, stating:

The example of so many married persons down through the centuries shows, not only that fidelity is according to the nature of marriage, but also that it is a source of profound and lasting happiness and finally, this love is fecund for it is not exhausted by the communion between husband and wife, but is destined to continue, raising up new lives. "Marriage and conjugal love are by their nature ordained toward the begetting and educating of children. Children are really the supreme gift of marriage and contribute very substantially to the welfare of their parents." ⁷¹

In brief, a love that is not total and exclusive is a contradiction.

The teaching of the Papal encyclical *Humanae Vitae* and of the apostolic exhortation *Familiaris Consortio* is developed in deep coherence with the teachings of the Second Vatican Council. Showing the very close relationship between conjugal love and the procreative mission without entering into particular technicalities, the Council explained:

Hence, while not making the other purposes of matrimony of less account, the true practice of conjugal love, and the whole meaning of the family life which results from it, have this aim: that the couple be ready with stout hearts to cooperate with the love of the Creator and the Savior. Who through them will enlarge and enrich His own family day by day. ⁷²

Here, the traditional teaching about the procreative ends of marriage that Pope John Paul II extols in "Male and Female He Created Them," ⁷³ is validated by the Council.

Pope John Paul II emphasizes the importance of procreation in marriage when he explains that "this totality which is required by conjugal love also corresponds to the demands of responsible fertility." ⁷⁴ Thus, to exclude in conjugal love the potentiality of **[*316]** fertility prevents a full, unconditional giving and ignores the truth that "by their very nature, the institution of matrimony itself and conjugal love are ordained for the procreation and education of children." ⁷⁵ This truth about conjugal love is asserted with particular clarity in *Familiaris Consortio*: "It demands indissolubility and faithfulness in definitive mutual giving; and it is open to fertility." ⁷⁶ This truth applies not only to Christian values, but to the "characteristics of all natural conjugal love." ⁷⁷ For, from this truth about conjugal love, it follows that all men "are not free to proceed completely at will, as if they could determine in a wholly autonomous way the honest path to follow." ⁷⁸

D. The Family Is a Social Subject

I have attempted to explain, in an article published in the *Lexicon*, edited by the Pontifical Council for the Family, ⁷⁹ that because we are facing the privatization of the family and a drastic reduction in its public and social role, it is necessary to rescue the conception of the family as a social subject. In the privatized conception of the family,

⁷¹ Id. (quoting *Gaudium et Spes*, supra note 3, P 50).

⁷² *Gaudium et Spes*, supra note 3, P 50.

⁷³ This refers to Pope John Paul II's four-year catechesis on the Theology of the Body, given during the Wednesday General Audiences from 1979 to 1984. See Pope John Paul II, *The Theology of Marriage and Celibacy* (1986).

⁷⁴ *Familiaris Consortio*, supra note 5, P 11.

⁷⁵ *Gaudium et Spes*, supra note 3, P 48.

⁷⁶ *Familiaris Consortio*, supra note 5, P 13.

⁷⁷ Id.

⁷⁸ *Humanae Vitae*, supra note 70, P 10.

the family is not a good or a value that must be defended as something fundamental to the state. One of the problems that leads to other forms of privatization of the family comes from considering family members separately, instead of viewing the family in its totality, as a unit into which all the members of the family are integrated. The central theme in the Holy See's Charter of the Rights of the Family is that the family is a social subject. I have dealt with this point on other occasions. Children must not be considered separately from their parents. Doing so cuts children and parents off from their relationships, including the most natural and necessary ones, and fails to respect Saint Thomas's idea of the family as "spiritual womb."⁸⁰ The temptation exists today to deny the rights and duties of parents, as if, in regards to their children in certain areas (for example, "sexual rights" and sexual education) parents do not have a primary right and obligation. Along the same lines, some [*317] scholars argue that a radical individualist approach to children's rights is at the core of the Convention on the Rights of the Child whereby rights are defined ambiguously and the very idea of the family as a social subject is rejected. According to such an interpretation, the treaty does not reaffirm the public dimension of the family and fully guarantee and attend to the rights of the child with respect to this subject. Rather, the treaty promotes the private rights of the child, which for the most part, are disconnected from the family as a subject.⁸¹

The family founded on marriage is a unit made up of its members. The members cannot be separated or atomized into isolated individuals. The family must be seen as a whole, as a communion that becomes a community. There exists a "sovereignty" of the family that protects it from the tentacles of the state, with its unvanquished totalitarian temptations, even in new "democratic" modes. The risk of intrusion into family life by a totalitarian state is present in more than just family and life issues.⁸² Therefore, the genitive, the rights of the family, has that exact meaning. The members are found in it. Pastorally, it should be treated as a unit, especially in relation to children.

The principle of subsidiarity is key in the social doctrine of the Church.⁸³ Sometimes the "privatization" that removes the family from the social stage prepares the way for a dictatorial state through the means of a parliamentary majority. This goes together with a [*318] confusion of the proper relationship between natural law and positive law, and more concretely the split that destroys the natural law and exalts the positive law. This split represents the decadent conception of legal positivism. Under this split, the law is deemed good simply because it is the law, because it fits the democratic "game" (used almost as a technical term) as the imposition of the majority. This contrasts with the proper relationship between natural and positive law according to which the law is deemed good because it agrees with the fundamental aspirations and the integral good of man, with the good of the community in agreement with the notion of the common good.⁸⁴

⁷⁹ Alfonso Lopez Trujillo, familia y privatizacion, in *Lexicon* 487-99 (Consejo Pontificio para la Familia eds., 2004). Translations of this work are available in Spanish and French, and are being prepared in other languages.

⁸⁰ It is possible to interpret this idea in a broader form.

⁸¹ Trujillo, *supra* note 79, at 490 (citations omitted).

⁸² As John Paul II explained:

How can we not recall, in this regard, the aberrations that the so-called constitutional state has tolerated in so many countries? The law of God is univocal and categorical with respect to human life. God commands: "You shall not kill." No human lawgiver can therefore assert: it is permissible for you to kill, you have the right to kill, or you should kill. Tragically, in the history of our century, this has actually occurred when certain political forces have come to power, even by democratic means, and have passed laws contrary to the right to life of every human being, in the name of eugenic, ethnic or other reasons, as unfounded as they are mistaken. A no less serious phenomenon, also because it meets with widespread acquiescence or consensus in public opinion, is that of laws which fail to respect the right to life from the moment of conception. How can one morally accept laws that permit the killing of a human being not yet born, but already alive in the mother's womb? The right to life becomes an exclusive prerogative of adults who even manipulate legislatures in order to carry out their own plans and pursue their own interests.

Gratissimam Sane, *supra* note 24, P 21 (citation omitted).

⁸³ See Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* PP 186-87 (2004) [hereinafter *Compendium*].

⁸⁴ See *id.* P 432.

The relationship between politics and ethics must not fall into either the totalitarian form of ideological imposition or into that new form of totalitarianism - relativism taken to its ultimate consequences. In regard to this latter form of totalitarianism, Pope John Paul II reminds us in the encyclical *Evangelium Vitae* that democracy can lead to measures that deny the fundamental right to life. He explains:

This is what is happening also at the level of politics and government: the original and inalienable right to life is questioned or denied on the basis of a parliamentary vote or the will of one part of the people - even if it is the majority. This is the sinister result of a relativism which reigns unopposed: the "right" ceases to be such, because it is no longer firmly founded on the inviolable dignity of the person, but is made subject to the will of the stronger part. In this way democracy, contradicting its own principles, effectively moves towards a form of totalitarianism. The State is no longer the "common home" where all can live together on the basis of principles of fundamental equality, but is transformed into a tyrant State, which arrogates to itself the right to dispose of the life of the weakest and most defenceless members, from the unborn child to the elderly, in the name of a public interest which is really nothing but the interest of one part.⁸⁵

To prevent such tyranny, the state must recognize a certain sovereignty in the family. Certainly, the family is incorporated into society and serves society, but family is not absorbed by it. In this regard, the principle of subsidiarity must be observed and respected. [*319] In the Letter to Families, Pope John Paul II observes that "in the first place there is the almost organic link existing between the family and the nation From the very outset the identity of the family is to some extent shaped by the identity of the nation to which it belongs."⁸⁶ He goes on: "By sharing in the nation's cultural heritage, the family contributes to that specific sovereignty, which has its origin in a distinct culture and language Not only the nations, but every family realizes its spiritual sovereignty through culture and language."⁸⁷ One can go even further and argue that a distinction exists between nation and State where the latter has a less "familiar" structure since it is organized into a political and bureaucratic system.⁸⁸

E. Identity of the Family and Alternatives: Variety of "Definitions"

A conceptual confusion about the family reigns today. This confusion has been broadly introduced through a series of cultural transformations of the family that have coincided with the proliferation of new "models" of marriage and family that seek to bring the original model to an end and thereby remove the "traditional family" from consideration.⁸⁹

Professor Joseph Hagan, in an article published in the *Lexicon*, discussed these new models of the family. He explained:

The term "new family models" attempts, evidently, to convince people that these dispositions should be considered as morally acceptable and equivalent, or at least as a substitution for the traditional social notion of the family, that is to say, a man and a woman, permanently committed to each other as husband and wife, open to the gift of children in the marital relations and who, when "blessed" with children as a result of realizing their sacred marital mission of procreation, educate these children physically, morally, and spiritually.

To adopt this euphemism ("new family models") in the field of reason would lead precisely to the ambiguity and relativism desired by those that propose it. This moral ambiguity and relativism, they [*320] believe, are necessary

⁸⁵ Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] P 20 (St. Paul ed. 1995) [hereinafter *Evangelium Vitae*].

⁸⁶ Gratissimam Sane, supra note 24, P 17.

⁸⁷ Id.

⁸⁸ See id.

⁸⁹ Max Pietsch, *Industrialism*, in 3 *Sacramentum Mundi* 130-32 (Karl Rahner ed., 1969) (providing a brief synthesis of the body of transformations in industrial society).

to create the consensus in favor of the euphemism, and, even more important, for the acceptance of the dispositions described above, to which the euphemism refers.⁹⁰

To explain the problems with such a "new family model," it is worthwhile to clarify a few simple, although not always recognized, ideas. One must distinguish between changes of a substantial-structural type (that is, changes that alter the nature of something, converting it into an entirely different thing), and changes of an accidental type (changes that alter certain appearances or external manifestations of something, but without converting it into a different thing). *Gaudium et Spes* makes a sharp examination in this respect. It states:

Yet the excellence of this institution is not everywhere reflected with equal brilliance, since polygamy, the plague of divorce, so-called free love and other disfigurements have an obscuring effect. In addition, married love is too often profaned by excessive self-love, the worship of pleasure and illicit practices against human generation. Moreover, serious disturbances are caused in families by modern economic conditions, by influences at once social and psychological, and by the demands of civil society. Finally, in certain parts of the world problems resulting from population growth are generating concern.

All these situations have produced anxiety of consciences. Yet, the power and strength of the institution of marriage and family can also be seen in the fact that time and again, despite the difficulties produced, the profound changes in modern society reveal the true character of this institution in one way or another.⁹¹

Thus, transformations that have occurred in certain modalities of marriage, like the step from "patriarchy" to a greater recognition of the rights of women, are not the same as radical transformations in the identity of the family as "nuclear" family: father, mother, and children. In effect, as to "the rights of women," Pope John Paul II writes:

In our times the question of "women's rights" has taken on new significance in the broad context of the rights of the human person. **[*321]** The biblical and evangelical message sheds light on this cause, which is the object of much attention today, by safeguarding the truth about the "unity" of the "two," that is to say the truth about that dignity and vocation that result from the specific diversity and personal originality of man and woman.⁹²

There are clear examples of progress that proceed from the consideration of women on a plane of equality (although there is much left to do on this aspect, especially in non-Christian religions such as Islam), but they go too far when they lead to a "transformation" of the family that supposes an alteration of the identity, of the very definition of marriage and family.

For example, the work of the woman outside of the home typical of the industrial revolution is very different from the form of life in an agrarian civilization. The agrarian family, as a work community, had another profile. Today, women are open to other relationships, are better prepared academically and professionally, and break with certain environmental conditioning. This is in itself positive, as long as it is not imposed as something necessary. Pope John Paul II asserts:

In this context it should be emphasized that, on a more general level, the whole labor process must be organized and adapted in such a way as to respect the requirements of the person and his or her forms of life, above all life in the home, taking into account the individual's age and sex. It is a fact that in many societies women work in nearly every sector of life. But it is fitting that they should be able to fulfill their tasks in accordance with their own nature, without being discriminated against and without being excluded from jobs for which they are capable, but also without lack of respect for their family aspirations and for their specific role in contributing, together with men, to the good of society. The true advancement of women requires that labor should be structured in such a way that

⁹⁰ Joseph Hagan, *nuevos modelos de familia*, in *Lexicon*, supra note 79, at 869, 870.

⁹¹ *Gaudium et Spes*, supra note 3, P 47.

⁹² Pope John Paul II, *Mulieris Dignitatem* [Apostolic Letter on the Dignity and Vocation of Women] P 10 (St. Paul ed. 1988).

women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role.⁹³

[*322] The marked changes coming as a result of women's access to the world of work do not nullify family life, although they make it difficult. There is less time for dialogue, for meetings between spouses, and for meetings between spouses and their children.⁹⁴

Today, marriage still persists and remains a union of love and life between a man and a woman. It is a stable union and one open to life. Marriage is the nucleus of the family. For this reason, each family is a nuclear family regardless of whether there are children, or grandparents, cousins, and so forth. The original model remains widely prevalent. The dark prophecy that pictured the decline of the family has not been fulfilled. The natural structure of the family remains and will resist the requiem prophesied by some sociologists, such as Louis Rousel in his book *La famille incertaine*. This book reached its peak of popularity during the 1994 International Year of the Family, and according to its thesis, changes in the family model are so profound that the continued existence of the family is in doubt.⁹⁵ The book's pessimistic perspective was in line with the vision of the United Nations for the 1994 International Year of the Family and is symbolized in the book's cover: two hearts under a roof and an arrow lost into the infinite - that is, toward uncertainty, freeing itself from a family that will exist no more.

Despite this prediction, much evidence indicates that the original model of the family will continue to exist. For example, the Italian sociologist Pierpaolo Donati observes that the "decline of the family" theme has been the order of the day, to some degree, in all societies from the very beginning of history.⁹⁶ Despite the challenges to the **[*323]** family, there are regenerative forces that continually emerge from the family and maintain its resilience:

In traditional systems, common in pre-modern societies and early modern societies, the family is an institution-group that constitutes a kind of forced horizon (relatively "autarchical") for individuals. The family mediates external relationships in the sense not only that a strong "identity" is conferred from it, not modifiable, or only modifiable in part and with difficulty, but above all, in the sense that it offers to individuals a very restricted number of possibilities for reaching certain external positions

In highly modernized social systems, the social mediation of the family is not more rigid or forced; instead, the family is more "crossed over by society." It comes to be more interpenetrated with society and a social hierarchy (stratification) legitimized by belonging to a family that no longer exists.⁹⁷

Lastly, the family, the basic cell of society, gives hope to humanity because without it humanity regresses. Years ago, Claude Levi-Strauss commented that "society belongs to the realm of culture while the family is the emanation,

⁹³ Pope John Paul II, *Laborem Exercens* [Encyclical Letter on Human Work] P 19 (St. Paul ed. 1981) [hereinafter *Laborem Exercens*].

⁹⁴ The Compendium of the Social Doctrine of the Church says:

The recognition and defence of women's rights in the context of work generally depend on the organization of work, which must take into account the dignity and vocation of women, whose "true advancement ... requires that labor should be structured in such a way that women do not have to pay for their advancement by abandoning what is specific to them." This issue is the measure of the quality of society and its effective defence of women's right to work.

The persistence of many forms of discrimination offensive to the dignity and vocation of women in the area of work is due to a long series of conditioning that penalizes women, who have seen "their prerogatives misrepresented" and themselves "relegated to the margins of society and even reduced to servitude."

Compendium, *supra* note 83, P 295 (citing *Laborem Exercens*, *supra* note 93, P 10). These transformations broaden many problems for the spouses and children, but they do not radically change the structure of marriage and the family.

⁹⁵ See generally Louis Roussel, *La famille incertaine* (Odile Jacob ed., 1999).

⁹⁶ Pierpaolo Donati, *Manuale di sociologia della famiglia* 371-72 (2d ed. 1999).

⁹⁷ *Id.*

on the social level, of those natural requirements without which there could be no society, and indeed no mankind."⁹⁸

In order to appreciate the fundamental nature of marriage and family for all humanity, we must understand the authentic relationship between truth and freedom. To this end, we might first ask: what is freedom? Dealing with the truth of marriage in a social context that emphasizes freedom to the point of transforming it into "freedomolatry," to use the words of Dionigi Cardinal Tettamanzi, it is important to clarify two things: on the one hand, the ontological reality, and on the other hand, the "nature" and the meaning of "freedom," albeit with a critical and sober eye.⁹⁹

To this end, it is necessary to make the distinction, as proposed by Cardinal Tettamanzi, between "freedom of the individual" and "freedom of the person."¹⁰⁰ The former follows a selfish design that **[*324]** leads to the "instrumentalization" of others; individuals become "merchandise." The latter, the freedom of the person, is authentic freedom and it fulfills the truth about the person. It is fulfilled in a personal encounter in which free persons interact and make connections. This meaning of freedom is in relation to the truth that we know through reason and the word of God: "the truth will set you free."¹⁰¹ As we become prisoners in the crisis that dims and obscures human reason, we lose the capacity and the confidence to reach the truth.¹⁰²

In large part, the encyclical *Fides et Ratio*¹⁰³ is a necessary response to the hazy conceptual confusion regarding reason and lack of confidence in reason. Cardinal Tettamanzi observes that if we do not consider "the truth" as a basic element of the development of authentic freedom, we will remain condemned to the quicksand of "opinion" of an exasperated and absolute pluralism, and of a totalitarianism "in which the force of law does not rule, but the law of force."¹⁰⁴ Therefore, at the heart of the cultural debate is the question concerning the proper relationship between freedom and truth.

In brief, a truly responsible attitude of a respectful, committed love exalts and maintains the integral value of the person - of the other - with which this adventure-vocation of love is shared. Such love does not "instrumentalize" the other, but venerates him or her as a person, the image of God. This proper conception of love includes the recognition of the social and public roles of the family founded on marriage and places the powers of the state at the service of the family.

II. Social and Legal Distortions and Errors

This discussion raises the question of whether we are today facing a vague and distressing perversion of law and justice. In the Western legal systems, a relativization of the family is occurring in which specific social pathologies are becoming accepted as equivalent to the family. It is as if these pathologies constituted the same natural reality. Such a relativization places the family on a par with unequal realities. The characteristic element of all the social transformations **[*325]** of the natural family is an individualistic anthropology which has led to the abandonment of the natural system of family relationships that has governed Western society and culture until the present day.

If the new anthropological vision were endorsed, family relations would become nothing more than socially significant contractual relationships that would not legally exist until they were arbitrarily established by the citizens and then recognized by the state. Family relationships, therefore, would be created by the arbitrary decisions of individuals. They would subsist only as long as the interests and feelings that justified the contract that was the

⁹⁸ Claude Levi-Strauss, *The Family*, in *Man, Culture & Society*, 333, 356 (Harry L. Shapiro ed., rev. ed. 1971) (1956).

⁹⁹ See Dionigi Cardinal Tettamanzi, *Bioetica e societa* 157-59 (2004) (on file with the author).

¹⁰⁰ See *id.*

¹⁰¹ John 8:32.

¹⁰² See Tettamanzi, *supra* note 99.

¹⁰³ Pope John Paul II, *Fides et Ratio* [Encyclical Letter on the Relationship Between Faith and Reason] (St. Paul ed. 1998).

¹⁰⁴ See Tettamanzi, *supra* note 99.

cause of the legal-family business remained in effect. Once the social function was satisfied, or fulfilled, the subjects would be able to free themselves from the contractual link by petitioning for its dissolution from state authorities.

Indeed, we have reached a point where a very pronounced anthropological void exists. Laws have been introduced that propose alternatives to what the various cultures of mankind, who have conceived of marriage as "the patrimony of humanity," have lived and defended throughout the ages. A variety of "de facto unions" are given the benefit of civil legal incidence that was previously only recognized for marriages. This has been done without any demand whatsoever on the stability of the couple or the couple's commitment to society or to children. Some countries have even enacted laws allowing homosexual "marriages" through which homosexuals have also been granted the right to adopt children.¹⁰⁵

A. "De Facto" Unions

In a systematic and progressive manner, recognition of the natural legal identity of the family, as a permanent institution based on the complete and mutual gift of self in a community of life and love, has been obscured. For years now, there has been a growing phenomenon of free consensual unions. They do not even pretend to mirror marriage or provide an alternative to this natural institution, one not subject to the whim of man. De facto unions are not just free consensual unions; they represent a new social phenomenon that has arisen in the last twenty years. Although the 1981 post-synodal Apostolic Exhortation of Pope John Paul II, *Familiaris Consortio*, used [***326**] the expression "de facto unions,"¹⁰⁶ back in the 1980s, the current forms of de facto unions now discernable in the world were not yet contemplated. As they exist today, these unions give rise to a surprising internal contradiction: they are called "de facto" unions because they do not have an independent legal quality. They lack stability, obligations, and a public dimension - all qualities of marriage - but are nevertheless given legal recognition by the state and granted the full gamut of legal effects.¹⁰⁷

In this regard, the observation by Paul Moreau on the topic of de facto unions is very astute:

Don't couples in de facto unions sometimes ask to be recognized and protected, even to the point of receiving the same assistance as married couples? Finally, why do married couples deserve to be recognized and protected, except that they enter into the family institution with the duties and obligations (to the spouse, to the children yet to be born, to the spouse's family) that the Civil Code provides and defines? ... On the other hand, the couple that attempts to owe nothing to society does not have any reason to be recognized or helped by it.¹⁰⁸

B. Same-Sex Unions

Following the lead of the Scandinavian countries,¹⁰⁹ France, through the promulgation of law 99-944 of November 15, 1999, approved the so-called "Civil Solidarity Pact" ("PACS"), which regulates de facto unions.¹¹⁰ It defines a de facto union as a contract established between two persons, of the same or different sex, to organize

¹⁰⁵ See *infra* notes 109, 117-21, and accompanying text.

¹⁰⁶ *Familiaris Consortio*, *supra* note 5, P 81.

¹⁰⁷ See generally Family, Marriage, and "De Facto" Unions, *supra* note 15.

¹⁰⁸ Paul Moreau, *Familia y Sociedad*, in *Familia en un mundo cambiante* 54-55 (1994).

¹⁰⁹ Denmark was the first nation to legalize de facto unions of homosexual persons in 1989. Norway, Sweden, and Iceland soon followed Denmark's lead in legalizing de facto unions. Although homosexual "marriage" is not yet legal in Scandinavian countries, the approximation of homosexual de facto unions to marriage is almost complete. Finland, while not recognizing homosexual de facto unions, has permitted their legal registry since 2002. Developments in the Law--The Law of Marriage and Family--Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe, [116 Harv. L. Rev. 2004, 2008-09 \(2003\)](#) [hereinafter *Inching Down the Aisle*].

¹¹⁰ *Pacte civil de solidarite*, Law No. 99-944 of Nov. 15, 1999, *Journal Officiel de la Republique Fran<ced>aise* [J.O.] [Official Gazette of France], Nov. 16, 1999, p. 16959.

their lives in common. ¹¹¹ The PACS makes unmarried [*327] couples equivalent to married couples in tax, economic, and social aspects. ¹¹² Despite the noble struggle against this law by the clerics and laity in France, the Parliament nevertheless eventually passed PACS and thereby revealed Parliament's ideological face. The initial advance of de facto unions in Europe has moved at a very slow pace since 1989. However, in the last few years, there has been an acceleration and intensification of efforts focusing on homosexual "marriage." They come in response to the first law recognizing homosexual "marriage" enacted by the Netherlands in 2000. ¹¹³

The controversy over the recognition of same-sex unions is also a heated one in the Americas. ¹¹⁴ De facto unions are being taken, in [*328] these new versions, whether explicitly or implicitly, as alternatives to the traditional model of marriage and family. This change is proof of an anthropological vision gravely altered toward an acceptance of homosexual de facto unions that obfuscates the concept of marriage (as the communion of a man and a woman, consistent with the natural meaning of gift, to form "a single flesh" union). As the Spanish Episcopal Conference has recently reminded us, "to make false money is to devalue the true money and put the entire economic system in danger. In the same way, to make homosexual unions equal to true marriages introduces a dangerous factor of dissolution for the institution of marriage, and, with it, the very social order." ¹¹⁵

We have reached, in Europe and the Americas, not only the enormous fiction, without any foundation, that certain "unions" of persons of the same sex can be an explicit alternative to marriage, but even the greater fiction that

¹¹¹ Id.

¹¹² Id.

¹¹³ In 2000, the Netherlands was the first country to legalize homosexual marriage, allowing the adoption of children without the restrictions of Danish or Icelandic law. See Joan Clements, Holland Allows 'Gay' Marriage, *The Daily Telegraph* (London), Dec. 20, 2000, at 13; Inching Down the Aisle, *supra* note 109, at 2007, 2010-11. Belgium followed, also legalizing "marriage" between persons of the same sex, although the Belgian legislators then rejected the possibility of adopting minors. *Id.* at 2010. Germany approved the "eingetragene Lebenspartnerschaft" (registered life-partnership) on August 1, 2001, which provided de facto unions with tax and legal advantages that previously had been limited to civil marriages. *Eingetragene Lebenspartnerschaft* [Life Partnership Act], Feb. 16, 2001, *Bundesgesetzblatt I*, at 266 (F.R.G.). For an in-depth discussion of the German law, see generally Greg Taylor, Same-Sex Unions and the Law: The New Gay and Lesbian Partnerships Law in Germany, 41 *Alberta L. Rev.* 573 (2003). The German law did not permit the adoption of children for homosexual unions. Inching Down the Aisle, *supra* note 109, at 2011.

¹¹⁴ In the United States, the possibility of legalized homosexual "marriage" depends, presently, on each state of the union. The federal "Defense of Marriage Act" defines marriage as "the legal union of a man and a woman" and permits the states that approve it to recognize only such a union as a marriage. Defense of Marriage Act ("DOMA"), [28 U.S.C. §1738C](#) (2000). Since then, more than forty states have adopted such legislation. Lynn D. Wardle, Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution, [38 Creighton L. Rev.](#) 365, 370-71 (2005). In 1997, Nebraska and Nevada rejected homosexual "marriage" in referenda. Recent Legislation--Domestic Relations--Same-Sex Couples--Vermont Creates System of Civil Unions, [114 Harv. L. Rev.](#) 1421, 1426 n.39 (2001). By the end of 2004, eleven states had rejected the possibility of homosexual "marriage" by referenda. Dwight G. Duncan, Is the Massachusetts Law on Marriage of Non-Residents a Barrier to the Spread of Same-Sex Marriage?, [3 Ave Maria L. Rev.](#) 483, 485 (2005). Nevertheless, state judicial decisions in Massachusetts and New York have made, or tried to make, these "marriages" possible. [Goodridge v. Dep't of Pub. Health](#), 798 N.E.2d 941 (Mass. 2003) (creating the right to marry for homosexuals under the Massachusetts Constitution); [Hernandez v. Robles](#), 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005), vacated, [805 N.Y.S.2d 354](#) (N.Y. App. Div. 2005), *aff'd*, --- N.E.2d ---, [2006 N.Y. Slip Op. 05239](#) (N.Y. July 6, 2006) (upholding state marriage law that limited marriage to men and women and affirming the intermediate court's ruling that had vacated the trial court's decision that homosexual couples may marry). The Bush Administration has proposed initiating a constitutional amendment to preserve traditional marriage, Duncan, *supra*, at 484, but the House of Representatives and the Senate in 2006 both failed to approve the measure by the required two-thirds majority. See Shailagh Murray, Gay Marriage Amendment Fails in Senate, *Wash. Post*, June 8, 2006, at A1; Amy Fagan, Senate Halts Marriage Amendment; Falls Short of Support Needed to Force a Vote, *Wash. Times*, June 8, 2006, at A1; Kate Zernike, House G.O.P. Lacks Votes for Amendment Banning Gay Marriage, *N.Y. Times*, July 18, 2006, at A17; Christian Bellantoni, House Vote Fails on Amendment to Define Marriage, *Wash. Times*, July 19, 2006, at A3. In Canada, homosexual "marriage" became legal on July 20, 2005, with the adoption of the Canadian Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

¹¹⁵ Executive Committee of the Spanish Bishops Conference, *En favor del verdadero matrimonio* P 4b (2004).

these unions can act as "marriage." This goes against reason and sound legal sense. The will of a parliamentary majority and the decision to interpret such an approach as the desire of a society that has not been duly consulted frees them from any argumentation or dialogue. Does this view of same-sex unions represent an aspiration and a priority held by families in society? If we allow the mere will to legislate on same-sex unions to be seen as a triumph of modernity and democracy, we will be supporting a giant cultural deception against the universal experience of mankind. This contradicts the sciences, which view the complementarity of the sexes as something natural and see Judeo-Christian anthropology not as something exclusively for believers, but as an experience and a wisdom of dignified universal value. ¹¹⁶

C. Adoption by "Same-Sex Unions"

The peak of the anthropological void is reached when rights are claimed to legal adoption on the part of these same-sex couples. Denmark, since 1989, and Iceland, since 1996, have allowed adoption by those in homosexual unions when the child is the biological child **[*329]** of one of the two partners. ¹¹⁷ The Dutch "marriage" law of 2000, however, was the first that granted same-sex couples the legal "right" to adopt children not their own. ¹¹⁸ The Dutch law had restricted this adoption to children, but the Netherlands in 2004 approved legislation that lifted the ban on homosexual couples' adopting foreign children, the first country in Europe to do so. ¹¹⁹ Sweden also accepted, in its 2002 law, adoption by homosexual unions without additional restrictions. ¹²⁰ The Spanish parliament, on June 30, 2005, approved a same-sex marriage law that also gives homosexual couples the right to adopt children. ¹²¹

These changes indicate little respect for the principle of "the best interest of the child," a central element in the 1989 United Nations Convention on the Rights of the Child. ¹²² In this regard, important questions are raised: What type of education are same-sex couples able to provide and is such education morally reliable? Is the child being treated as a simple instrument to abate the homosexual couple's loneliness or, perhaps still deeper and more disconcerting, is the child being used to suppress a more profound loneliness? What will happen when the children grow up and realize that these iniquitous and permissive laws have put them at risk? Is not moral violence done when these couples are permitted to adopt such vulnerable children, those who lack a home, a roof over their heads, and tender care, without considering the anthropological question founded on the solid traditions of all peoples?

Unfortunately, the extremely well-organized supporters of adoption for homosexual couples often turn to studies that justify their wishes and show that the children raised by same-sex unions are happy and healthy. ¹²³ However, while these studies accommodate their wishes, the conclusions of the studies have been challenged on the grounds of whether they successfully measure the harmful impact **[*330]** of same-sex adoptions on children. ¹²⁴

¹¹⁶ *Id.*

¹¹⁷ *Inching Down the Aisle*, *supra* note 109, at 2011.

¹¹⁸ *Id.*

¹¹⁹ See *The State of Gay Union in Europe*, *Time Intl.*, June 7, 2004, at 47; *Dutch Cabinet Passes Bill Allowing Adoption of Foreign Children by Gay Couples*, *AP Worldstream*, June 24, 2005.

¹²⁰ Katherine McGill, *Sweden Passes Bill Allowing Homosexual Couples to Adopt*, *The Independent (London)*, June 7, 2002, at 11.

¹²¹ See Jennifer Green, *Spain Legalizes Same-Sex Marriage*, *Wash. Post*, July 1, 2006, at A14.

¹²² *Convention on the Rights of the Child*, G.A. Res. 44/25, art. 3, U.N. Doc. A/RES/44/25 (Dec. 12, 1989) [hereinafter *U.N. Convention on the Rights of the Child*].

¹²³ See generally Jesse Bernard, *The Future of Marriage* (2d ed. 1982).

¹²⁴ See Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same Sex Parenting* (2001) for a critical examination of the forty-nine most influential studies regarding same-sex parenting.

Only when children reach adolescence and clearly grasp their situation will they understand that the situation was undesirable and imposed on them by those with a clear responsibility to society.

One has the impression that in the rush to show themselves to be members of the vanguard of sexual liberation and revolution, many have used whatever justifications are available to support adoption by same-sex couples. The purpose of adoption is to give the appropriate help for the harmonious development of the child. Adoption rules must heed the principle of the "best interest of the child," which incorporates the principle that a child must not be used as an instrument or an object for the satisfaction of those adopting. This principle was created in 1989 by the United Nations during the Convention on the Rights of the Child,¹²⁵ and was recognized by the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which was adopted at the Hague Conference on Private International Law.¹²⁶ In just a few years, this principle has been distorted and undermined by the arbitrary imposition of same-sex adoption that makes victims of the adopted children. This imposition even goes beyond the desires of many homosexuals who do not pretend to possess the right to adopt children.

Under this new approach of granting broad rights to those in same-sex unions, anything is possible! The lack of limits this approach gives to same-sex unions reveals a crude moral relativism that ignores the evidence offered to the observer. Since this approach treats marriage as merely a social pact marked by an absence of ontological depth, the limits of such a pact are difficult to grasp. Why not de facto unions of several men? Or why not legislative changes in the age requirements of the "contracting parties" permitting unions with minors? In the latter case, a crime would become a right - something denounced in the encyclical *Evangelium Vitae*. Pope John Paul II describes in that encyclical the process by which these damaging changes occur:

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Here though we shall concentrate particular attention on another category of attacks, affecting life in its earliest and in its final stages, attacks which present new characteristics with respect to the past and which raise questions of extraordinary seriousness. It is not only that in generalized opinion these attacks tend no longer to be considered as "crimes;" paradoxically they assume the nature of "rights," to the point that the State is called upon to give them legal recognition and to make them available through the free services of health-care personnel. Such attacks strike human life at the time of its greatest frailty, when it lacks any means of self-defence. Even more serious is the fact that, most often, those attacks are carried out in the very heart of and with the complicity of the family - the family which by its nature is called to be the "sanctuary of life."¹²⁷

Indeed, harmful consequences are anticipated from the adoption of children by those in such same-sex "unions." Elementary psychology shows that an equilibrium exists in the upbringing of children through the complementarity of the sexes that proceeds from the father and the mother with their individual properties and charisma. This can be demonstrated by any objective study. We might even say that this is something genetically determined since the embryo proceeds from the contribution of the father and the mother. The XX and XY chromosomes (corresponding to the female and male genetic identity) are a gift of inheritance, just like the other characteristic aspects of the stock of knowledge of paternal and maternal love involved in the upbringing of children.

It is nothing new to say that children look for models to imitate. They encounter their first models in their parents, their father and mother. Does it not do psychological violence when the model offered is abnormal, but is nonetheless deemed acceptable for imitation by the adopted child? Are there not risks in imposing the homosexual and lesbian "culture" on the adopted child? Should there not be concern about how children would be integrated into the world, into school, and with their friends? Although offensive attitudes of a discriminatory nature should always be rejected as unjust discrimination, what about the clashes and altercations that could occur unexpectedly?

¹²⁵ See U.N. Convention on the Rights of the Child, *supra* note 122, art. 3.

¹²⁶ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 1, art. 4, May 29, 1993, [32 I.L.M. 1134, 1139](#).

¹²⁷ *Evangelium Vitae*, *supra* note 85, P 11 (emphasis omitted).

Would the couples not be acting imprudently? Would society not view these couples as responsible for generating the difficulties?

[*332] Legislators, Catholic or not, cannot accept social opinion with impunity. They must not believe that all these adventurous projects are not in essence aggressive and discriminatory against the rights of the family. Catholics must speak out against attacks on the family. It is not possible to gag those who, for love and the integral good of the children, dare to advance the most serious doubts and objections about something so opposed to God's plan.

Many legal systems and much contemporary legislation departed from the Western legal tradition on the family from the moment they conceded the right to divorce. The right to divorce now enjoys the same value in many countries that the recognition of the right to marriage enjoys. Husband and wife are no longer seen in these countries as a parental unit, since their identities - that of husband and wife - are not defined with any reference to modes of being or personal identities and are limited to reflecting social functions created by the positive legal order. In marriage as well as in its dissolution, it is the state that respectively attributes or eliminates the legitimate use of those functions on the part of the citizens. Thus, under this mistaken notion, it is the positive order that establishes the meaning and content of the various family relations.

Such legal positivism cannot be ignored. This is especially true since it is very widespread, even in areas outside the law, including politics. With representatives like Norberto Bobbio and Hans Kelsen, legal positivism is one of the factors that has contributed to the current decline of the proper role of the family, especially when it is seen as a theory of law in opposition to natural law. Hans Kelsen, who is often considered the founder of this positivist school of thought, belonged to the so-called "Circle of Vienna," an intellectual environment whose influence went well beyond the Austrian capital in the early twentieth century. It had very prestigious members like Ludwig Wittgenstein, Rudolf Carnap, Karl Popper in part, and, to a certain degree, even Sigmund Freud himself. In agreement with the fundamental principles of the positivist line of thought, Kelsen's theory starts from the proposition that an empirical foundation for value judgments is impossible.¹²⁸

As a result, with his "Pure Theory of Law" coming from the positivist perspective, Kelsen insists that legal knowledge must do without any value judgment with respect to legal norms.¹²⁹ Thus, for **[*333]** Kelsen, law is the same as the positive norm. Therefore, he supposes a clear rejection of natural law, and, consequently, of the multi-secular wisdom of mankind which has recognized the family as the basic cell of society.

Kelsen's rejection of the natural law and the prevalence of legal positivism are expressions of an inadequate anthropology in which the delicate equilibrium between faith and reason lacks expression. Rationalism is thus unleashed with a paradoxically irrational willfulness.

As is known, in the last few years of his long life Kelsen worked on the elaboration of a general normative theory that would include not only legal norms, but also moral norms. The concept of the norm - and consequently morality and legality - of the nonagenarian Kelsen, is formulated with the same clarity as all his work, and it has an even greater simplicity. For him only positive norms, whether moral or legal, that are the product of a human act of will can be taken into consideration. The willfulness of the conception of norms reaches an extreme ... [with] Kelsen who denies the application to norms of traditional logical principles like the principle of non-contradiction. The pluralism reaches in this way an unsuspected peak: it could give rise to contradictory norms, equally valid, within a single normative system The Kelsenian coherence ends in pure irrationality.¹³⁰

We do not ignore the varied interpretations of legal positivism and the possibility of distinguishing, along with Bobbio, between a concept of science and a concept of law, or a theory of law and an ideology. This can also be

¹²⁸ See Michel Troper, *Positivisme Juridique*, in *Dictionnaire de philosophie politique* 495, 498 (Philippe Raynaud & Stephane Rials eds., 1996).

¹²⁹ *Id.*

¹³⁰ Carlos Jose Errazuriz, *La etica y el derecho ?instancias separadas o armonicas?*, 24 *Humanitas* 589, 591 (2001) (citations omitted).

done in relation to Kelsen, who resisted formulating value judgments. He established connections that linked the negation of value judgments with ethical relativism. In the end, the ideas of John Rawls in regard to the positivist and pragmatic "game" observed by so-called democracies are far more interesting. ¹³¹

One also cannot avoid recognizing in the spread of legal positivism a manifestation of the dehumanization of contemporary society. As the philosopher Antonio Millan-Puelles points out:

Legal positivism will only be overcome if jurists and non-jurists - everyone - lends more and more consciousness to continuing to [*334] question what is man and what is his permanent nature. To achieve a legal situation and a culture where man affirms himself because he is anchored in the most profound demands of his nature is one of the objectives to pursue so that Europe and the world are re-humanized and re-Christianized. ¹³²

The radically individualist anthropology of the evolution of family law brought about by legal positivism can be seen clearly today. This anthropology exhibits itself when, for example, the legal recognition of a "right" to a sex change is recognized for a person who, despite having been part of a family in the role of "husband" with a masculine gender, is allowed to later take part in another "family" (after the "sex change") with the functions of a "wife." The same worrisome individualist dynamic is seen in the area of parent-child relationships. This is evident in the technique of artificial fertilization (with the distinctions between "biological" father and "social" father, between "biological" mother, "surrogate" mother, and "social" mother, and so on). This question of parental identity becomes even more serious with the eventual cloning of human embryos. In relation to cloning, I have previously explained:

The cloning of human embryos is contrary to the dignity of the family.

There also exists an important ethical factor worth considering that is often ignored. Human beings are social beings. The sexual and procreative dynamic in man is naturally developed in an environment in which sexuality and procreation are incorporated harmoniously in the reality of conjugal love that gives full sense to human sexuality open to life. Love and responsibility are found in marriage in the opening up to life and continue in the work of education by means of which the parents exercise, in an integral manner, the care of their children.

Human cloning breaks with this dynamic. In cloning, life is presented as an element completely external to the family. The embryo "appears," so to speak, on the margin not only of sexuality, but also of genealogy. Every human being has the right to be born from an integral love - physical and spiritual - of a father and a mother, to receive their care, to be received as a gift by its parents, [*335] and to be educated. When the worrisome possibility emerges that the life of a conceived human being could be manipulated and submitted to experiments to later destroy it once the cells or the biological knowledge sought is obtained, then it is the very concept of parent-child relationships and paternity-maternity that is put into question. It is the very idea of family that is destroyed. ¹³³

In the last few decades, we have been witnessing a progressive evolution that consists in applying the same legal schemes that had been previously attributed to the conjugal relation and the family to other identities and relations. According to this evolution, neither family identities nor family relationships constitute "modes of being" for persons. Instead, they are defined and attributed by each legal order. ¹³⁴ Since in Western legal culture terms like "ex-wife" and "ex-husband" are now commonly used, it does not seem unlikely that these same expressions will soon be used when referring to the components of a "broken" union of homosexuals. Such terms may even be applied to other "familial" identities in the cases where homosexuals have adopted children; for example, the terms "ex-children," "ex-fathers," or "ex-brothers" may be used.

¹³¹ Cf. Troper, *supra* note 128, at 498-99.

¹³² Antonio Millan-Puelles, *Positivismo jurídico y dignidad humana*, 34 *Humanitas* 206, 211 (2004).

¹³³ Alfonso Lopez Trujillo, *Clonación: pérdida de la paternidad y negación de la familia*, *L'Osservatore Romano* (Spanish edition), Sept. 5, 2003, at 7.

¹³⁴ See generally Franceschi & Carreras, *supra* note 9.

Thus, Christian jurists, politicians, and legislators at the beginning of the third millennium are called by the Church to denounce contemporary nations' systems of family law that dangerously separate them from the system of natural family relations. This system serves them as a foundation. The basic notions on the sexual and interpersonal nature of family relations must be found in the natural system. This system must be upheld against other legal systems that pretend to construct themselves on a "spiritualist" and anthropologically unhinged vision of the human subject, understood as "a freedom which is self-designing."¹³⁵ The unlimited freedom found in that technological and scientific progress that permits one to define himself must be combated.

No system of family relationships could resist such a profound transformation and so radical an emptying of values. To slow this process of constant decomposition, the importance of anthropological studies must be emphasized. The current problem with many legal systems' treatment of the family lies in the fact that anthropologists **[*336]** are not lawyers: they do not say how a particular family system should be, but rather describe and study it. They describe what it is like (or what it appears to be like). The development of a legal anthropology on sexuality, marriage, and the family that has as its end the study of family systems in light of human dignity is a desirable and recommended goal. Such an anthropology would not deal with the creation of an artificial system made in the laboratory, but rather analyze the logic and the dynamic of family identities and family relationships. It would consider their ontological link to the human person. This would provide a foundation on which cultures could develop their laws pertaining to the family. In this way, there would be an anthropological basis rather than a system of rules driven by a positivistic perspective and enacted by each parliament or each national or international institution.

A legal anthropology, therefore, would provide the natural law foundation for limits on the power of public institutions. These institutions do not create the family and their jurisdiction must be limited according to a proper anthropology so that they recognize this truth. Moreover, it is the duty of these institutions to form laws that reflect, and do not confuse, the identity of the family and each one of the identities within the family relationship. Thus, in an effort to recuperate the unity between the legal comprehension of marriage and the family, it is necessary to rediscover the legal dimension intrinsic to the family and to develop its anthropological study. This study will not only describe what the family is, but will also attempt to define what it should be. It will incorporate the dimension of justice into the various areas of human sexuality.

It is the grouping of these factors, in addition to the erosions that come from the fragility of the family, itself trapped within a "neo-pagan" society (not to use the term secularization which takes God away from the scene of man), that lends authority to the radical, drastic, and insensitive changes made by so many parliaments and international organizations.

It is important ... to observe in the different cultures this essential aspect of permanence and continuity which permits the giving of a valid definition to "family." This definition is singular, and does not speak of families in an indeterminate plural. "Families" suggests that multiple permutations of family models and structures do exist. If this were so, there would not even be precision in the use of terms.

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The recognition and the deepening on the truth of the family through research constitute an exigency that has arisen in a pressing manner in the midst of so many confusions in the Year of the Family 1994.

Thus the Council considered: "Yet, the power and strength of the institution of marriage and family can also be seen in the fact that time and again, despite the difficulties produced, the profound changes in modern society reveal the true character of this institution in one way or another."

This also reflects the posture taken by the Catechism of the Catholic Church. A dialogue is thus put into place at the philosophical level. This is especially true in international forums, where the pressure to spoil the very concept

¹³⁵ See *Veritatis Splendor*, supra note 10, P 48.

of family prevails and where the fear of the link between the family and marriage has been clearly manifested. The result is a closing of the doors to an integral and proper conception of the family.¹³⁶

The evident transformations in marriage and the family can be provoked from outside (like the phenomenon of privatization, or political-cultural projects, with strong repercussions in the legal order with the introduction of iniquitous laws against the family and against life). The challenge may also come from inside, not only through the lack of preparation of spouses for such a responsibility, but also because the spouses are themselves often victims of a disorientating and disintegrating "sexual education" that promotes "lifestyles" incompatible with their human and Christian vocation. Either way, such transformations are obstacles to the exercise of free giving and mutual respect of spouses within marriage. They fail to alter the primordial design of God for the family, the original model, to which I referred above.¹³⁷

In an environment in which the transformations of marriage and the family are propagated, God is not considered the foundation of the family. This is a society in which a neo-paganism has spread. We find ourselves facing the loss of the truth of the family founded on marriage, on the original, creational model. That truth, to use the **[*338]** Pauline terminology, is imprisoned and suffocated.¹³⁸ The truth is imprisoned in injustice and receives a deep wound where conjugal love is supposed to be found. This makes space for less dignified mentalities and behaviors with respect to the vocation of the spouses. If no truth about the family existed, and it were impossible to speak of a natural "model" for the family, how would it be possible to stimulate research on the elaboration of legitimate laws for the family?

In conclusion, many signs show a crisis of marriage and the family with its deepest roots in a false conception of man, in a poor, sickly, and deficient anthropology. This anthropology incapacitates men and women with respect to the family. It makes them incapable of giving an authentic and solid foundation to the family and life, to the succession of future generations in the society, with the transmission of values that such a project requires.

As Pope John Paul II pointed out in the encyclical *Veritatis Splendor*, a pernicious disassociation has been established between truth (in this case the truth of man, the truth of the family) and freedom (freedom conceived of in an erroneous manner).¹³⁹ The natural law and the very concept of nature are denied by the influx of an unbridled legal positivism. We could say that the original family model that seemed to be consolidated, that was defended in the Church, and was respected as a necessary good for society, is being taken apart piece by piece. An alarming disregard for the natural institution of marriage reigns in the hearts of the members of parliament of some nations.

III. The Reconquest of the Values That Are in Play

In the past, before the changes in modern times, mankind recognized the fundamental importance and irreplaceable role of the family in society. Such recognition goes back to Aristotle who asserts at the beginning of his *Politics* that states emerge from families. Aristotle recognizes that society as a whole has its most solid foundation in family connections.¹⁴⁰ In the *Nicomachean Ethics* (Book VIII), he further elaborates on the importance of the family institution. Friendship (or at least a "not enemy" status, as Aristotle says) is an **[*339]** essential factor in the unity of every society.¹⁴¹ The origin, the motor, the nucleus from which it expands, is,

¹³⁶ Alfonso Lopez Trujillo, *Familia, Vida y Nueva Evangelización* 179-80 (2000) (citations omitted) (citing *Gaudium et Spes*, supra note 3, P 47; *Catechism of the Catholic Church*, supra note 22, P 1603).

¹³⁷ See supra Part I.A.

¹³⁸ Romans 1:18.

¹³⁹ See *Veritatis Splendor*, supra note 10, P 31.

¹⁴⁰ See Aristotle, *Politics*, Bk. I, Ch. 1-2 (B. Jowett trans.) in 2 *The Complete Works of Aristotle*, supra note 14, at 1986, 1986-87.

¹⁴¹ *Nicomachean Ethics*, supra note 14, Bk. 8, Ch. 1, at 1825.

precisely, the family. Aristotle asserts that it is easier for childless couples to separate because "children are a good common to both and what is common holds them together." ¹⁴²

The succession of the generations is a common good essential to all peoples - a fundamental element of their unity. Plato recognizes this in his Republic, as do Roman thinkers like Cicero (who emphasizes this even more than Aristotle). The nucleus of states and societies is the family since all the institutions of society and even states themselves have their origin in it. Cicero explains that:

Since it is by nature common to all animals that they have a drive to procreate, the first fellowship exists within marriage itself, and the next with one's children. Then, there is the one house in which everything is shared. Indeed that is the principle of a city and the seed-bed, as it were, of a political community... . In such propagation and increase political communities have their origin. ¹⁴³

Thus, the family is a precious good for society, not only because it provides its projection to the future and gives continuity to its existence as a people, but also because its values, culture, and the specific manner of understanding life according to the traditions of a people are communicated and transmitted through the family.

Education, in effect, has its most proper and primordial place in the family. As St. Thomas Aquinas says,

a child is by nature part of its father: thus, at first, it is not distinct from its parents as to its body, so long as it is enfolded within its mother's womb; and later on after birth, and before it has the use of its free-will, it is enfolded in the care of its parents, which is like a spiritual womb ¹⁴⁴

This fundamental place of the family in the educational process forms part of the group of goods that is concentrated in the family. This is a good from which the entire society benefits.

[*340] The Second Vatican Council, in its Pastoral Constitution *Gaudium et Spes*, emphasizes the duty to transmit life and educate one's children as a duty of marriage in which the spouses know themselves to be "cooperators with the love of God the Creator, and are, so to speak, the interpreters of that love." ¹⁴⁵ The formation of a proper judgment about the family heritage also belongs to the spouses. It is up to the spouses to

thoughtfully take into account both their own welfare and that of their children, those already born and those which the future may bring. For this accounting they need to reckon with both the material and the spiritual conditions of the times as well as of their state in life. Finally, they should consult the interests of the family group, of temporal society, and of the Church herself. ¹⁴⁶

The solidity of the family, its stability, is one of the fundamental goods of man and society. If society continues down the path that deprives marriage of its identity as being the complement between man and woman, of its stability, of its openness to life, the family will be deprived of its solidity. If marriage is devalued even more, making it equivalent to realities that have nothing to do with the family like same-sex unions, it will be pulled from the very root of its well-being. Consequently, society will be deprived of one of the fundamental goods on which human life is constituted, as has been recognized for centuries by the wisdom of mankind. This is something that will doubtless have very serious consequences for the future.

The family is a precious good for humanity - the guarantee of continuity and development of human beings. Therefore, the family is a good that not only should be protected and cared for but that carries a projection for the future: the family is, for public institutions, a very important good to construct, to promote, and to assist in its

¹⁴² Id. Bk. 8, Ch. 12, at 1836.

¹⁴³ Cicero, *On Duties* 23 (M.T. Griffin & E.M. Atkins eds., 1991).

¹⁴⁴ *Summa Theologica*, supra note 61, Pt. II-II, Q. 10, Art. 12.

¹⁴⁵ *Gaudium et Spes*, supra note 3, P 50.

¹⁴⁶ Id.

fulfillment. For this reason, the family is not only a good common to humanity; it is the hope for humanity and a foundation for a better world. This is shown today in the family's ongoing validity as a task, a job, a responsibility, and a duty of society.

In light of the family's role in society, it is important to question seriously the values that predominate in today's society, especially the manner in which young people perceive the values of the family. **[*341]** Is our culture in favor of life, open to the future, or is it rather an old culture, impregnated with hedonistic selfishness, closed and exclusive, in the way that Pope John Paul II calls the "culture of death?"¹⁴⁷ Is it a culture on the path of self-extinction that wants to choke whatever glimmer of hope there may be for the future, for life? Is it Cronos - the god of time - devouring his children? Certainly, laws have been imposed that hurt the family. The family is hurt, when in fact it should not only be protected but stimulated to move forward toward its future.

The fear of having children, population aging, the demographic winter - factors contributing to the family's present deterioration - have been worsening in the last twenty years.¹⁴⁸ The similarization of de facto unions to marriage, the deficit of authentic family policies, the adopting of children on the part of homosexual persons on one hand, and the legislation promoting abortion and contraceptives on the other - are they consistent with the affirmation of the values of the family and life in a society truthfully projected toward the future and coherently cemented in the dignity of the human person and human rights, the most fundamental of which is the right to life? Does the promotion of irresponsible and superficial lifestyles and a manner of understanding sexuality disconnected from authentic love and marriage correspond to a society conscious of the fundamental importance of the family in the present, and, above all, in the future? Or, is it an indication of a powerful and inhuman, even a cruel culture?

Because there is an active campaign today for the confusion of concepts related to the family, proposals exist (even in very important and influential international bodies) for the legalization of homosexual "marriages." It cannot be left out that, while on one hand the word "marriage" is systematically silenced in so many national and international forums (replaced by the term "couple" or other equivalents), on the other hand, influential lobbies insist that homosexual relations should qualify as "marriages." This is a meaningful paradox.

[*342] Yet, despite the expansion of divorce, of free unions, of contraception, of abortion, of homosexual "marriage," recent statistics continue to show that, despite everything, the younger generations recognize marital stability as a good. They see the value of sacrifice in marital life and the beauty of children. And because the family finds itself written in a "grammar" of the human heart, neither inhuman ideologies nor the culture of death can destroy it in its totality. As I had occasion to assert in 1994 as the envoy of the Pope before the General Assembly of the United Nations,

The family, founded in marriage, is a good belonging to this natural institution, loved by God, which is found in the depths of human nature. It is a good - I repeat - as Vatican Council II notes, for the spouses, the children, and society. It is a good which is necessary to recognize, to defend, and to treat as the pillar of authentic family policies.
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¹⁴⁷ Evangelium Vitae, supra note 85, P 50

¹⁴⁸ Professor Jean-Claude Chesnais of the National Institute for Demographic Studies in France has carefully analyzed these factors. See also The Pontifical Council for the Family, Declaration on the Decrease of Fertility in the World (Feb. 27, 1998), http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_29041998_fecondita_en.html.

¹⁴⁹ Trujillo, supra note 136, at 162.