TRADITION AND DEVELOPMENT IN THE CATHOLIC CHURCH'S TEACHING ON MARRIAGE: A RESPONSE TO CARDINAL TRUJILLO

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During the twentieth century, the teaching of the Roman Catholic Church on the nature of marriage remained fully faithful to ancient tradition and witnessed new developments. In his article, *The Nature of Marriage and Its Various Aspects*, Alfonso Cardinal López Trujillo has afforded a splendid overview of both the timeless and adaptive features of the Church's teaching.[1] In commenting on the article, I have been asked to identify obstacles to the article's reception as well as to suggest possible resolutions. My brief response to His Eminence, Cardinal Trujillo, consists of two parts. First, I suggest that an epistemological issue is raised by the Church's insistence that marriage continues to constitute an objective social reality in the face of modern trends in favor of the subjectivity of marriage. Second, I will discuss the "personalist" perspective on marriage as a twentieth-century development in the Church's teaching, which represents an adaptation to subjectivity even as it maintains the objective tradition. My commentary focuses on Cardinal Trujillo's appeal to the natural law. Natural law holds that traditional marriage consists of one man and one woman who are united in an exclusive fidelity and a permanent bond.[2]

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1. Alfonso Cardinal López Trujillo, *The Nature of Marriage and Its Various Aspects*, 4 AVE MARIA L. REV. 297 (2006).

2. The Church's teaching also encompasses a theological tradition that holds marriage between Christians to be a sacrament. As Cardinal Trujillo indicates, the natural law and theological foundations of marriage are complementary in the Church's teaching. *See id.* at 298 ("Marriage is a natural institution which precedes the sacrament.").

I. MARRIAGE AS AN OBJECTIVE SOCIAL REALITY

One of the most fundamental obstacles to the reception of the Church's teaching on marriage is an epistemological one. Toward the beginning of his article, Cardinal Trujillo observes that "[m]arriage 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."[3] In keeping with this observation, his article affirms the natural law approach to marriage. Natural law posits that marriage is a fundamental community that is necessary to the good of individuals and society as a whole.[4] For the individual, natural law holds that marriage constitutes a most basic form of human participation and solidarity. It represents the profound justification for the expression of sexual intimacy between a man and a woman. It affords the stable form of life in which children learn of human love and trust from their parents.[5] Socially, marriage is understood as the basic building block for culture and civilization. As an objective social reality, the family unit formed around marriage remains an essential element of the common good. A society's health depends directly upon the health of marriage and the family.[6] From the perspective of natural law, the fundamental community of marriage and the family constitute an objective social reality.[7] Critical of legal positivism, Cardinal Trujillo recognizes that the natural law approach to marriage conflicts with the epistemological assumptions of mainstream legal theory.[8] At the outset, it seems important to contextualize the discussion by acknowledging that the natural law approach to marriage and family represents an understanding of law that is not necessarily widely held in contemporary jurisprudence.

St. Thomas Aquinas defined law as an "ordinance of reason for the common good, made by him who has care of the community, and

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3. *Id.* at 301.

4. *See* Pope Paul VI, *Humanae Vitae* [*Encyclical Letter on the Regulation of Birth*] ¶ 23 (St. Paul ed. 1968); Pope Pius XI, *Casti Connubii* [*Encyclical Letter on Christian Marriage*] ¶ 121 (St. Paul ed. 2001) (1930) [hereinafter *Casti Connubii*].

5. *See, e.g.*, KAROL WOJTYLA [POPE JOHN PAUL II], LOVE AND RESPONSIBILITY 125-40 (H.T. Willetts trans., Ignatius Press 1993) (1960).

6. *See* CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD, at xxiii-xxiv (W.W. Norton & Co. 1995) (1977).

7. *See* Pope Paul VI, The Nature of the Marriage Bond, Address to the Roman Rota (Feb. 9, 1976), *in* PAPAL ALLOCUTIONS TO THE ROMAN ROTA: 1939-2002, at 133, 135-36 (William H. Woestman, O.M.I. ed., 2002); Pope John Paul II, One Cannot Give In to the Divorce Mentality, Address to the Roman Rota (Jan. 28, 2002), *in* PAPAL ALLOCUTIONS TO THE ROMAN ROTA: 1939-2002, *supra*, at 267, 271.

8. *See* Trujillo, *supra* note 1, at 309.

promulgated."[9] According to the definition, law must be first and foremost an "ordinance of reason." This requirement raises an epistemological question. In other words, if reason is a primary measure of law, one might ask: "What counts as reason?" For St. Thomas, there is a close relation between law and "practical reason."[10] Practical reason identifies and applies reason for choice.[11] It would be incomplete to describe practical reason as a merely cognitive and abstract mental function of the intellect. Rather, practical reason relies on the harmony of the somatic, emotional, and higher cognitive functions in the human person.[12] Practical reason functions to recognize basic human goods, intermediate moral principles derived from the basic goods, and specific rules deduced from the intermediate principles.[13] Natural law theorists have long held that practical reason reveals marriage as a basic human good, and that practical reason is able to translate the basic good of marriage into positive law.[14] The Thomistic position reflects an epistemological

9. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. I-II, Q. 90, Art. 4 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter SUMMA THEOLOGICA]. In the original Latin: "*quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata*." THOMAS AQUINAS, SUMMA THEOLOGIAE, Pt. I-II, Q. 90, Art. 4.

10. St. Thomas drew a specific distinction between the practical and speculative intellects. *See* SUMMA THEOLOGICA, *supra* note 9, Pt. I, Q. 79, Art. 11 ("[T]he speculative and practical intellects differ. For it is the speculative intellect which directs what it apprehends . . . while the practical intellect is that which directs what it apprehends to operation.").

11. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 101 (1980) (describing "practical reasonableness").

12. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 104 (1999) ("Right reason is reason unfettered by emotional or other impediments to choosing consistently with what reason fully requires."); LADISLAS ÖRSY, S.J., THEOLOGY AND CANON LAW: NEW HORIZONS FOR LEGISLATION AND INTERPRETATION 176-77 (1992) (discussing the Thomistic definition as meaning an ordinance of practical right reason).

13. *See* GEORGE, *supra* note 12, at 102 (identifying the three sets of principles of which natural law consists).

14. St. Thomas suggests two ways by which the legislator uses practical intellect to translate the transcendent principles of natural law into historically specific rules of positive law. First, the legislator could reach a direct conclusion from premises. *See* SUMMA THEOLOGICA, *supra* note 9, Pt. I-II, Q. 95, Art. 2; *see also* FINNIS, *supra* note 11, at 284-90 (noting that the requirements of practical reason, as, for example, the prohibition of killing, are derived from particular fundamental values, for example, life, and that law is either directly deduced from principles of practical reason or from construing *determinationes*); GEORGE, *supra* note 12, at 102-11 (observing that natural law consists of three sets of principles: first, those concerning basic human goods; second, intermediate principles directing human choice and action; and third, fully specific moral norms). Second, according to St. Thomas, the legislator's process in translating the transcendent principles of natural law into positive law involves *determinationes*. SUMMA THEOLOGICA, *supra* note 9, Pt. I-II, Q. 95, Art. 2.

Fundamental goods also serve as sources from which practical reason derives intermediate principles and tertiary norms. Considering procreation as a basic natural good of life, for example, leads to the intermediate principle that parents are the primary educators of their

optimism about the capacity of human reason to know the natural law and specifically to recognize marriage as an aspect of natural law.[15]

In contrast to the Thomist understanding of law and practical reason, Alasdair MacIntyre distinguishes between two rival conceptions of reason that have been hallmarks of post-Enlightenment thought.[16] The first, or "encyclopaedist," conception understands reason as universal, impersonal, and disinterested.[17] It focuses on "the progress of reason in which the limited conceptions of reasoning and practices of rational enquiry generated by Socrates, Plato, and Aristotle were enlarged by their successors, albeit with new limitations, and then given definite and indefinitely improvable form by Descartes."[18] For the encyclopaedist, natural law theory represents a limited conception of reason that was propagated in one variation or another by historical figures such as Aristotle and St. Thomas Aquinas. In the encyclopaedist's view of the progress of reason, the notion of a natural law has long since been abrogated in favor of pure reason, which requires that all legal claims be subjected to rigorous critical evaluation.[19]

The first modern conception of reason is evident in legal positivism, which calls for the separation of law from moral claims.[20] Legal positivism places a high value on equality and diversity, which

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children. As the second way, or *determinatio*, demands more creativity than the first, St. Thomas draws an analogy to the "craftsman" who sets out to build a house. *Id.* *See also* GEORGE, *supra* note 12, at 102, 108-09 (translating the Latin word *artifex* as "architect," and suggesting that natural law consists of three sets of principles: basic human goods, intermediate principles, and specific moral norms, all of which depend on practical reason). Consistent with the Thomistic metaphor, the legislator is like the craftsman who understands the general form of house and must implement it in a practical specification. *See id.* at 109 ("[T]he legislator (including the judge to the extent that the judge in the jurisdiction in question exercises a measure of law-creating power) makes the natural law effective for his community by deriving the positive law from the natural law.").

15. *See* SUMMA THEOLOGICA, *supra* note 9, Pt. I-II, Q. 91, Art. 2 ("It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law."); *see also* MARTIN RHONHEIMER, NATURAL LAW AND PRACTICAL REASON: A THOMIST VIEW OF MORAL AUTONOMY 243 (Gerald Malsbary trans., 2000) ("When we realize that there is a 'plan' (a *ratio*) that underlies the divine government of the world, and that this *ratio gubernationis* is called the eternal law, then we can understand what it means to say that the natural law is a participation of the eternal law in the rational creature.").

16. *See* ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION 58-59 (1990).

17. *Id.* at 59.

18. *Id.* at 58.

19. *See* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 2-3 (1987).

20. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 74-76 (3d ed. 2004).

are expressed in legal rights independent from moral claims.[21] A claim that suggests a particular group of persons should receive preferential treatment under the law must be based on reason. For the legal positivists, it does not suffice to argue that the claim represents a basic good that is prior to legal rights. For example, the claim of natural law—that marriage consists of one man and one woman who are united in an exclusive fidelity and a permanent bond—would need to sustain the pressure of critical evaluation in order for it to pass as a requirement of reason.[22] Pursuant to the positivist rubric, traditional marriage is not recognized as a basic good prior to any individual's legal right. To the contrary, adherents of this first modern conception of reason would tend to view traditional marriage as one of a number of possible ways in which human beings might elect to order living arrangements. For the encyclopaedist, reason cannot necessarily distinguish among traditional marriage, same-sex marriage, or couples living together without the formal structures of marriage. As this conception of reason requires that the law treat all human persons equally, it follows that the positive law ought to recognize the rights of persons to structure their personal relationships in accord with subjective preference, as long as the subjective preference remains otherwise lawful.

The competing modern conception, which MacIntyre labels as "genealogy," views all claims of neutrality and disinterestedness as mere facades that mask particular interests and the drive to power.[23] Attributing the competing conception to Friedrich Nietzsche, MacIntyre describes it as "one in which reason, from the dialectic of Socrates through the post-Kantians, both serves and disguises the interests of the will to power by its unjustified pretensions."[24] Legal realism, which approaches law more for its instrumental possibilities than normative content, reflects this alternative modern conception of reason.[25] The critical legal studies movement and certain forms of feminist theory are also consistent with this second, modern approach

21. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 39-41 (1996).

22. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (rejecting marital claim of natural law and holding that the state of Massachusetts "failed to identify any *constitutionally adequate reason* for denying civil marriage to same-sex couples") (emphasis added).

23. *See* MACINTYRE, *supra* note 16, at 58.

24. *Id.*

25. *See* WILFRED E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 48-55 (1968).

to reason.[26] According to the genealogist perspective, natural law theory is nothing more than the creation of the powerful to maintain a social order and status that takes advantage of those who are less powerful. The genealogist rejects traditional marriage as an unwarranted and unjustified limitation on the individual's autonomy. MacIntyre points out that the modern conceptions of the encyclopaedist and genealogist are mutually exclusive.[27] The encyclopaedist sees reason as universal, impersonal, and disinterested, while the genealogist views such claims as a ruse that hides the will to power.[28] Nonetheless, the conceptions agree in conferring a unified history of reason.[29] The first conception ascribes a unified history in the progress of reason, while the competing conception assigns a "distorting and repressing function" to the history of reason.[30]

In attributing a unified history to reason, the two modern conceptions of reason, MacIntyre indicates, remain at odds with a third "traditional" conception.[31] This alternative holds as follows:

> reason can only move towards being genuinely universal and impersonal insofar as it is neither neutral nor disinterested, that membership in a particular type of moral community, one from which fundamental dissent has to be excluded, is a condition for genuinely rational enquiry and more especially for moral and theological enquiry.[32]

While the two modern conceptions posit a unified historical development of reason, the traditional conception points to a rupture in the history of reason. The third conception distinguishes between the philosophy that developed from Socrates to St. Thomas and that of modernity, which starts with René Descartes and yields Nietzsche. The third conception understands reason from the perspective of a community whose members are united around a living tradition and defined by certain canonical texts. The first two conceptions of reason resist the idea that canonical texts contain truth from which there can

26. *See* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 151-52 (1990); BIX, *supra* note 20, at 222-28.

27. *See* MACINTYRE, *supra* note 16, at 59.

28. *See id.* at 58, 59.

29. *See id.* at 58.

30. *Id.*

31. *See id.* at 59.

32. *Id.* at 59-60.

be no fundamental dissent. The third conception of reason considers such texts to serve as sources of wisdom in the absence of which there cannot be enduring agreement about moral value in the community.

Cardinal Trujillo's analysis proceeds from the traditional conception of reason. In analyzing the relationship between truth and freedom, he suggests that contemporary culture and law manifest a "lack of confidence in reason."[33] In his analysis, reason is able to demonstrate that marriage is an objective social reality that is good for the spouses, children, and general societal stability and well-being. This natural law position contrasts with the modern understanding of marriage as an agreement between autonomous individuals based upon subjective preferences. The modern view eschews indissolubility as an impermissible restriction on the autonomy of individuals. It leads to a redefinition of marriage by the state in a way that is contrary to the natural law tradition. Skepticism about reason and the consequent reduction of marriage render it difficult to offer persuasive public policy arguments, such as Cardinal Trujillo's, against same-sex marriage. If marriage is fundamentally based on subjective choice, one may be hard-pressed to argue why official state recognition must be limited to traditional marriage. This is not to suggest that efforts to rehabilitate a certain epistemological optimism and preserve the special legal status of traditional marriage as a natural institution ought to be abandoned. However, the epistemological skepticism has paved the way for judicial recognition of same-sex marriage as a fundamental constitutional right.[34] The

33. Trujillo, *supra* note 1, at 324.

34. The primacy of the subjective self has become a constitutive aspect of the "substantive due process" right of privacy designed by the United States Supreme Court. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court struck down a state statute that criminalized the use of contraceptives "'for the purpose of preventing conception.'" *Id.* at 480 (quoting CONN. GEN. STAT. REV. § 53-32 (1958)). The Court appealed to the "sacredness" of marriage, describing the statute as "repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 486. The Court's ruling in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended the privacy right by protecting the distribution and use of contraceptives to non-married individuals. *Id.* at 454-55. The legal reasoning underlying those two cases subsequently established the right of a woman to have an abortion in *Roe v. Wade*, 410 U.S. 113 (1973). Thus, though the privacy right has its origins in the "sacred character" of marriage, the Court expanded it to include constitutional protection for individuals to distribute and use contraception outside marriage as well as to perform and have abortions.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court refused to further expand the privacy right to homosexual activity because such activity was neither "'implicit in the concept of ordered liberty,'" nor "'deeply rooted in this Nation's history and tradition.'" *Id.* at 191, 192 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937); Moore v. East Cleveland, 431 U.S. 494, 503 (1977)). By a six-to-three vote in *Lawrence v. Texas*, 539 U.S. 558 (2003), however, the Court reversed its *Bowers* holding. The effect of the recognition of this legal right to privacy for the

Thomistic definition of law as an ordinance of reason suggests that Cardinal Trujillo's position will be acceptable to those who understand reason from the perspective of natural law. For those who have jettisoned this conception of reason in favor of a more modern approach, the natural law argument is likely to be problematic.

II. MARRIAGE AND PERSONALISM

One of the primary implications of the shift to modern conceptions of reason has been the increased importance attributed to human subjectivity.[35] During the twentieth century, the traditional understanding of marriage as an objective social reality began to deteriorate visibly.[36] The Church responded by affirming its traditional understanding of marriage and offering new insights in accord with its ancient wisdom. As Cardinal Trujillo states: "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

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definition of marriage was apparent in *Baker v. State*, 744 A.2d 864 (Vt. 1999), where the Vermont Supreme Court held that a same-sex couple may not be deprived of the statutory benefits and protections afforded to a heterosexual married couple pursuant to the Common Benefits Clause of the Vermont Constitution. *Id.* at 867. In *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003), the highest court in Massachusetts held that failure to grant marriage licenses to same-sex couples violated the Commonwealth's constitution.

35. This is consistent with the thought of Walter Ullmann and others, who argue that the view of individuals with autonomous and individual rights was an Enlightenment idea, foreign to the Middle Ages. *See* R.H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 306, 465 (1996). In contrast, others, including William of Ockham, suggest that the medieval canon law contains the origins of individual rights theory. *See id.*

36. Statistics indicate that American society has a culture of divorce at the turn of the twenty-first century. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, at 60 tbl.70 (2004), http://www.census.gov/prod/2004pubs04statab/vitstat.pdf. While the data indicate a divorce rate of approximately fifty percent of all marriages, *see id.*, the long-term negative effects of the divorce culture on the spouses and their children have also now been well established.

Married people in general are significantly better off in terms of physical, emotional, financial, and spiritual well-being than divorced persons. *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (Broadway Books 2001) (2000). Waite and Gallagher conclude, on the basis of statistical surveys, that married persons and their children are generally better off than divorced persons and their offspring both emotionally, *see id.* at 65-77, and financially, *see id.* at 110-23. Longitudinal studies comparing children from intact families to children whose parents are divorced have shown similar differences, and they further indicate that the difficulties for children of divorced parents can continue for many years into adulthood. *See* JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY 294-316 (2000) (concluding, on the basis of a twenty-five-year longitudinal study, that divorce has damaged spouses and children socially, psychologically, and financially).

resultant faithfulness and stability last forever."[37] This "personalist" emphasis in the Cardinal's thought reflects a new way of thinking about marriage that developed during the twentieth century.

When Pope Pius XI promulgated *Casti Connubii* in 1930, the Holy Father relied heavily on the seminal thought of St. Augustine.[38] St. Augustine identified the three goods of marriage as: *proles* (children), *fidelium* (fidelity), and *sacramentum* (symbolic stability).[39] Pius XI accepted the traditional, Augustinian view that "[p]ropagation of children . . . is . . . the primary, natural and legitimate purpose of marriage."[40] In the Augustinian view, marriage constitutes an objective social reality because it serves both as a remedy for concupiscence and a stable structure in which to have and raise children. The 1917 *Code of Canon Law* also reflected this traditional understanding of the primacy of procreation: "The primary end of marriage is the procreation and education of children; the secondary [end] is mutual support and a remedy for concupiscence."[41]

In 1965, at Vatican II, a development was recognized in the Church's teaching.[42] *Gaudium et Spes* discusses love between the spouses and procreation as the inseparable and coequal ends of marriage.[43] This new understanding is confirmed in the 1983 *Code of Canon Law*:

> The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation

37. Trujillo, *supra* note 1, at 302.

38. *See generally Casti Connubii*, *supra* note 4, ¶¶ 77-117.

39. *See* SAINT AUGUSTINE, THE GOOD OF MARRIAGE, *reprinted in* ST. AUGUSTINE ON MARRIAGE AND SEXUALITY, 1 SELECTIONS FROM THE FATHERS OF THE CHURCH 42, 42-61 (Elizabeth A. Clark ed., 1996) [hereinafter THE GOOD OF MARRIAGE].

40. SAINT AUGUSTINE, ADULTEROUS MARRIAGES, BOOK TWO: A REPLY TO FURTHER OBJECTIONS FROM POLLENTIUS, *reprinted in* MARRIAGE AND VIRGINITY, PT. 1, VOL. 9 THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY 166, 175 (Ray Kearney trans., David G. Hunter & John E. Rotelle, O.S.A. eds., 1999); *see also Casti Connubii*, *supra* note 4, ¶ 80.

41. 1917 CODE c.1013, § 1, *reprinted in* THE 1917 OR PIO-BENEDICTINE CODE OF CANON LAW 352 (Edward N. Peters, curator, Ignatius Press 2001) (1918).

42. The development of Catholic doctrine presents a historical and theologically complex question. For a classical description, see JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (Univ. of Notre Dame Press, 6th ed. 1989) (1878).

43. *See* Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 48 (1965), *reprinted in* THE SIXTEEN DOCUMENTS OF VATICAN II 513, 561-63 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967).

> and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.[44]

As with *Gaudium et Spes*, the goods of procreation and the love between the spouses are treated as inseparable, and one is not prioritized over the other.

The development remains consistent with several prominent strains of St. Augustine's thoughts on marriage. St. Augustine wrote as a bishop, and much of his thought on marriage was intended as an answer to pastoral problems. Early in his episcopate, one of these pastoral answers arose in response to an asceticism movement with Manichean overtones in the Church.[45] During the final decade of the fourth century, St. Jerome entered into a debate with a fellow Christian, Jovinian, over the nature of marriage.[46] While Jovinian argued that marriage was of equal status to chastity, St. Jerome thought that marriage was an inferior way of life as compared to chastity.[47] St. Jerome urged married women to live chaste lives even while they continued to be married.[48] Although he vigorously denied the charge, St. Jerome advanced a position that bordered on Manicheanism, which viewed the human body and sexual reproduction in a negative light.[49] St. Augustine attempted to steer a middle course in the debate between St. Jerome and Jovinian.[50] In *The Good of Marriage*, St. Augustine acknowledged the superiority of chastity, but wrote about the goodness of marriage.[51] "[T]he marriage of male and female is something good," St. Augustine explained, not "solely because of the procreation of children, but also because of the natural companionship between the two sexes."[52] Although St. Augustine thought that procreation was the primary good, he also recognized the companionship of the spouses as a good of marriage.

In his later writing, St. Augustine confronted the Pelagian denial of original sin.[53] In Book 14 of *The City of God*, St. Augustine

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44. 1983 CODE c.1055, § 1, *reprinted in* NEW COMMENTARY ON THE CODE OF CANON LAW 1240 (John P. Beal et al. eds., Paulist Press 2000) (1998).

45. *See* THE GOOD OF MARRIAGE, *supra* note 39, at 42-61.

46. *Id.* at 42.

47. *See id.*

48. *See id.*

49. *See id.*; THEODORE MACKIN, THE MARITAL SACRAMENT 177-86 (1989).

50. *See* THE GOOD OF MARRIAGE, *supra* note 39, at 43.

51. *See id.*

52. *Id.* at 45.

53. A recently discovered letter of St. Augustine suggests that he thought that even if the Fall had not occurred, there may have been sinless sexual desire in Eden. *See* SAINT AUGUSTINE,

advanced a view that was directly at odds with the opinion of St. Jerome and other patristic writers.[54] If original sin had not been committed, St. Augustine speculated, Adam and Eve would still have engaged in sexual intercourse in the Garden of Paradise.[55] St. Augustine stated: "The man, then, would have sown the seed, and the woman received it, as need required, the generative organs being moved by the will, not excited by lust."[56] St. Augustine thought that prior to the original sin, what is "now moved in his body only by lust should have been moved only at will."[57] Referring to Adam and Eve, the first married couple, he wrote:

> But that blessing upon marriage, which encouraged them to increase and multiply and replenish the earth, though it continued even after they had sinned, was yet given before they sinned, in order that the procreation of children might be recognised as part of the glory of marriage, and not of the punishment of sin.[58]

St. Augustine thought that sexual intercourse was a good created by God that had become disordered as a result of original sin.[59]

The Augustinian tradition on the goodness of sexuality and marriage is evident in the personalist thought of Karol Wojtyla (Pope John Paul II). Wojtyla was one of a number of twentieth-century Catholic thinkers who adopted a methodological turn to the human subject.[60] Specifically, Wojtyla's thought exemplifies an attempt to

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EPISTLE 6, *reprinted in* ST. AUGUSTINE ON MARRIAGE AND SEXUALITY, *supra* note 39, at 99, 99-105. *See also infra* notes 55-59 and accompanying text.

54. SAINT AUGUSTINE, THE CITY OF GOD, Bk. XIV, (Marcus Dods trans., 1993).

55. *See id.* ch. 24.

56. *Id.*

57. *Id.*

58. *Id.* ch. 21.

59. The Thomist position differed from the Augustinian view. The fourth article of question 42 of the supplement to the *Summa Theologica* states: "There was matrimony in Paradise, and yet there was no carnal intercourse." SUMMA THEOLOGICA, *supra* note 9, Supp., Q. 42, Art. 4. The same article states that "matrimony is holier without carnal intercourse." *Id.*

60. For examples of works by some of these twentieth-century Catholic thinkers, see YVES M.J. CONGAR, 2 I BELIEVE IN THE HOLY SPIRIT 11 (David Smith trans., 1983); HENRI DE LUBAC, CATHOLICISM: CHRIST AND THE COMMON DESTINY OF MAN 326 (L. Sheppard & E. Englund trans., 1988); KARL RAHNER, FOUNDATIONS OF CHRISTIAN FAITH: AN INTRODUCTION TO THE IDEA OF CHRISTIANITY 24-115 (William V. Dych trans., The Seabury Press 1978) (1976); HANS URS VON BALTHASAR, A THEOLOGICAL ANTHROPOLOGY 43-102 (1967). This is not to suggest that these twentieth-century theologians were consciously working in concert as part of a larger systematic project. To be sure, they were writing from diverse perspectives, and there are significant differences in their thought. Some of the theological contributors to the endeavor found that their work was met with censure from ecclesiastical authority. A shift transpired at the Second Vatican Council (1963-65), when official documents of the Ecumenical Council incorporated the

address modern subjectivity even as it remains faithful to the Catholic tradition.[61] This approach paved the way for the development in the Church's teaching on marriage that was recognized at Vatican II. First, Wojtyla affirmed the goodness of human sexuality. In *Love and Responsibility*, he wrote that "[n]either sensuality nor even concupiscence is a sin in itself, since only that which derives from the will can be a sin—only an act of a conscious and voluntary nature (*voluntarium*)."[62] While St. Augustine saw concupiscence as a consequence of original sin, Wojtyla emphasized that "a sensual reaction, or the 'stirring of' carnal desire which results from it, and which occurs irrespectively and independently of the will, cannot in themselves be sins."[63]

Second, Wojtyla drew a distinction between individualism and personalism.[64] According to Wojtyla, "[i]ndividualism sees in the individual the supreme and fundamental good . . . ."[65] While individualism denotes that the human person acts primarily to advance self-interest, personalism refers to the constitution of the human person through acting in solidarity with others. Personalism posits the human person as created not for self-interest but for self-transcendence.[66]

Third, Wojtyla applied his personalist analysis to sexuality and marriage. The analysis starts with an appreciation of the value of the human person as "its own master" endowed with free will.[67] Wojtyla insisted that sexuality involves more than sensual and emotional phenomena. He wrote:

> The sensual and emotional experiences which are so vividly present in the consciousness form only the outward expression and also the

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turn to the human subject. *See* 1 HISTORY OF VATICAN II 72-132 (Giuseppe Alberigo & Joseph A. Komanchak eds., 1995); Giacomo Martina, *The Historical Context in Which the Idea of a New Ecumenical Council Was Born*, *in* 1 VATICAN II: ASSESSMENT AND PERSPECTIVES: TWENTY-FIVE YEARS AFTER (1962-1987) 3-73 (René Latourelle, S.J. ed., 1988).

61. *See* Robert F. Harvanek, *The Philosophical Foundations of the Thought of John Paul II*, *in* THE THOUGHT OF JOHN PAUL II: A COLLECTION OF ESSAYS AND STUDIES 1-21 (John M. McDermott, S.J. ed., 1993) (describing the phenomenological and Thomistic philosophical strains in the thought of Wojtyla).

62. *See* WOJTYLA, *supra* note 5, at 161.

63. *Id.*

64. *See* 10 KAROL WOJTYLA [POPE JOHN PAUL II], ANALECTA HUSSERLIANA [THE ACTING PERSON] 264-67, 272-73, (Andrzej Potocki trans., Anna-Teresa Tymieniecka ed., D. Reidel Publ'g Co. 1979) (1969) (describing the distinction between individualism and personalism).

65. *Id.* at 273.

66. *See generally* EMMANUEL MOUNIER, PERSONALISM at xv-xxviii (Univ. of Notre Dame Press, paperback ed. 1970) (1950) (describing the origins and characteristics of modern personalist thought).

67. WOJTYLA, *supra* note 5, at 125.

> outward gauge of what is happening, or most certainly should be happening, deep inside the persons involved. Self-giving can have its full value only when it involves and is the work of the will. For it is free will that makes the person its own master (*sui juris*), an inalienable and untransferable "some-one" (*alteri incommunicabilis*). Betrothed love, the love that is the gift of self, commits the will in a particularly profound way. As we know already, it means disposing of one's whole self, in the language of the Gospels, "giving one's soul."[68]

This paradoxical aspect of betrothed love flows from the "work of the will," in which the mutual love of the spouses entices acts of self-sacrifice for each other and then for the family as a whole.[69] Wojtyla contrasts this profound "love that is a gift of self" with "the superficial view of sex."[70] The superficial view involves "mutual sexual exploitation" in which the "woman[] surrender[s] . . . her body to a man."[71] Instead, the profound love of the spouses in marriage demands the reciprocity of mutual surrender of both persons.[72] The experience of marital love, according to Wojtyla:

> forcibly detaches the person, so to speak, from this natural inviolability and inalienability. It makes the person want to do just that—surrender itself to another, to the one it loves. The person no longer wishes to be its own exclusive property, but instead to become the property of that other. This means the renunciation of its autonomy and its inalienability. Love proceeds by way of this renunciation, guided by the profound conviction that it does not diminish and impoverish, but quite the contrary, enlarges and enriches the existence of the person.[73]

Wojtyla's personalism reflects a certain understanding of the human person, or "anthropology." The anthropology holds that the human person has the capacity for reason, which reveals the truth about sexuality and marriage and the will to act in accord with this truth. According to this anthropological vision, the permanent and exclusive commitment of marriage affords the human person the opportunity for self-transcendence in which the person is not diminished but increased.

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68. *Id.* at 126.
69. *See id.*
70. *Id.*
71. *Id.*
72. *See id.* at 125-26.
73. *Id.*

Cardinal Trujillo shares this anthropological vision.[74] Even as he affirms marriage as an objective social reality that justifies special treatment under the law, Cardinal Trujillo relies upon personalist language to describe marriage. The love between spouses, he writes, "is a very special form of personal friendship."[75] Cardinal Trujillo's analysis reflects the Church's attempt to respond to the increasing importance of human subjectivity in culture and law. At the mid-point of the twentieth century, this response was evident in the personalism of Catholic thinkers such as Wojtyla. When it focused on the good of spousal love as equal to procreation, Vatican II accepted this personalist anthropology as an aspect of the Church's teaching on marriage. While the new focus may be described as a development in the Church's teaching, its roots are detectable in the tradition of the Church and are not entirely inconsistent with the thought of St. Augustine. Cardinal Trujillo calls for legal protection of marriage that corresponds to the personalist anthropological vision.

CONCLUSION

In the face of the skepticism of modern, epistemological assumptions, Cardinal Trujillo's analysis of marriage and family offers a more optimistic assessment of the possibilities for human reason. He maintains that practical reason has the capacity to recognize marriage as a basic human good that merits preferential treatment in positive law. His insistence that traditional marriage constitutes an objective social reality offers an antidote to a culture and law in which marriage is increasingly defined by subjectivity. It is likely that Cardinal Trujillo's epistemological assumptions will not be universally accepted in legal systems that reject natural law in favor of the increased subjectivity afforded by legal positivism. The personalist perspective on marriage represents an attempt to highlight the subjective experience of the love within marriage and the family even as it upholds the Augustinian view of marriage as an objective social reality. It is difficult to predict whether or not the Church's traditional teaching, with its twentieth-century development, might ultimately correct the legal situation in which traditional marriage is increasingly seen as an artifact. In the face of the family's disintegration and the social ills associated with it, Cardinal Trujillo's analysis offers hope for a future rooted in a living tradition.

74. *See* Trujillo, *supra* note 1, at 336.

75. *Id.* at 314.