

# DIVORCE: A NORMATIVE ANALYSIS

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I.	INTRODUCTION .....	2
II.	THE LIMITS OF MARITAL OBLIGATION .....	3
	A. <i>Qualified Commitments</i> .....	7
	1. Adultery .....	8
	2. Abuse .....	9
	3. Incompatibility .....	10
	B. <i>Invalid or Unsustainable Commitments</i> .....	10
	1. Impossibility of Fulfillment.....	11
	2. Inadequate Consent.....	16
	3. Unachievability of a Commitment's Central Purpose .....	17
	C. <i>Conclusion</i> .....	19
III.	DIVORCE AND HARM.....	19
	A. <i>Is Bringing About Harm Permissible?</i> .....	20
	B. <i>Refusing to Intend Harm</i> .....	22
	1. Divorce May Not Be a Means to Some Other End .....	23
	2. One Must Not Arbitrarily Prefer Oneself to One's Spouse or Children .....	27
	C. <i>Acknowledging Relationship-Specific Limits on         Divorce</i> .....	28
IV.	CONCLUSION .....	30

**DIVORCE: A NORMATIVE ANALYSIS**

*Gary Chartier\**

**I. INTRODUCTION**

In a previous Article,<sup>1</sup> I laid the groundwork for a discussion of divorce by articulating a normative model of marriage. I suggested that a proper marital commitment is an unconditional commitment to the creation or solidification of a shared identity, a “we,” and that this will entail a variety of more specific commitments to communication, truthfulness, vulnerability, acceptance, attentiveness, and understanding, respect, equality, and, preferably, exclusivity. I suggested that such a commitment is a natural outgrowth of romantic delight, desire, and care, and thus the achievement of the inner *telos* of romantic love. I argued, however, both that one could not derive the normative structure of marriage from a consideration of the moral limits on sexual conduct, and that those limits did not entail a duty of prospective sexual fidelity to an anticipated marriage partner.

Now, I want to build on this normative framework for marriage to offer a normative analysis of divorce. I want to take a step back from the current debate about the specifics of divorce legislation. I want to

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<sup>1</sup> Gary Chartier, *Marriage: A Normative Framework*, 9 FLA. COASTAL L. REV. 347 (2008).

focus, instead, on the moral underpinnings of our divorce regime. However we resolve disputes about whether marriage should be thought of as a “contract” or a “covenant,” marital obligation derives centrally from the *promises* of the partners. The nature of their responsibilities to each other is a function principally of their *actual commitments*, which determine, indeed, whether their relationship really is a marriage or not. And problems related to the morality of divorce can and must be resolved not, ultimately, by appeals to natural teleology or divine fiat, but to considerations derived from the morality of promise making and promise keeping.

I begin, in Part II, by constructing an account of divorce as release from promissory obligation, constrained by the demands of care and the avoidance of intentional harm. In Part III, I focus specifically on the question of the harm a divorce might cause in order to determine when, apart from the general question of promissory obligation, it might be appropriate to cause such harm. I conclude in Part IV with an overview of the Article and of some key themes.

## II. THE LIMITS OF MARITAL OBLIGATION

It might seem that because unconditional love is an element of the marital norm, divorce would be morally impermissible. I want in Part II to show why this is not the case.

An authentic marriage is established by an unconditional commitment to the creation and maintenance of a shared identity, a “we.”<sup>2</sup> Marriage is a response to the call of love. It is a profound testament to the possibility and value of faithfulness. Only a commitment to unconditional love can create a relationship that is true to the intentionality of love and capable of offering the rich and liberating security each partner needs. Once I have deliberately and freely won someone’s trust, elicited her or his vulnerable self-disclosure, coaxed her or him out of her or his shell, I cannot rightly retract my pledge. A vow to stay together only “as long as love shall last” or “till choice do us part,” of the sort people sometimes offered each other not so long ago, simply does not

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<sup>2</sup> This is so whether the commitment occurs before, during, or after a wedding ceremony (if, indeed, one ever takes place), or before, during, or after a couple’s first coitus (if, indeed, they are ever able to unite sexually).

offer the safety, the hope, the identity, the meaning that genuine, unre-served love makes possible.<sup>3</sup>

A promise to love unconditionally is unqualified; otherwise, it would not be a promise to love unconditionally. There are no escape hatches—that is simply what unconditional love *means*. But such a promise is valid only if it has been made freely—if the promisor has not been deceived and the promisor is capable of fulfilling her or his promise given her or his prior obligations to others and her or his own psychic capacities. Further, a partner to whom one has made an offer of unconditional love may release one from one's obligation (though responsibilities to children and others may impose limits on the partners' freedom to accept such an offer). Partners may agree, freely and lovingly, to end their marriage without thereby betraying each other or violating each other's trust. And it is often safe to say that someone who unequivocally abandons her or his partner for another relationship or simply for the doubtful pleasures of untrammelled freedom has effectively released her or his partner from her or his marital commitment.

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<sup>3</sup> It is interesting to note that according to Delphy and Leonard, "[T]he 1970s search for self-fulfillment and autonomy in collective houses, with individuals always free to leave, created greater insecurity and tension rather than companionship and a freer sex life for women." CHRISTINE DELPHY & DIANA LEONARD, *FAMILIAR EXPLOITATION: A NEW ANALYSIS OF MARRIAGE IN CONTEMPORARY WESTERN SOCIETIES* 14 (1992). The same point is a recurring theme in Susan Cheever's exquisite biography which documents the extent to which women accommodated men's desires for *sexual freedom* and were themselves consistently the losers. See SUSAN CHEEVER, *A WOMAN'S LIFE: THE STORY OF AN ORDINARY AMERICAN AND HER EXTRAORDINARY GENERATION* (1994). On the broader context within which the sexual revolution's repudiation of male commitment took shape, see BARBARA EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* (1983). Zygmunt Bauman offers a biting critique of aestheticism and lack of commitment in intimate relations (as well as of a routinization that is also clearly inappropriate). ZYGMUNT BAUMAN, *POSTMODERN ETHICS* 95-106 (1993). I think Bauman is overly pessimistic in his reflections on the question whether promised love can be promised. Ehrenreich and English explore the dynamics of sexual and romantic aestheticism and lack of deep engagement in BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 268-92 (1st ed. 1978). See also Maximiliane E. Szinovacz, *Changing Family Roles and Interactions*, in *WOMEN AND THE FAMILY: TWO DECADES OF CHANGE* 163, 188 (Beth B. Hess & Marvin B. Sussman eds., 1984) ("Women are increasingly encouraged to pursue autonomous and self-fulfilling goals in similar ways as men.").

In making a marital commitment, one cedes rights over oneself to another, but she or he may return them.

Release is meaningful only if it is free and genuine; release offered out of good will, but with the hope that it will not be accepted does not count. And even when released by another who may, at the time, genuinely wish to set one free, one may sometimes sense oneself gifted with a distinctive vocation on her or his behalf. Not everyone who has made a commitment has such a vocation, but it is *possible* that one is uniquely situated to offer her or him the nurture and love she or he needs, and, if so, one may be called to continue loving her or him as long as it seems realistically possible that one might again be able to offer it to her or him, even if she or he flees. Indeed, especially in such a case, one who has been wronged may be able, as no one else is, to offer the other a healing and acceptance of irreplaceable value. Obviously, this is not a stance to be commended to everyone; in many cases, offering forgiveness will not and need not mean seeking to remain intimately involved with the other.<sup>4</sup> Still, one may nonetheless sometimes be called to regard a spouse's rejection, even if she or he intends it to release one from one's commitment, as a challenge to be met with resourceful love.

Many marital commitments are not, however, commitments to unconditional love. And such commitments will thus be justly terminable for a variety of reasons. Once I have deliberately and freely won someone's trust, elicited her or his vulnerable self-disclosure, coaxed her or him out of her or his shell, I cannot rightly retract my pledge. But I can be obligated in this way only through an explicit, deliberate, free, informed promise.<sup>5</sup> Sexism and other kinds of injustice have so

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<sup>4</sup> Some comments by Margo Haskins on an earlier draft of this Article led me to see the importance of including this qualifier.

<sup>5</sup> "Can a couple who do not intend to form an indissoluble union actually bind themselves absolutely?" he asks. "I do not think so," he replies, observing that "the essential factor in limiting the commitment is the couple's intent." But then, after noting that a couple need not have a perfect understanding of why marriage is indissoluble in order to effect a necessarily permanent union (and he is no doubt right), he maintains "that marriage with a limited commitment, entered into by sincere and upright persons who do not appreciate fully what marriage ought to be, nevertheless is a true, though imperfect, union." Germain Grisez, *Rational Ethics Says No*, COMMONWEAL, April 14, 1967, at 125.

distorted the structure of female-male relationships in our society that many are not grounded in this kind of promise.<sup>6</sup>

Initially, this might not seem to be the case: conventional marriage vows appear to preclude divorce. The familiar commitment to be

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<sup>6</sup> See CHARLES A. GALLAGHER ET AL., *EMBODIED IN LOVE: SACRAMENTAL SPIRITUALITY AND SEXUAL INTIMACY* 40 (1983) (“Many outwardly, ceremonially, married people, then, are not really, not interiorly, married. They haven’t acquired the new identity that marriage brings, but have, to all intents and purposes, remained single. In the externals of living together and enjoying sexual intercourse, they may have changed; they share expenses and do things together—including having and raising children. But in the depths of their minds and hearts—in how they view the world, themselves, and each other—they have remained single. . . . They may feel important to each other, may make willing sacrifices for each other. But their life—even though it is a common life—becomes fragmented, divided into separate compartments. And their marriage is only one of those compartments.”); ROBERT E. JOYCE, *HUMAN SEXUAL ECOLOGY: A PHILOSOPHY AND ETHICS OF MAN AND WOMAN* 290-91 (1980) (“Today, on the one hand, there are probably many non-marriages in most communities. The situation is particularly unfortunate for anyone who has attempted to receive the sexually other person as a spouse, but was not really so received in return, and may not even know it thirty years later. Perhaps we could reasonably surmise that many divorces are not really divorces (that is, attempts to dissolve a marriage bond) because there was no marriage bond present in the first place.”); EDWARD STEVENS, *MAKING MORAL DECISIONS* 71 (1981) (“[A] personalistic view sees marriage as a definitive, personal, total life commitment involving my goal and identity as a person. The resulting union, therefore, cannot be broken, since I have staked my life and moral worth upon my fidelity to this commitment . . . . [But] [h]ow many people realize or even intend to make such a complete and serious commitment? Very few, if we look at the divorce statistics . . . . Probably there was no such definitive and total commitment. Probably the parties were even incapable of it. A divorce here wouldn’t really be a divorce, but a recognition that no marriage had taken place. In this view, a total commitment either is or it isn’t. If there really was a mutual total gift and commitment to each other, then it’s done. There can be no sense in talking about undoing it. That would mean it wasn’t total to begin with. There *is* sense in saying that it wasn’t total to begin with. This is not divorce, but a statement that no marriage ever took place. Such is the personalistic case against divorce.”). My only concern with this way of putting the matter is that an interior awareness of identity might be destroyed, but this would not in and of itself invalidate one’s commitment to one’s spouse. This problem could be dealt with, as I have tried to suggest, by identifying consummation in existential terms and suggesting that a marriage exists when this kind of interior union exists in conjunction with commitment. It continues if the sense of interior oneness is fractured, just as, on the more traditional view, sexual dysfunction or abstinence once a marriage has come into being does not invalidate a consummated union.

married “till death do us part” embodies what I have already argued is a deeply important sense of the value of unconditional love. If these mutual vows constitute unequivocal commitments to unconditional love for those who recite them, it would not be possible to question their validity without disrupting the secure basis upon which marital intimacy rests. It would surely be wrong for persons authentically committed to unconditional love to divorce. One would hardly wish to imply that promises generally, and pledges of unconditional love in particular, should be viewed as unimportant or revocable. The question, then, is whether most or all such vows *do* constitute commitments to unconditional love.

It does not follow, of course, that, even if they are, the law should give effect to them. A promise can be morally but not legally binding. In fact, however, there is no good reason to wonder whether many marital vows constitute unconditionally binding commitments.

Ignoring instances where both spouses choose freely to divorce (where people have promissory obligations only to each other, they are surely almost always free to release each other from these obligations), the vows establishing a marriage might fail to bind in situations of at least two kinds: they might be qualified or they might be defective.

### A. *Qualified Commitments*

The specific commitments made by the spouses may have included implicit (or explicit) qualifications. They may have accepted abuse or adultery as implicit grounds for divorce. Both may have understood marriage as morally dissoluble for no more specific reason than incompatibility.<sup>7</sup> They may have recognized the possibility of an-

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<sup>7</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 308-09 (1980) [hereinafter FINNIS, *NATURAL LAW*] (“[A] promise is usually an exclusionary reason that can be defeated by some countervailing reasons, often by a wide range of readily available reasons (though never by *any and all* of the reasons that would, in the absence of the promise, have warranted not doing the thing promised). When it is intended by the parties that the promise shall afford a virtually indefeasible exclusionary reason, the promise will have to be expressed with solemnity and precision as being one that binds them ‘for better for worse, for richer for poorer, in sickness and in health . . . till death . . . (and even such a form of words may be given a reduced obligation-creating significance by the practice in which it is rooted).”). Note that Finnis regards any authentic marriage as indissoluble (as do I—but I suspect our definitions of

nulment. In such cases, exceptions have been built into their original agreement, and any behavior triggering the exception clause would thus warrant dissolution of the relationship.

### 1. Adultery

The spouses may accept that adultery justifies divorce and therefore must, to be consistent, grant that other impediments to intimate communion have the same effect. People often suppose, unreflectively, that marriage is dissoluble for some reasons, even if not for those to which I allude here. It might be argued that their acceptance of these reasons—depending on the grounds for this acceptance—entails that they should accept the reasons I regard as appropriate grounds for divorce as legitimate as well. Many people often grant, for instance, that adultery justifies divorce. If two people believe that it does, this fact helps to determine the meaning of their vows. However, if they accepted when they were wed that divorce might at some time be possible for them, then they did not, in fact, commit themselves to unconditional love.

Like other wrongs, adultery is forgivable. Where adultery justifies divorce, it does so not because a person who commits adultery deserves punishment, but because of the consequences of her or his infidelity for future intimate communion with the spouse to whom she or he has been unfaithful. (Thus, adultery that expressed, reinforced, or gave good reason to expect a consistent emotional disengagement might be grounds for the dissolution of a marriage, provided that one's spouse was not one's partner.) But my point here is not to argue about whether one may, in fact, appropriately divorce in case of adultery, or about whether one should judge when committing to marry that adultery will be grounds for divorce, but instead to point out that even fairly traditional spouses will characteristically grant that marriage is not necessarily indissoluble because they concede that divorce for adultery is appropriate. They often understand this as an implicit feature of an agreement to marry. I think, however, that if they grant this, they need to see that, to be consistent, they need to grant the acceptability of di-

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authenticity and our justifications for indissolubility may differ). See JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 7 (1991) (speaking of “the indissolubility of true marriage”).

voiced for other reasons. Adultery matters—or ought to matter—to us because it erodes the intimacy between spouses. And if *this* is why adultery matters, then other erosions of spousal intimacy, other factors that similarly contribute to disconnection, should also justify divorce.<sup>8</sup> To be consistent, those who regard adultery as grounds for divorce ought also to regard other impediments to intimacy in the same way. If one married believing that adultery would justify divorce, then one ought to accept that divorce is justified because of behaviors or character traits that similarly impede intimacy.

## 2. Abuse

A commitment may have been predicated on the assumption that abuse would justify divorce. It is increasingly common for physical abuse, like adultery, to be regarded as warranting divorce, even if no mention of this is made in a couple's vows.<sup>9</sup> In case such an understanding obtains a spouse would be free to end a would-be marital relationship that is not a marriage when abuse occurs. Depending on its consequences for a spouse's dignity, sanity, or sense of self-worth, humiliating or otherwise hurtful behavior that did not involve physical violence might warrant divorce on analogy with physical abuse. What *counts* as significant here will, of course, vary from person to person. Marriage offers spouses "increased possibilities of wounding and being wounded by each other."<sup>10</sup> For those "of a certain delicacy of feeling some less crudely disturbing elements constitute a far more intolerable burden"<sup>11</sup> than traditional marital offenses. Some vulnerable people will obviously be capable of being hurt in ways that more detached

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<sup>8</sup> "[W]hatever contributes to the alienation of a couple from each other weakens and adulterates a marriage." DIOGENES ALLEN, *LOVE: CHRISTIAN ROMANCE, MARRIAGE AND FRIENDSHIP* 109 (1987). "The form of adultery most characteristic . . . of our own society is not adultery with another person, but the purely self-regarding adultery which demands of the partner the full range of goods associated with sexual property but gives few or none of them in return." L. WILLIAM COUNTRYMAN, *DIRT, GREED, AND SEX: SEXUAL ETHICS IN THE NEW TESTAMENT AND THEIR IMPLICATIONS FOR TODAY* 254 (1988).

<sup>9</sup> See MARGARET A. FARLEY, *PERSONAL COMMITMENTS: BEGINNING, KEEPING, CHANGING* 75, 140 n.15 (1986).

<sup>10</sup> HELMUT THIELICKE, *THE ETHICS OF SEX* 167 (John W. Doberstein trans., 1964).

<sup>11</sup> EMIL BRUNNER, *THE DIVINE IMPERATIVE: A STUDY IN CHRISTIAN ETHICS* 362 (Olive Wyon trans., 1947).

people will not. It seems reasonable, though, that—wherever one draws the relevant lines for a given person—humiliation, rejection, or verbal abuse could have the same basic significance as physical abuse.

### 3. Incompatibility

A marital commitment may have presupposed that divorce would be morally appropriate in case of incompatibility. *Incompatibility* is a catch-all term that lacks much content. Once the initial flush of infatuation has worn off, most couples will find themselves to be incompatible in some important ways. So it may well be short-sighted for people to premise their marriage vows on the assumption that these vows bind absent incompatibility, so generally defined. However, indissolubility *is* a function of the intentions and commitments of the spouses. If both spouses believe that incompatibility warrants divorce, and that what *counts* as incompatibility can be determined unilaterally by either, then *their* vows fail to bind in case of incompatibility. Such a relationship may amount to little more than legally registered dating, and it may have little to recommend it. On the other hand, given the seriousness with which people are likely to enter a relationship understood to be terminable in this way, and the consequent likelihood of especially problematic marriages, the ready availability of divorce to such people may not be an altogether bad thing. Many bad marriages would not be made, no doubt, if people refused to marry while thinking, “Well, if it doesn’t work out, I can always get a divorce.” But given that they entered such marriages, it is probably fortunate that exit opportunities are available. In any case, if the members of a couple agree that incompatibility justifies divorce, their vows will not bind if they are (by whatever definition they have mutually accepted) incompatible (though the same standards of fairness and care apply here as in other cases).

#### ***B. Invalid or Unsustainable Commitments***

General principles regarding the binding claims of serious commitments suggest circumstances under which a marital commitment might cease to hold. One or both spouses might be unable to fulfill marital commitments adequately. One or both may have failed to consent freely to the marriage, or may have failed to give adequate consent because of a lack of information. The structure of the relationship cre-

ated by the commitment may itself be unjust—a fact which may render the commitment invalid. A marital commitment might be predicated on a questionable assumption, or assumptions. And it might appear unlikely or impossible that the central purpose of a marital commitment could be achieved.

### 1. Impossibility of Fulfillment

It may not be possible for one spouse or both spouses to fulfill marital commitments. Spouses also often recognize the possibility of annulment when they marry. The inability to join a spouse in a deeply intimate relationship that aims at the formation of a “we” could be argued to render a would-be marriage as invalid as it would be if either party were unable to consummate the relationship physically—an inability conventionally regarded as invalidating a marriage.<sup>12</sup> I want to stress that I do not regard sexual dysfunction on its own as an appropriate justification for terminating a marriage; if marriage is truly about loving communion rather than sexual gratification, then sexual dysfunction, like any other illness or disability, should be no barrier to the continuance of a marriage. Loving partners, intimate friends, can explore alternate means of sexual gratification if more conventional ones are unavailable, and it is surely more appropriate that they should do so that they end their relationship or compromise it by becoming sexually involved with other people. I refer here to sexual dysfunction only to note that many people believe that inadequate sexual functioning is grounds for annulment and that, for them, this assumption forms part of the background that provides the meaning of their wedding vows. The inability to form a “we” is clearly a more serious threat to intimate connection than is sexual dysfunction. Those who accept that the latter is cause for annulment should, therefore, to be consistent, accept the former as acceptable too. As Milton plausibly asks, why “shall divorce be granted for want of bodily performance, and not for want of fitness to intimate conversation, when as corporal benevolence cannot in any human fashion be without this?”<sup>13</sup>

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<sup>12</sup> See Thomas J. Paprocki, *Marriage, Same-Sex Relationships, and The Catholic Church*, 38 Loy. U. Chi. L.J. 247, 253 (2007) (citing Gerald Bradley to argue that marriage is a “union that is actualized in reproductive-type acts.”).

<sup>13</sup> JOHN MILTON, *TETRACHORDON: THE WORKS OF JOHN MILTON* 102 (4th ed. 1931).

Even, however, if the spouses did not give serious thought to the possibility of annulment, so that it did not figure as an implicit qualifier on their vows, the ability of each to fulfill her or his vows seems relevant to the validity of those vows. Some people may simply be unable psychically to consent to or fulfill the full demands of marriage. The capacity for intimacy, acceptance, and understanding are crucial if a relationship is to be a marriage. If marriage normatively requires the goal of forming a “we,” then the inability of one’s spouse to achieve deep intimacy with one means that the relationship has not, at minimum, become a marriage.<sup>14</sup>

Emil Brunner notes that a marriage from which sexual attraction is absent presents one with a “constant temptation” to infidelity.<sup>15</sup> He suggests that the absence of this presupposition makes it morally imperative that the relationship be dissolved because of the tension and the resulting possibility of abuse created by it.<sup>16</sup> But surely the same is true when intimacy is lacking. A disunion of the spirit is also a temptation to infidelity—not merely to emotional disengagement, but also to ordinary, garden-variety adultery, since the body will (and indeed, under normal circumstances might be expected to) follow the spirit away from the marriage. There is, as I have suggested, an essential incoherence in a relationship in which communion of flesh is expected in the absence of communion of spirit, in which the flesh is therefore deanimated, robbed of soul. Perhaps such a temptation is, like the one to which Brunner refers explicitly, a source of highly problematic instability that may justify a divorce.

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<sup>14</sup> *Id.* at 97-98. Where authentic union does not exist, “all the ecclesiastical glue that liturgy or laymen can compound is not able to solder up two such incongruous natures into the one flesh of a truly be seeming marriage.” Joyce maintains that “[w]eakness of ability to carry out the responsibilities of the covenant should not be misinterpreted as a conditional mindedness about the vow itself. The person may well intend to be faithful to his or her spouse for life, and then fail miserably to live up to this commitment.” JOYCE, *supra* note 6, at 291. But it seems to me that relative psychic inability to fulfill the demands of normative marriage renders one unfit for the relationship. One may fail to live up to a marital commitment—perhaps even willfully and maliciously—and yet still genuinely *be* committed. But if one cannot do so—if one cannot create and sustain a relationship of deep intimacy, then it seems as if the basic terms under which the relationship was entered are called into question.

<sup>15</sup> BRUNNER, *supra* note 11, at 360-61.

<sup>16</sup> *Id.*

People for whom trust does not come easy may be psychologically ill-equipped for deep intimacy or unreserved commitment, and thus for marriage. Those who have experienced abuse or neglect in childhood often find it difficult to trust,<sup>17</sup> as do, for instance, the many others who have been socialized to avoid intimacy. They may thus be unable to do what is required to sustain a marriage, and, if so, may have difficulty forming intimate relationships. One may simply overestimate one's own capacities, if one is such a person. Or one may have entered a relationship with someone who is limited in this way without knowing it. One may, of course, marry such a person, knowing her or his limitations, and seek to love her or him to wholeness, offering her or him an unconditional commitment to forming a "we." But one should be expected to do so when one has chosen such a difficult venture deliberately out of love, *not* when one has stumbled upon it unawares.

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<sup>17</sup> On childhood sexual abuse as disruptive of the capacity to trust, see ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* 233, 236, 348 (3d ed. 1994); DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 168 (1986); P. E. Mullen et al., *The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life*, 165 *Brit. J. Psychiatry*, 35, 35-47 (1994); Karen Alter-Reid, *The Long-Term Impact of Incest: An Investigation of Traumagenic Factors and Effects in Four Types of Childhood Abuse* (1989) (unpublished Ph.D. dissertation, Fairleigh Dickinson University) (on file with author); John C. Britcher, *Rape and Incest: The Long-Term Effects on the Victims* (1986) (unpublished Ph.D. dissertation, United States International University) (on file with author); Doris Brothers, *Trust Disturbances Among Rape and Incest Victims* (1982) (unpublished Ph.D. dissertation, Yeshiva University) (on file with author); Melanie Ann Higgins, *Adult Women Molested as Children: Variables Related to Childhood Incest and Later Psychological Functioning* (1988) (unpublished Ph.D. dissertation, The Union for Experimenting Colleges and Universities) (on file with author); Doris Jean Holmes, *Incestuous Sexual Abuse in Childhood: Correlates of Delayed Post-Traumatic Stress Disorder in Women* (1989) (unpublished Ph.D. dissertation, Temple University) (on file with author); Gloria Rose Koepping, *The Psychological Impact of Childhood Incest Among Adult Women Survivors* (1987) (unpublished Ph.D. dissertation, Southern Illinois University at Carbondale) (on file with author); Kirsten Amy Koopman, *Sequelae of Childhood Sexual Abuse in Women* (1993) (unpublished M.S.N. thesis, University of Texas at Arlington) (on file with author); Monika H. Riederle, *The Effects of Father-Daughter Incest on Intimacy and Object Relations* (1994) (unpublished Ph.D. dissertation, California School of Professional Psychology) (on file with Alliant International University Los Angeles library).

Psychic dysfunction surely matters more than sexual dysfunction for the creation and maintenance of a “we.” Such an understanding of annulment moves from defending annulment for lack of communion by analogy with annulment for sexual dysfunction and moves the intimate communion of the spouses to center stage. The point here is not that the intimate communion of the parties has been fractured, but that truly intimate communion never even came into being.<sup>18</sup>

One can and should forgive one’s spouse for moral failures that complicate one’s relationship with her or him; and one may in turn need to ask forgiveness for one’s own failures. But the fact that one forgives does not necessarily eliminate genuine obstacles to the formation of a “we.”

To be sure, there is something importantly different about the moral character of a person who *chooses* unrepentantly to beat a spouse, deny affection and communication, objectify or distance herself or himself from a spouse, or commit adultery—a person who is not, thus, genuinely committed to marriage or is ignorant of what it requires—and the character of someone who is sincerely committed to marriage but finds it very difficult, if not impossible, to fulfill its demands. One kind of person is in serious moral danger, while the other is growing toward wholeness. But what makes the termination of a marriage appropriate is not a judgment about the character of one’s spouse, but considerations relative to the binding nature of one’s commitment and the wrongs and losses one will experience if one stays married (as well as the likely effects of divorce on one’s spouse). Put more baldly, being beaten is still destructive even if my spouse is trying not to be violent. Divorce is not discipline. It is not punishment for wrongdoing. It is a way of ending a relationship that causes or is liable to cause unjust harm—ranging from the disintegration of one’s self, to the betrayal of trust, to depression, to bodily injury, to death—harm to the possibility of which one has not already consented. The spouse who is abusive, humiliating, withholding, or incapable of being or unwilling to be a partner may be a *material*, though not a *formal*, aggressor.

It is important to note some qualifiers. Someone making a marital commitment may have reckoned with the possibility that her or his

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<sup>18</sup> See JAMES J. YOUNG, *DIVORCING, BELIEVING, BELONGING* 202 (1984).

prospective partner lacked certain capacities for relational intimacy, and may have committed herself or himself to marriage in full awareness of the incapacities. Genuine partners can sometimes do bad things: they can withhold themselves, they can be domineering, they can keep secrets, they can be sexually unfaithful. Such behaviors *may* be evidence that someone has not made a genuine commitment to being part of a “we” or is incapable of fulfilling such a commitment; but authentically committed people who are capable of marriage can fail to live up to them. What matters is whether a spouse’s behavior over time gives clear evidence that she or he is simply incapable of fulfilling a marital commitment adequately (or never made such a commitment in the first place). A partner who is imprisoned, lost, comatose, or suffering from some form of dementia is not able to be present to one either, but she or he is still a partner. Not being able to function as a partner is different from not being a partner at all. Caring for a spouse through illness, absence, or accident is part of what genuine friendship is about, and thus part of what marriage is about. But even in a would-be marital relationship that is not an authentic marriage, one which can, in principle, be terminated by divorce, one’s responsibilities surely do not evaporate simply because one’s spouse is in trouble of one kind or another.

The challenge is to articulate just what the difference is. For it seems that if a person with a severe mental disorder should still be loved and cared for, then a person with a subtle personality problem that leaves her or him functioning normally should not, simply in virtue of that disorder, be divorced. And I am uncertain just how to do this. One option would be to say that, as with impotence, psychic dysfunction must be present from the beginning of the relationship. This would resolve the problem in a direction that would comport with my intuitions, at least, by entailing that no one could be divorced because of an illness that arose after the marriage, but that an inability to connect present from the beginning could be regarded as cause for divorce. But this solution seems somewhat arbitrary and inclined to relocate one’s focus from the actual presence or absence of a “we” to various other questions.

In short, considerations regarding a spouse’s capacity to fulfill the obligations associated with marriage can help to determine the moral appropriateness of terminating a marriage. But the fact that ques-

tions of capacity might be raised to justify divorces, which seem to me to be clearly immoral or morally problematic, means that the issue of capacity clearly deserves more reflection.

## 2. Inadequate Consent

Consent to a marriage may not have been adequately informed. One cannot legitimately expect to know all the details of one's spouse's personality, past, or predispositions at the time of one's marriage (though before making or requesting a commitment to marriage, one should have shared with the other every story and detail one regards as significant, and everything one expects the other might regard as significant). One cannot expect to know what ailments might overcome her or him, or what external calamities may try the strength of one's relationship. One cannot reasonably expect to know all of the habits, attitudes, or character traits she or he has at the time of one's marriage to her or him or the ones she or he will develop subsequently. One cannot expect to be informed about such things, and informed consent does not require that one be. It is part of marrying, part of loving someone, to accept the risks of fortune—accident, illness, natural disaster—and to recognize that she or he will not behave perfectly. Several things are relevant to the question of informed consent, however. They include one's understanding of one's spouse's conception of the nature of the relationship one is entering. They also include one's understanding of her or his commitment to the relationship and their respective ability (and one's own) to fulfill—imperfectly, no doubt, but nonetheless genuinely—the responsibilities associated with that relationship.

If one did not know about one's spouse's capacities and commitments, her or his understanding of and readiness for marriage, then—unless one has deliberately and responsibly waived one's right to informed consent in the relevant areas—one cannot be said to have consented to one's marriage. One's vows were made under, as it were, false pretenses. When a marriage commences, spouses typically “assume that both parties share the same expectations and have signed up for the same kind of marriage.”<sup>19</sup> But the experience of the women in a recent study is likely to be closer to reality: “Because the contract was

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<sup>19</sup> CHARLOTTE MAYERSON, *GOIN' TO THE CHAPEL: DREAMS OF LOVE, REALITIES OF MARRIAGE* 153 (1996).

unspoken, it was as if the couple was signing a binding agreement, blindfolded. Few of the women verbalized either to themselves or to their future husbands what they thought they were agreeing to.”<sup>20</sup> And the men were presumably just as inarticulate.<sup>21</sup> Each must have assumed that the other was consenting to the same kind of relationship.

My argument is not for a legalistic understanding of marital nullity, what might be called the “You didn’t say ‘Simon says’” approach to marital morality. I do want to argue, however, that when there are substantial material differences between spouses’ understandings of marriage, when other significant initial assumptions are not shared and agreed to, informed consent may have been significantly impaired. And it is the substantive impairment which may render the relevant commitment defective, and consequently invalid and non-binding.

It is obviously an objection to this position that one *should* have been aware of the likelihood of the circumstances that now occasion one’s dissatisfaction. This may or may not be the case; however, whether or not it is cannot, probably, be answered in the abstract, and depends on the information available to one at the time of one’s wedding, and one’s willingness to confront potentially unpleasant truths. In any case, the fact that one was not aware of certain possibilities and would have chosen differently if one had, should make a difference in one’s understanding of the validity of one’s vows.

### 3. Unachievability of a Commitment’s Central Purpose

The achievement of the central purpose of a marital commitment may be unlikely or impossible. A commitment does not bind when it becomes pointless, when its purpose cannot be achieved, when the objectives of the parties are probably or certainly out of reach. As Milton puts it, no “[c]ov’nant, how solemne or strait soever, either between God and man, or man and man, though of God’s joyning, should bind against a prime and principall scope of its own institution, and of both or either party cov’nanting.”<sup>22</sup> Like any other commitment, a marriage ought not to bind when it is impossible to achieve the prime objec-

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See MILTON, *supra* note 13, at 390.

tives of the parties or unlikely that they can be achieved. If a “we” is what one sought in marrying, then its absence from a marriage means that this principal intention has not been achieved.<sup>23</sup>

The instrumental, extrinsic ends of marriage are not as fundamental and significant as the intrinsic goal of marital intimacy. The needs of the spouses suggest that the formation of a “we” is the *telos* of marriage. And, in any case, if a spouse’s commitment presupposed a common dedication to the formation of a “we,” then the unachievability of this goal would itself point to the invalidity of the marital commitment.<sup>24</sup> It is the actual structure of the individual commitment in question, of course, that determines what is appropriate and what is not. In a would-be marriage, the inability to achieve genuine intimacy or the im-

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<sup>23</sup> See GERMAIN G. GRISEZ & RUSSELL SHAW, *BEYOND THE NEW MORALITY: THE RESPONSIBILITIES OF FREEDOM* 165 (3rd ed., 1988) [hereinafter GRISEZ, *BEYOND*] (“It sometimes happens . . . that there is a change in the purposes of a society which one joined voluntarily. In such a case one has a moral responsibility only in regard to duties which reflect the purposes of the society at the time one accepted membership; one has no responsibility to fulfill duties which reflect new purposes to which one does [better, did—one cannot simply change one’s mind after having made a serious commitment] not subscribe.”).

<sup>24</sup> For a different view, see Farley, *supra* note 9, at 96. See also 2 TRUTZ RENDTORFF, *ETHICS: APPLICATIONS OF AN ETHICAL THEOLOGY* 11 (Keith Crim trans., 1989). Rendtorff is critical of the notion that marriage has particular goals, and that the achievement or non-achievement of these goals provides an index of a relationship’s appropriateness or viability. He is no doubt correct that extrinsic purposes—“procreation, the continuation of an extended family, the amassing and preservation of property, and the formation of an economic unit,” and “the regulation of sexual activity, the prevention of promiscuity, and the control of unchastity”—do not provide “a sufficient basis for the meaning of marriage.” *Id.* at 11. To be sure, “in every case in which the goals can be achieved by other means the reasons for marriage as a permanent, living community disappear.” *Id.* But to talk of goals is not necessarily to talk of extrinsic goals. Rather, we can argue that purpose of the marriage is precisely the communion of the spouses, their intimate union and deep friendship. In this way, we avoid allowing marriage to be eclipsed by other relations, but at the same time we retain the capacity to evaluate the capacity of a given relationship to foster, reinforce, and express mutual self-gift. The communion of the partners, to which Rendtorff refers, cannot—or should not—mean simply their being together, but their being together in a way marked by intimate connection. To ask about the adequacy of a given marriage to this purpose is not necessarily to return to a detached atomism; it is to seek, not to move beyond relation, but to craft new and more adequate patterns of relation.

probability of its achievement make release from marital commitment reasonable.

### *C. Conclusion*

The marital ideal includes unconditionality, and so indissolubility. But our promises are the principal source of our special obligations to marriage partners. As they are intended by those who make them, marital promises often do not commit people to love each other unconditionally. This is true for two broad kinds of reasons. First, the promises made by the partners may, if fully spelled out, provide various grounds for divorce. They may do so because certain grounds were actually presupposed by the partners, and because other kinds of grounds might be implied by grounds the partners presupposed, even if they were unaware that this was the case. Second, there may be defects at the root of someone's marital promises—defects which render the promises non-binding. Where relevant defeating conditions or promissory defects obtain, a couple's vows will not render divorce morally inappropriate. Of course, even if divorcing is not inconsistent with a couple's vows, the harm someone brings about by divorcing may or may not be appropriate. Whether it is requires separate consideration.

### **III. DIVORCE AND HARM**

Having made conventional marriage vows does not always rule out a divorce. But, while we rightly take the obligation to keep promises very seriously, there is more to moral responsibility than fidelity to commitments. Though duties arising directly from a promise to a spouse may cease to bind someone who wishes to end a marriage, other obligations to a spouse or children may remain. Being morally responsible means more than simply exhibiting a concern with promissory obligation; it also requires direct attention to the harm divorce may constitute or cause for spouses and children.

A divorce ordinarily constitutes a significant rupture with a spouse. It may also lead to relational disconnection between children and one or both parents, as well as to considerable chaos in children's lives. Relational ruptures are themselves harms, and they and the upsets to which they can lead can bring about additional harms. In addition to

asking about the binding force of one's commitments, one must also ask whether one may rightly bring about the harms likely to follow from a decision to divorce.

One's spouse will likely be especially vulnerable, since a divorce directly and unavoidably disrupts one's relationship with her or him. The adverse consequences for children, also real and potentially quite painful, are side effects of one's attempts to rectify the injustice obtaining in one's relationship with one's spouse. The children of divorce are rather like noncombatant bystanders injured during a military conflict. It is wrong, both in virtue of general moral principles and as a violation of trust, to harm one's children or one's spouse, directly or as a means to some other end. Once one moves from the more abstract perspective of justice to consider the embodied fragility of spouses and children, the moral challenge posed by the question whether or not to end a would-be marriage becomes exceptionally daunting.

I consider this problem in Part III. First, I reflect on whether it is permissible to bring about harm at all in the context of marriage. I suggest that it is, but only if one does not cause harm purposefully or instrumentally. I explain what this might mean in relation to a decision to divorce. And I note that the commitments and vulnerabilities that obtain in a particular relationship will help to determine which harm-producing choices may be appropriate.

### *A. Is Bringing About Harm Permissible?*

Dissolving one's marriage may seem to threaten one's integrity because it entails dissolving, destroying, or denying one's identity. Suppose I have offered myself in love to another, only to retract it. I have cared, perhaps deeply, about this person, but now I elect to withdraw, deciding that I am within my rights to leave her or him. Behaving in this way, I seem almost to deny the reality of my past love, and of my identity as a loving person.<sup>25</sup>

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<sup>25</sup> Carol Gilligan helpfully explores the tension between care and justice in women's moral decision-making. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 128-50 (1982). The "morality of care" Gilligan describes is clearly of particular relevance to discussions of intimate relations. For Gilligan, the "morality of care" emerges from women's experience of intimacy

The challenge that a choice to end a marriage can pose for one's integrity is especially obvious when one considers the essential *point* of marriage—the creation of a “we”—and the experience of care that evokes an offer of unconditional love—the recognition of the need of another self for such nurture. If I really love you, I will be with you forever.

[W]e can grow in our promised love to the point where we truly love the other (to whom we are committed) more than ourselves. We are willing, and we may experience ourselves called, to sacrifice everything we possess, even our lives, in order to do what is necessary for the well-being and happiness of the beloved.<sup>26</sup>

How can one *cause* psychic trauma after one has come to see the significance of an institution devoted to healing? How can one ever claim to love another person again—a subsequent spouse, say—after one has acted in a way that seems to be the very antithesis of love?

Friendship—and so the friendship that is marriage—is a basic aspect of human well-being. Rupturing this friendship is thus clearly a harm.<sup>27</sup> And when we contemplate bringing about harm, even unintention-

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and connectedness. While rejecting male attempts to denigrate care and uphold justice as the moral ideal, Gilligan recognizes that because the disposition to care results too often in the loss of the self in its relations, moralities of justice offer significant insights as well. Nel Noddings attempts, with some success, to develop a more elaborate account of a “morality of care.” NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION* (1985). Without endorsing all features of Noddings's analysis, I regard the insights of a morality of care as indispensable to a complete moral perspective—in its stress on emotion, on the vulnerability of the other, on the importance of relationship, and on the potential asymmetry of the caring situation.

<sup>26</sup> See FARLEY, *supra* note 9, at 104.

<sup>27</sup> See AGNES HELLER, *GENERAL ETHICS* 90 (1988) (“Some women would, upon divorce . . . have to live with the probability, or at least the possibility, that their husbands will commit suicide. In a situated choice, probably and possible consequences cannot be left unconsidered.”). Not all harms are painful, and not all painful things are harmful. I do not believe “do not cause pain” is the same injunction as “do not cause harm.” But the two are close enough in meaning that the one can serve as a rough proxy for the other. On “do not cause pain” as a basic moral rule—understood to include psychological as well as physical pain. See BERNARD GERT,

tionally, we must not forget that “the justification of the Other’s pain is the beginning and the hard core of all immorality . . . .”<sup>28</sup>

Nonetheless, the Western moral tradition has characteristically suggested that the basic moral principle should not be expressed as “do not *cause* harm,” but as “do not *intend* harm” or “do not cause harm *directly*.”<sup>29</sup> Causing harm purposefully—as one’s objective, or as a means to an end—is never reasonable. And doing so is also unreasonable when the risk of harm is imposed unfairly. But unintentionally—even if foreseeably—causing harm in a manner that is consistent with the demands of fairness may be morally appropriate.

### ***B. Refusing to Intend Harm***

Causing harm purposefully or instrumentally is problematic for at least two reasons. First, when I cause harm, I treat one instance or aspect of human welfare as more important than another. But the various dimensions of human welfare are incommensurable and non-fungible; and this means that there can be no rational basis for treating a preference for one as justifying an attack on another. In addition, choosing harm means identifying with it, making it part of one’s own

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MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES 47-48, 100-01, (1988). According to Gert, “[M]ental suffering need not even be of the kind that is normally called mental pain . . . . I include in mental suffering any feeling or emotion that involves the feelings of sadness, displeasure, or anxiety . . . .” *Id.* at 101.

<sup>28</sup> BAUMAN, *supra* note 3, at 108 (summarizing or paraphrasing Emmanuel Levinas). Bauman cites THE PROVOCATION OF LEVINAS: RETHINKING THE OTHER 63 (Robert Bernesconi and David Wood eds., 1988), as an example of a place in which Levinas makes this point, but he does not appear to be quoting directly. *Id.* at 108-09.

<sup>29</sup> *Cf.* so-called “just war” doctrine and the “principle of double effect.” Joseph Allen suggests an analogy between the just divorce and the just war in LOVE AND CONFLICT: A COVENANTAL MODEL OF CHRISTIAN ETHICS 247-53 (1984). My principal source regarding the principle of double effect is Germain Grisez, *Toward a Consistent Natural Law Ethics of Killing*, 15 AM. J. JURIS. 64-96 (1970) [hereinafter Grisez, *Toward*]. See also ALLEN at 199-200. Joseph M. Boyle elaborates the presuppositions of the principle of double effect in *Toward Understanding the Principle of Double Effect*, in 90 ETHICS 527, 527-38 (1980).

project in the world; we make ourselves into people of whose identities causing harm is constitutive.<sup>30</sup>

Many of our actions lead inadvertently to harmful consequences, even though we neither prefer these consequences for their own sakes or opt for them as means to our other objectives. Even here, we may act unreasonably. For we may impose harms, or the risks of harms, on others *unfairly*. Perhaps we are willing that someone else suffer a harm in a given case which we would not regard as appropriate or reasonable were we to undergo the same harm. Fairness demands that, when someone else is harmed as a by-product or side-effect of something I do, the harm be one we would accept as reasonable were I or someone I cared about to be the victim.

I want to reflect here on two moral considerations that flow from the requirement that one not cause harm purposefully: one may not divorce as a means to some other end and one must refuse arbitrarily to prefer oneself to one's spouse in determining whether one may divorce (the Golden Rule), and one must accept the specific limits on causing harm imposed by the nature of one's unique relationship with one's spouse.

#### 1. Divorce May Not Be a Means to Some Other End

One is not justified in harming another as a means of increasing one's own or another's well-being.<sup>31</sup> If one is to avoid willing or intending harm, one may not divorce *for the purpose* of causing harm—of punishing one's spouse or taking revenge on her or him. To do so is clearly and unequivocally cruel and morally reprehensible. The requirement that we avoid intending harm is more complicated than it might seem. However, even if one does not consciously intend a harmful outcome which one anticipates, the structure of one's action may be such

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<sup>30</sup> Cf. Grisez, *Toward supra* note 28, at 66 (arguing that “human life can never rightly be directly attacked, but that indirect killing covers more cases than has generally been supposed.”).

<sup>31</sup> For arguments of this sort, see generally ALAN GEWIRTH, *REASON AND MORALITY* 230-40 (1978). Gewirth might not agree with my understanding of psychological wounds—to security, dignity, self-esteem, and perceived self-worth—as harms addressable under his Principle of Generic Consistency, but his distinction between additive and nonsubtractive goods is helpful here. See *id.*

that one cannot but identify oneself with it, if one reflects honestly on one's action. In particular, if one causes harm that is a means to the achievement of one's purpose, if the causing of harm is a distinguishable act directed toward one's goal, then one cannot avoid willing the harm.

Divorcing because one's marriage is not a marriage need not require one to intend harm to one's spouse or children. The divorce itself may be precisely the way in which one protects oneself from the harm or deprivation experienced in a would-be marital relationship that is not a marriage.<sup>32</sup> If the harm one causes in divorcing is to be appropriate, it must not be possible to effect the self-protection brought about by divorce by some other means. One would not, surely, be justified in causing pain or other harms by divorcing if one could reasonably anticipate that other alternatives would enable one to avoid the harms or deprivations brought about by one's marriage. There may be no realistic way to escape abuse or humiliation, to avoid experiencing the unfairness of an unjust *emotional contract*, or to impede "the slow soul-starvation of communication denial"<sup>33</sup> apart from divorce, but one needs to be confident that this is the case. One needs to be warranted in believing that it is unlikely or impossible that one's marriage will be transformed into a marriage. Otherwise, one will have chosen the causing of pain or other harms as a means to the end of self-defense when one did not need to do so.<sup>34</sup>

One also instrumentalizes the pain of one's spouse or children in divorcing if one divorces in order to achieve some good end, extrinsic to one's liberation from the injustice, pain, or deprivation caused by one's marriage. Divorcing one's spouse must be appropriate apart from its indirect effects. A good end—service to the community, more money for starving children, a better relationship than that which one currently enjoys with one's spouse, with someone in particular, or with anyone—does not justify the harm of divorce. Only if the means is itself justified, is the act permissible.

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<sup>32</sup> See WILLIAM E. MAY, *BECOMING HUMAN: AN INVITATION TO CHRISTIAN ETHICS* 94-96 (1975).

<sup>33</sup> ROSEMARY RADFORD RUETHER, *SEXISM AND GOD-TALK* 174 (1983).

<sup>34</sup> Cf. Grisez, *Toward, supra* note 28, at 88.

A consequentialist calculus may suggest that one could do a great deal of good with the money gained through a divorce settlement, or that, freed from commitments to an ailing spouse, one could do important work for the community. But to divorce for extrinsic goals like these is to will that one's spouse or children suffer the evil of relational loss.<sup>35</sup> Similarly, an egoistic calculus might inspire one to divorce in order to *trade up*<sup>36</sup>—to leave one's spouse simply or primarily *because* an alternative prospective spouse is more interesting or attractive or desirable.

The issue of trading up will not arise at all for a morally responsible person except when her or his promissory obligations to her or his spouse do not require her or him to remain married. When marriage vows still bind, trading up is not a moral option. But trading up would be wrong for a variety of other reasons, too.

First, to bond with someone enough to know that she or he would likely be prepared to marry one after a divorce will characteristically involve a violation of one's responsibilities to one's spouse. And even if they did not do so directly, one ought to avoid intense emotional ties with a possible future spouse in order to ensure that one can view one's spouse honestly and resist the temptation to give up unfairly on the possibility of converting one's relationship with her or him into a marriage.

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<sup>35</sup> For criticisms of consequentialist approaches, see, for example, Stephen R. L. Clark, *Natural Integrity and Biotechnology*, in HUMAN LIVES 58-76 (Jacqueline A. Laing & David S. Oderberg eds., 1997); ALAN DONAGAN, THE THEORY OF MORALITY 172-209 (1977); JOHN M. FINNIS, FUNDAMENTALS OF ETHICS 80-108 (1983) [hereinafter FINNIS, FUNDAMENTALS]; FINNIS, NATURAL LAW, *supra* note 7, at 111-19; JOHN M. FINNIS, JOSEPH M. BOYLE, JR. & GERMAIN G. GRISEZ, NUCLEAR DETERRENCE, MORALITY, AND REALISM 177-296 (1987); GERMAIN G. GRISEZ & RUSSELL SHAW, BEYOND THE NEW MORALITY: THE RESPONSIBILITIES OF FREEDOM 111-14, 131-33 (3rd ed., 1988); ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 61-63, 67-68, 185 (2nd ed., 1984); NODDINGS, *supra* note 24, at 151-54 (1984); DAVID S. ODERBERG, MORAL THEORY: A NON-CONSEQUENTIALIST APPROACH 65-76, 97-101, 132-33 (2000); BERNARD A. O. WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS (2nd ed., 1993); Bernard A. O. Williams, *A Critique of Utilitarianism*, in UTILITARIANISM 77-150; Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS 21 (1978).

<sup>36</sup> I owe this apt expression to Robert Nozick.

Further, trading up would mean that one *loved* one's spouse as a bearer of qualities rather than as an irreplaceable particular individual whose distinctive value transcended her or his particular features. One's spouse is not a source of satisfactions to be exchanged for another source of satisfactions; she or he is a *person*.

One may be aware, perhaps, that divorce will enable one to marry someone else, perhaps someone in particular, and this may be recognized as a good. But the desire for self-protection against the adverse consequences of marriage to one's spouse—including her or his harmful or hurtful, debilitating or depressing, unjust or irresponsible acts, omissions, or deprivations—must *on its own* be sufficient to motivate one to divorce if one's act is to be morally appropriate. One's choice to divorce must reflect the harm caused by continuing commitment to one's marriage. If one is satisfied with the features of one's marriage that identify it as a non-marriage, but dissatisfied because of factors not intrinsically significant for its status as a non-marriage, then one is not justified in ending it.

The conscious *structure* of one's action must include the distinct goal of ending one's marriage because of the liabilities internal to it. This goal must be sufficiently appealing to make one choose to end one's marriage apart from the attractiveness of any post-marital possibilities. The knowledge that a marriage is possible in the wake of the dissolution of one's marriage may give one the security one needs to end one's marriage (jumping out of a burning building is considerably less risky if someone is holding a net in which one can land). But before concluding that one's marriage is not a marriage, one ought to be confident that one desires to be apart from one's spouse, whether or not a relationship with anyone else—anyone at all or someone in particular—is possible.<sup>37</sup> The intrinsic flaws of one's marriage must, on their own, be sufficient to motivate one to divorce if one is to avoid instrumentalizing the pain of one's spouse or children.

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<sup>37</sup> Cf. ROBERT J. STERNBERG, *THE TRIANGLE OF LOVE: INTIMACY, PASSION, COMMITMENT* 248 (1988). This is not only morally but practically important. For one brings with one, to any relationship, the same self, with its idiosyncrasies and neuroses and pathologies, that one brings to other relationships. One cannot, therefore, envision a marital relationship with a real or imagined other as a panacea.

## 2. One Must Not Arbitrarily Prefer Oneself to One's Spouse or Children

One should not arbitrarily prefer oneself to one's spouse or children in determining whether one may cause the harm one believes will result if one divorces.<sup>38</sup> This means one should refuse to divorce unless the harm one believes one will cause is warranted by a judgment that could, in an appropriately qualified way, be universalized. "From one's way of conducting oneself here and now it should be possible to derive a universal norm applicable to every case involving no rational consideration other than those involved in this case"—though these may, of course, include very specific considerations regarding probable outcomes, attitudes, abilities, needs, and so forth.<sup>39</sup>

Another way to put the same point, making use of a valuable imaginative device, is to say that one may rightly end one's marriage only if a genuinely impartial observer would agree that one could rightly do so, given the harm that divorcing or remaining married might cause for oneself and one's spouse and children. The observer would, of course, recognize that different people are harmed and incapacitated in different ways by superficially similar events, "for people of a certain delicacy of feeling some less crudely disturbing elements constitute a far more intolerable burden"<sup>40</sup> than traditional marital offenses. Contemporary marriage offers spouses "increased possibilities of wounding and being wounded by each other."<sup>41</sup> The observer would take all these factors into account.

The observer would consider possible outcomes and options as she or he determined whether one could cause the harm to one's spouse or children to which one believed one's divorce might lead, asking, in effect: "if I were close to each of these people—given that the relationship is unjust, but also given that the harms each may experience in the future must be taken into account—if each were a close friend, what would I deem acceptable? What would seem appropriate?"

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<sup>38</sup> I frame the issue here in terms of "arbitrary preference" in light of the analysis of FINNIS, *FUNDAMENTALS*, *supra* note 35, at 106-09.

<sup>39</sup> GRISEZ, *BEYOND*, *supra* note 22, at 120.

<sup>40</sup> BRUNNER, *supra* note 11, at 362.

<sup>41</sup> THIELICKE, *supra* note 10, at 167.

A lack of equality and mutuality raises the question of whether a marital relationship really *is* a marriage at all. But if this is so, then it follows that one person is exploiting the other. This implies, however, that this person has the most to gain from the continuation of the marriage, and thus the most to lose if it is dissolved. Nonetheless, the fact of such exploitation—which ironically renders the (often unintentional, perhaps even benevolent) exploiter especially vulnerable in case of divorce—does not make it unnecessary to think about questions of care. Even if there *is* an imbalance of power, one must take seriously one's responsibility to care for the other—though what this may mean in any given situation is obviously dependent upon a wide variety of particular factors. It might even rarely mean that, despite the injustice of the relationship, one may be obligated to stay to avoid destroying one's spouse.<sup>42</sup> On the other hand:

[w]hen a disproportionate burden of sacrifice is laid on one person in a commitment-relationship, and when the person who bears it is the one with the least power, the duty of self-sacrifice is morally suspect. This suggests that where there is an imbalance of power, the expectation ought to be that the one with the greater power will be obligated to the greater self-sacrifice.<sup>43</sup>

### *C. Acknowledging Relationship-Specific Limits on Divorce*

The kind and degree of harm one may reasonably cause in a given relationship varies with the relationship. The intimacy, care, and commitment that characterize a relationship impose limits beyond which one may not transgress. For instance, the more vulnerable one's spouse's self-disclosure, the more one has welcomed and encouraged her or his self-exposure, the less appropriate divorce will be. The more

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<sup>42</sup> Cf. GRISEZ, *BEYOND*, *supra* note 22, at 164 (observing that slaves are *legally* obligated “to submit to their enslavement . . . . But no one today seriously supposes that this duty carries with it any real moral responsibility. . . . [I]n a society which accepts slavery as a social institution some people may have a social duty to be slaves, but they can have no moral responsibility arising from this role, and it is not immoral of them to refuse their duty. (Of course, this does not mean that a slave has no moral responsibilities at all. At times a slave might be required by other responsibilities to endure with patience even the injustice of the condition of slavery)”).

<sup>43</sup> FARLEY, *supra* note 9, at 107.

one cares about her or him—especially, though not exclusively, if one has expressed one's level of care in a clear commitment—the less suffering one should be prepared to cause her or him in self-defense. The more one has freely, whether or not explicitly, committed oneself to tolerating, the more one must be willing to accept. That is why authentic marriage vows preclude divorce; having given oneself unconditionally to another, to retract one's gift *would* represent a loss of personal and moral integrity.

There will be a threshold of acceptable harm in a relationship that determines how much we may act for our own interests when doing so would cause distress for the other. For instance, even if one wishes not to be someone's spouse, that person may still be a friend (though obviously not a deeply intimate one, or one would not be justified in seeking or contemplating a divorce). And, if so, in determining whether one may divorce, one must consider what responsibilities one has to her or him as a not-so-close friend, and not only as a generic human being. These responsibilities determine the nature and degree of suffering one may appropriately cause her or him, and one must have reason to believe that the amount of suffering one's departure will cause will not exceed this value if one is to be justified in divorcing.

If one has *not* chosen to suffer anything and everything out of love for the other, then one may appropriately consider how much suffering one has committed oneself to accepting in the course of loving one's spouse. One should not be expected to suffer more unjust harm or incapacitation than one has committed oneself to undergoing. Love that "*freely* chooses to suffer with others, bearing up under what is and waiting patiently for what is to come, is possible only to those . . . who start from a position of advantage that allows options for choice"<sup>44</sup>—which many people (especially women) do not, in reality, possess. In every case, however, harm requires justification.<sup>45</sup>

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<sup>44</sup> Antoinette Wire, *1 Corinthians*, in *2 SEARCHING THE SCRIPTURES* 183 (Elisabeth Schüssler Fiorenza et al. eds., 1994) (emphasis added).

<sup>45</sup> NODDINGS, *supra* note 24, at 150. Noddings is concerned here with animals, but I have no sense that she would suggest that one's obligation in human-human situations was any different. *See id.*

These constraints are not, and cannot be, stated with much precision. But it is important to acknowledge that there *are* limits, even if one may sometimes unintentionally harm a spouse or children in the course of divorce. Certainly it is more humane to accept limits of this kind than to adopt the callous attitude that leads one of the main characters in the film *Un Coeur en Hiver* to say, as he discusses his plan to leave his wife for a younger woman, “someone always gets hurt” and “one can’t go on living indefinitely with a good friend.”<sup>46</sup> The point of marriage and family, what makes them worthwhile, is giving and receiving the deeply reassuring and sustaining love that makes personal flourishing possible. It is in the name of this ideal that some relationships may, perhaps, be justifiably terminated. But to divorce in a way that was insensitive to this crucial good, to imply that the personhood of everyone deserves zealously to be guarded, would be to undercut the pursuit of love—real love—that is the center of marriage. One can hardly say, “I think nurturing fragile selves matters,” while at the same time devastating and destroying someone else.

A decision to divorce is no less serious than the amputation of an arm.<sup>47</sup> But just as such an amputation may sometimes be appropriate, so, too, may a divorce. A spouse is not a body part; that is why *her* or *his* pain, and not simply one’s own distress, must be taken into account. However, when the unjust reality that one’s marriage is not a marriage makes one desire to divorce, if one can do so without intentionally harming one’s spouse or children, and without imposing excessive or arbitrary harm on them, then doing so may fall within appropriate moral limits.<sup>48</sup>

#### IV. CONCLUSION

Marital obligation is grounded in at least two kinds of considerations: those related to the promises the partners have made to each other, and those related to their more general moral responsibilities to avoid harming intentionally and to act with due regard for the vulnera-

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<sup>46</sup> UN COEUR EN HIVER (Film Par Film 1992).

<sup>47</sup> Jonathan Butler, *Ghost Limb*, INSIGHT, June 22, 1985, at 4-9 (This haunting short story uses this metaphor exquisitely to evoke the pain of losing a love).

<sup>48</sup> See GILLIGAN, *supra* note 24, at 149 (discussing the cause of pain and on self care). Cf. NODDINGS, *supra* note 24, at 99-100.

bilities their interactions have created and sustained. One cannot substitute a model of what the partners' duties should be for an analysis of the duties they actually have in view of their particular circumstances. Thus, a proper understanding of the commitments actually made by particular partners may make it appropriate to acknowledge a variety of limitations even on putatively exceptionless obligations. At the same time, of course, even when some promissory obligations between partners cease to bind, other non-promissory responsibilities may affect the appropriateness of a decision to divorce.

The fact that a normative model of marriage calls for genuinely exceptionless vows should not, therefore, determine how the law treats the marriages of real people. While the obligations of marriage partners may derive from relatively general principles, these principles leave open a variety of moral options in view of people's individual histories and circumstances. The upshot is that there is little reason for the law to presume or enforce a single model of marital obligation. Indeed, the alternative to the current divorce regime which strikes me as the most appealing in light of the considerations adduced here would not, thus, be one featuring more stringent constraints on the decision to divorce, or on the content of marital obligation generally—consider the recent interest in “covenant marriage.” Rather, it would be one that provided for much more individual flexibility to couples, permitting them to outline their expectations in considerable detail and to tailor their marriage contracts to their own situations. Thus, they might well opt for no-fault divorce, for complete indissolubility, or for anything in between. And they might incorporate a variety of understandings regarding domestic responsibilities, sexual fidelity, and other matters. It is not the job of the state to require that everyone's marriage conform to a particular pattern. The state can, however, foster deeper, stronger relationships by encouraging partners to be explicit about what they believe about marriage and what they expect of each other. The point is not that all models of marriage are equally satisfactory, but that the state is not well-equipped to enforce a particular vision of marriage. The state can create structures that loom room for a diverse array of individual models of marriage without implying that all are equally valid.

Even if it does not violate any obligations to one's partner, a divorce may be imprudent for all sorts of reasons; people may be wiser

to remain committed to their partners during difficult times, even when divorce is morally appropriate. But the state is not practically equipped to judge the wisdom of a decision to divorce any more than it is to identify and impose a single, normative model of marriage. In light of the overwhelming complexity of the moral and prudential issues faced by those who seek to act wisely and well in relation to their intimate partners, the law can contribute most effectively to the fulfillment of marital responsibilities by allowing partners to shape the contours of their own relationships and then accept the consequences of having done so.