

An Apt and Cheerful Conversation on Marriage

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"The apt and cheerful conversation of man with woman is the chief and noblest purpose of marriage," wrote John Milton. "Where loving [conversation] cannot be, there can be left of wedlock nothing but the empty husk of an outside matrimony" -- dry, shrivelled, and dispensable. Aptness can strain cheerfulness: candid conversations between spouses can be very painful. Cheerfulness can strain aptness: blissful domestic ignorance can be very tempting. But aptness and cheerfulness properly belong together in a marriage, Milton tells us. Where they fail, the marriage fails.²

An apt and cheerful conversation about marriage must be part of our dialogue today. For marriage is one of the great mediators of individuality and community, revelation and reason, tradition and modernity. Marriage is at once a harbor of the self and a harbinger of the community, a symbol of divine love and a structure of reasoned consent, an enduring ancient mystery and a constantly modern invention.

To be "apt," our conversation cannot wax nostalgic about a prior golden age of marriage and the family, nor wax myopic about modern ideals of liberty, privacy, and autonomy. We cannot be blind to the patriarchy, paternalism, and plain prudishness of the past. Nor can we be blind to the massive social, psychological, and spiritual costs of the modern sexual revolution. To be apt, participants in the conversation on marriage must seek to understand both traditional morals and contemporary mores on their own terms and in their own context -- without deprecating or privileging either form or norm. Traditionalists must heed the maxim of Jaroslav Pelikan that "[t]radition is the living faith of the dead; traditionalism is the dead faith of the living."³ Wooden

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² John Milton, The Doctrine and Discipline of Divorce, 2d ed. (London, 1644), in The Complete Prose Works of John Milton (New Haven: Yale University Press, 1959), 2:235-256 (spelling modernized).

³ Jaroslav Pelikan, The Vindication of Tradition (New Haven: Yale University Press, 1984), 65.

antiquarianism, a dogmatic indifference to the changing needs of marriages and families, is not apt. Modernists must heed the instruction of Harold Berman that "we must walk into the future with an eye on the past."⁴ Chronological snobbery, a calculated disregard for the wisdom of the past, also is not apt.

To be "cheerful," our conversation must proceed with the faith that the crisis of modern American marriage and family life can be overcome. Marriage and the family are in trouble today. Statistics tell the bald American story. From 1975-1998, roughly one quarter of all pregnancies were aborted. One third of all children were born to single mothers. One half of all marriages ended in divorce. Three quarters of all African-American children were raised without fathers. The number of "no parent" households doubled each year. Children from broken homes proved two to three times more likely to have behavioral and learning problems as teenagers than children from two-parent homes. More than two-thirds of juveniles and young adults convicted of major felonies from 1970 to 1995 came from single- or no-parent homes. So much is well known.⁵ It brings little cheer.

What is less well known, and what brings more cheer, is that the Western tradition has faced family crises on this scale before. And apocalyptic jeremiads about the end of civil society have been uttered many times before -- by everyone from Cicero to Calvin, from Augustine to Acton. What brings cheer is that the Western tradition of marriage has always found the resources to heal and reinvent itself, to strike new balances between orthodoxy and innovation, order and liberty with regard to our enduring and evolving sexual, marital, and familial norms and habits. The prospect of healing and reinvention is no less likely today -- so

⁴ Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (Cambridge: Harvard University Press, 1983), v, vii.

⁵ See, inter alia, Dennis A Ahlburg and Carol J. DeVita, "New Realities of the American Family," Population Bulletin 47 (2) (1992): 15; Larry L. Bumpass, "What's Happening to the Family? Interactions Between Demographic and Institutional Change," Demography 27 (1990): 485; id. and Teresa Castro Martin, "Recent Trends in Marital Disruption," Demography 26 (1989): 37; Council on Families in America, Marriage in America: A Report to the Nation (New York: Institute for American Values, 1995); id., Closed Hearts, Closed Minds: The Textbook Story of Marriage (New York: Institute for American Values, 1997); Maggie Gallagher, The Abolition of Marriage (Washington: Regnery Publishing, 1996), 3-12; Barbara Dafoe Whitehead, The Divorce Culture (New York: Alfred A. Knopf, 1997). More recent studies, some with more encouraging recent statistics, include: Mary Ann Mason, Arlene Skolnick, Stephen D. Sugarman, All our Families: New Policies for a New Century (New York/Oxford: Oxford University Press, 1998); Symposium, "Law and the New American Family," Indiana Law Journal 73 (1998): 393-673; Morehouse Research Institute and Institute for American Values, Turning the Corner on Father Absence in Black America (New York, 1999).

long as academics, activists, and advocates, political, religious, and civic leaders ponder these problems in good faith and direct their resources to good works.

This essay makes a small start at such an apt and cheerful conversation on marriage. My argument is that modern Anglo-American marriage law was formed out of two traditions -- one rooted in Christianity, a second in the Enlightenment. Each of these traditions has contributed a variety of familiar legal ideas and institutions -- some overlapping, some conflicting. It is in the overlapping and creatively juxtaposed legal contributions of the Christian and Enlightenment traditions that one sees some of the ingredients of a third way respecting marriage. These are outlined in the latter part of the essay.

Marriage in the Christian Tradition

The Western tradition has, from its beginnings, viewed marriage in at least four perspectives.⁶ Marriage is a contract, formed by the mutual consent of the marital couple, and subject to their wills and preferences. Marriage is a spiritual association, subject to the creed, code, cult, and canons of the religious community. Marriage is a social estate, subject to special state laws of property, inheritance, and evidence, and to the expectations and exactions of the local community. And marriage is a natural institution, subject to the natural laws taught by reason and conscience, nature and custom.

These four perspectives are in one sense complementary, for they each emphasize one aspect of this institution -- its voluntary formation, its religious sanction, its social legitimation, and its natural origin, respectively. These four perspectives have also come to stand in considerable tension, however, for they are linked to competing claims of ultimate authority over the form and function of marriage -- claims by the couple, by the church, by the state, and by nature and nature's God. Some of the deepest fault lines in the historical formation and the current transformations of Western marriage ultimately break out from this central tension of perspective. Which perspective of marriage dominates a culture, or at least prevails in an instance of dispute -- the contractual, the spiritual, the social, or the natural? Which authority wields preeminent, or at least peremptory, power over marriage and family questions -- the

⁶ See sources and discussion in FSC, 1-22.

couple, the church, the state, or God and nature operating through one of these parties?

Catholics, Protestants, and Enlightenment exponents alike have constructed elaborate models to address these cardinal questions. Each group recognizes multiple perspectives on marriage but gives priority to one of them. Catholics emphasize the spiritual (or sacramental) perspective of marriage. Protestants emphasize the social (or public) perspective. Enlightenment exponents emphasize the contractual (or private) perspective. In broad outline, the Catholic model dominated Western marriage law until the sixteenth century. From the mid-sixteenth to the mid-nineteenth century, Catholic and Protestant models, in distinct and hybrid forms, dominated Western family law. In the past century, the Enlightenment model has emerged, in many instances eclipsing the theology and law of Christian models. A brief snapshot of each of these traditions follows to come to terms with a bit of the theological and legal pedigree of modern marriage.

The Catholic Inheritance.⁷ The Roman Catholic Church first systematized its theology and law of marriage in the course of the Papal Revolution of the twelfth and thirteenth centuries. For the first time in that era, the Church came to treat marriage systematically as a natural, contractual, and sacramental unit. First, the Church taught, marriage is a natural association, created by God to enable man and woman to "be fruitful and multiply" and to raise children in the service and love of God. Since the fall into sin, marriage has also become a remedy for lust, a channel to direct one's natural passion to the service of the community and the Church. Second, marriage is a contractual unit, formed by the mutual consent of the parties. This contract prescribes for couples a life-long relation of love, service, and devotion to each other and proscribes unwarranted breach or relaxation of their connubial and parental duties. Third, marriage, when properly contracted between Christians, rises to the dignity of a sacrament. The temporal union of body, soul, and mind within the marital estate symbolizes the eternal union between Christ and His Church. Participation in this sacrament confers sanctifying grace upon the couple and the community. Couples can perform this sacrament privately, provided they are capable of marriage and comply with the rules for marriage formation.

⁷ See sources and discussion in *ibid.* 16-41, 221-226. See esp. James A. Brundage, Law, Sex, and Christian Society in Medieval Europe (Chicago: University of Chicago Press, 1987); Theodor Mackin, Marriage in the Catholic Church, 2 vols. (New York: Paulist Press, 1982-1984).

This sacramental theology placed marriage squarely within the social hierarchy of the Church. The Church claimed jurisdiction over marriage formation, maintenance, and dissolution. It exercised this jurisdiction through both the penitential rules of the internal forum and the canon law rules of the external forum.

The Church did not regard marriage and the family as its most exalted estate, however. Though a sacrament and a sound way of Christian living, marriage was not considered to be so spiritually edifying. Marriage was a remedy for sin, not a recipe for righteousness. Marriage was considered subordinate to celibacy, propagation less virtuous than contemplation, marital love less wholesome than spiritual love. Clerics, monastics, and other servants of the church were to forgo marriage as a condition for ecclesiastical service. Those who could not were not worthy of the Church's holy orders and offices.

The medieval Catholic Church built upon this conceptual foundation a comprehensive canon law of sex, marriage, and family life that was enforced by an hierarchy of Church courts throughout Christendom. Until the sixteenth century Protestant Reformation, the Church's canon law of marriage was the preeminent marriage law of the West. A civil law or common law of marriage, where it existed, was usually supplemental and subordinate.

Consistent with the naturalist perspective on marriage, the canon law punished contraception, abortion, infanticide, and child abuse as violations of the natural marital functions of propagation and childrearing. It proscribed unnatural relations, such as incest and polygamy, and unnatural acts such as bestiality and buggery. Consistent with the contractual perspective, the canon law ensured voluntary unions by annulling marriages formed through mistake, duress, fraud, or coercion. It granted husband and wife alike equal rights to enforce conjugal debts that had been voluntarily assumed, and emphasized the importance of mutual love among the couple and their children. Consistent with the sacramental perspective, the Church protected the sanctity and sanctifying purpose of marriage by declaring valid marital bonds to be indissoluble, and by annulling invalid unions between Christians and non-Christians or between parties related by various legal, spiritual, blood, or familial ties. It supported celibacy by annulling unconsummated vows of marriage if one party made a vow of chastity and by prohibiting clerics or monastics from marriage and concubinage.

The medieval canon law of marriage was a watershed in the history of Western law. On the one hand, it distilled the most enduring teachings of the Bible and the Church Fathers and the most salient rules of earlier Jewish, Greek, and Roman laws. On the other hand, it set out many of the basic concepts and rules of

marriage and family life that have persisted to this day -- in Catholic, Protestant, and secular polities alike.⁸ Particularly, the great decree Tametsi, issued by the Council of Trent in 1563, codified and refined this medieval law of marriage, adding the rules that marriage formation requires parental consent, two witnesses, civil registration, and church consecration. A 1566 Catechism commissioned by the same Council, and widely disseminated in the Catholic world in multiple translations, rendered the underlying sacramental theology of marriage clear and accessible to clergy and laity alike.

The Protestant Inheritance.⁹ The Protestant reformers of the sixteenth and seventeenth centuries supplanted the Catholic sacramental model of marriage and the family with a social model. Like Catholics, Protestants retained the naturalist perspective of the family as an association created for procreation and mutual protection. They retained the contractual perspective of marriage as a voluntary association formed by the mutual consent of the couple. Unlike Catholics, however, Protestants rejected the subordination of marriage to celibacy and the celebration of marriage as a sacrament. According to common Protestant lore, the person was too tempted by sinful passion to forgo God's remedy of marriage. The celibate life had no superior virtue and was no prerequisite for clerical service. It led too easily to concubinage and homosexuality and impeded too often the access and activities of the clerical office. Moreover, marriage was not a sacrament. It was an independent social institution ordained by God, and equal in dignity and social responsibility with the church, state, and other social units. Participation in marriage required no prerequisite faith or purity and conferred no sanctifying grace, as did true sacraments.

Calvinist Protestants emphasized that marriage was not a sacramental institution of the church, but a covenantal association of the entire community. A variety of parties played a part in the formation of the marriage covenant. The marital couple themselves swore their betrothals and espousals before each other and God -- rendering all marriages triparty agreements with God as party, witness, and judge. The couple's parents, as God's bishops for children, gave their consent to the union. Two witnesses, as God's priests to their peers, served as witnesses to

⁸ See sources and discussion in Javier Martínez-Torrón, Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition (Berlin: Duncker & Humblot, 1998), 81-108.

⁹ See sources and discussion in Witte, Sacrament to Contract, 42-193, 226-268. See esp. Steven E. Ozment, When Fathers Ruled: Family Life in Reformation Europe (Cambridge, Mass.: Harvard University Press, 1983).

the marriage. The minister, holding the spiritual power of the Word, blessed the couple and admonished them in their spiritual duties. The magistrate, holding the temporal power of the sword, registered the parties and their properties and ensured the legality of their union.

This involvement of parents, peers, ministers, and magistrates in the formation of a marriage was not an idle or dispensable ceremony. These four parties represented different dimensions of God's involvement in the marriage covenant, and were thus essential to the legitimacy of the marriage itself. To omit any of these parties was, in effect, to omit God from the marriage covenant. Protestant covenant theology thus helped to integrate what became universal requirements of valid marriage in the West after the mid-sixteenth century -- mutual consent of the couple, parental consent, two witnesses, civil registration, and church consecration.¹⁰

As a social estate, Protestants taught, marriage was no longer subject to the church and its canon law, but to the state and its civil law. To be sure, church officials should continue to communicate biblical moral principles respecting sexuality and parenthood. Church consistories could serve as state agents to register marriages and to discipline infidelity and abuse within the household. All church members, as priests, should counsel those who seek marriage and divorce, and cultivate the moral and material welfare of baptized children, as their congregational vows in the sacrament of baptism required. But principal legal authority over marriage, most Protestants taught, lay with the state, not with the church.

Despite the bitter invectives against the Catholic canon law by early Protestant theologians -- symbolized poignantly in Luther's burning of the canon law and confessional books in 1520 -- Protestant rulers and jurists appropriated much of the traditional canon law of marriage and the family. Traditional canon law prohibitions against unnatural sexual relations and acts and against infringements of the procreative functions of marriage remained in effect. Canon law procedures treating wife and child abuse, paternal delinquency, child custody, and the like continued. Canon law impediments that protected free consent, that implemented Biblical prohibitions against marriage of relatives, and that governed the relations of husband and wife and parent and child within the household were largely retained. These and many other time-tested canon law rules and procedures

¹⁰ See my "Between Sacrament and Contract: Marriage as Covenant in John Calvin's Geneva," Calvin Theological Journal 29 (1998): 9-75.

were as consistent with Protestant theology as with Catholic theology, and were transplanted directly into the new state laws of marriage of Protestant Europe.

The new Protestant theology of marriage, however, also yielded critical changes in this new civil law of marriage. Because the reformers rejected the subordination of marriage to celibacy, they rejected laws that forbade clerical and monastic marriage and that permitted vows of chastity to annul vows of marriage. Because they rejected the sacramental concept of marriage as an eternal enduring bond, the reformers introduced divorce in the modern sense, on grounds of adultery, desertion, cruelty, or frigidity, with a subsequent right to remarry at least for the innocent party. Because persons by their lustful nature were in need of God's soothing remedy of marriage, the reformers rejected numerous canon law impediments to marriage not countenanced by Scripture.

After the sixteenth century, these two Christian models of marriage lay at the heart of Western marriage law. The medieval Catholic model, confirmed and elaborated by the Council of Trent, flourished in southern Europe, Spain, Portugal, and France, and their many trans-Atlantic colonies. A Protestant social model rooted in the Lutheran two kingdoms theory dominated portions of Germany, Austria, Switzerland, and Scandinavia together with their colonies. A Protestant social model rooted in Calvinist covenant theology came to strong expression in Calvinist Geneva, and in portions of Huguenot France, the Pietist Netherlands, Presbyterian Scotland, and Puritan England and New England. A Protestant social model rooted in an Anglican theologies of the overlapping domestic, ecclesiastical, and political commonwealths dominated England and its many colonies all along the Atlantic seaboard.

The Early American Distillation. These European Christian models of marriage were transmitted across the Atlantic to America during the great waves of colonization and immigration in the sixteenth to eighteenth centuries. They provided much of the theological foundation for the American law of marriage until well into the nineteenth century.

Catholic models of marriage, while not prominent in early America, came to direct application in parts of the colonial American south and southwest.¹¹ Before the United States acquired the territories of Louisiana (1803), the Floridas (1819), Texas (1836), New Mexico (1848), and California (1848), these colonies were under the formal authority of Spain, and under the formal

¹¹ See esp. Hans W. Baade, "The Form of Marriage in Spanish North America," Cornell Law Review 61 (1975): 1-89.

jurisdiction of the Catholic Church. Most of the areas east of the Mississippi River came within the ecclesiastical provinces of San Domingo or Havana; most of those west came within the ecclesiastical province of Mexico. The Catholic clergy and missionaries taught the sacramental theology of marriage. The ecclesiastical hierarchy sought to enforce the canon laws of marriage, particularly the Decree Tametsi issued by the Council of Trent in 1563.¹²

To be sure, there was ample disparity between the law on the books and the law in action, particularly on the vast and sparsely-populated frontier. Religious and political authorities alike often had to recognize the validity of private marriages formed simply by mutual consent, particularly if the union had brought forth children. Yet the church hierarchy sought to enforce the marital formation rules of Tametsi -- mutual consent of the couple, parental consent on both sides, two witnesses to betrothals and espousals, and priestly consecration in the face of the church (or, in the absence of a priest, which was not uncommon, a substitute "marital bond" pending later consecration). Privately or putatively married couples that had defied these rules sometimes faced sanctions. Intermarriage between Catholics and non-Catholics, in open defiance of the sacrament, led to involuntary annulment of the union and the illegitimizing of children born of the same. Ecclesiastical authorities also grudgingly acceded to the reality of divorce and remarriage, particularly in distant regions to the north and west that lay beyond their practical reach. Yet their persistent teaching was that a marriage, once properly contracted, was an indissoluble union to be maintained until the death of one of the parties.

With the formal acquisition of these territories by the United States in the nineteenth century, jurisdiction over marriage shifted to the American Congress and, after statehood, to local state governments. These new civil governments at first rejected portions of the inherited Catholic tradition of marriage -- sometimes ruefully, thereby introducing a persistent streak of anti-Catholicism in American marriage law tracts for the next

¹² This was not true of American Catholic communities, outside of Spanish territory, that came within the ecclesiastical provinces of Baltimore, Philadelphia, New York, and Boston, and, later, ecclesiastical provinces in the West. The original settlers in these non-Spanish communities were from Britain, Scotland, or other parts of northern Europe where the Decree Tametsi was not in effect. They thus continued to recognize the pre-Tridentine Catholic canon law that a secret marriage formed by mutual consent was valid, even without priestly consecration. This disparity continued among some American Catholics until the Tridentine legislation was written into the 1918 Code of Canon Law. See Baade, "Marriage in Spanish North America," 19-24, 36-38.

century and more.¹³ Particularly the church's administration of marriage laws and the canonical prohibitions on religious intermarriage and on divorce and remarriage were written out of the new state laws almost immediately. But the Catholic clergy in these territories were generally left free to teach the doctrines and retain the canons of marriage for their own parishioners. Marriages contracted and consecrated before Catholic priests were eventually recognized in all former Spanish colonies in America. The Catholic hierarchy was generally free to pass and enforce new rules for sex, marriage, and family life to guide their own faithful and to advocate state adoption of these rules. Many basic Christian marital norms thereby found their way into American common law, particularly with the exponential growth of America Catholicism in the later nineteenth century.

Protestant models of marriage were much more influential in shaping early American marriage law. By the American Revolution of 1776, the Atlantic seaboard was a veritable checkerboard of Protestant pluralism. Lutheran settlements were scattered throughout Delaware, Maryland, Pennsylvania, and New York. Calvinist communities (Puritan, Presbyterian, Reformed, and Huguenot) were strong in New England, and in parts of New York, New Jersey, Pennsylvania, and the coastal Carolinas and Georgia. Evangelical and Free Church communities (Baptists, Methodists, and Quakers especially) found strongholds in Rhode Island and Pennsylvania and were scattered throughout the new states and far onto the frontier. Anglican communities (after 1780 called Episcopalian) were strongest in Virginia, Maryland, Georgia, and the Carolinas, but had ample representation throughout the original thirteen states and beyond.

These plural Protestant polities, though hardly uniform in their marital norms and habits, were largely united in their adherence to basic Protestant teachings. While adhering to many of the same basic Christian norms of sex, marriage, and domestic life taught by Catholics, they rejected Catholic sacramental views of marriage and ecclesiastical jurisdiction over marital formation, maintenance, and dissolution. They encouraged ministers to be married. They permitted religious intermarriage. They truncated the law of impediments. They allowed for divorce on proof of fault. They encouraged remarriage of those divorced or widowed.

¹³ See, e.g., James Shouler, A Treatise on the Law of Marriage, Divorce, Separation, and Domestic Relations, 6th ed., (Albany, NY: Matthew Bender, 1921), 1:19; John Bouvier, Institutes of American Law (Philadelphia: Robert E. Peterson, 1851), 1:101.

One issue, however, divided these Protestant communities rather sharply -- jurisdictional conflicts over marriage and divorce. New England Calvinist communities, from the beginning of the colonial period, allowed eligible couples to choose to marry before a justice of the peace or a religious official. Anglican communities, following the Book of Common Prayer, insisted that such marriages be contracted "in the face of the church" and be consecrated by a properly licensed religious official. Calvinist communities in the north granted local civil courts jurisdiction over issues of divorce, annulment, child custody, and division of the marital estate. Anglican communities in the South insisted that only the legislature should hear and decide such cases.¹⁴ These jurisdictional differences between north and south were eventually smoothed over in the nineteenth century -- with the mid-Atlantic and mid-Western states often providing examples of a middle way between them. The New England way ultimately prevailed.

Aside from this jurisdictional differences, however, a common "Protestant temperament" attended much of the American legal understanding of marriage in the nineteenth and early twentieth centuries.¹⁵ Most common law authorities accepted Protestant social models of marriage that placed special emphasis on the personal felicity, social utility, and moral civility of this godly institution. Joseph Story, for example, one the leading American jurists of the nineteenth century, wrote repeatedly that marriage is "more than a mere contract." He elaborated this sentiment in 1834, arguing that marriage might be best viewed as a balance of natural, social, and spiritual contracts:

Marriage is treated by all civilized societies as a peculiar and favored contract. It is in its origin a contract of natural law.... It is the parent, and not the child of society; the source of civility and a sort of seminary of the republic. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; ... it is a great mistake to

¹⁴ See detailed study in George Elliott Howard, A History of Matrimonial Institutions, 3 vols. (Chicago: University of Chicago Press, 1904).

¹⁵ The phrase is from Philip Greven, The Protestant Temperament: Patterns of Child-Rearing, Religious Experience, and the Self in Early America (Chicago: University of Chicago Press, 1977).

suppose that because it is the one, therefore it may not be the other.¹⁶

Chancellor James Kent, one of the great early systematizers of American law, wrote about the spiritual and social utility of the marriage contract:

The primary and most important of the domestic relations is that of husband and wife. It has its foundations in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and cultivation of the liberal arts.¹⁷

W.C. Rogers, a leading jurist at the end of the nineteenth century, opened his oft-reprinted treatise on the law of domestic relations with a veritable homily on marriage:

In a sense it is a consummation of the Divine to "multiply and replenish the earth." It is the state of existence ordained by the Creator, who has fashioned man and woman expressly for the society and enjoyment incident to mutual companionship. This Divine plan is supported and promoted by natural instinct, as it were, on the part of both for the society of each other. It is the highest state of existence, ... the only stable substructure of our social, civil, and religious institutions. Religion, government, morals, progress, enlightened learning, and domestic happiness must all fall into most certain and inevitable decay when the married state ceases to be recognized or respected. Accordingly, we have in this state of man and woman the

¹⁶ Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies (Boston: Hillard Gray, and Company, 1834), 100 (sec. 108). In his second edition, Story added this note to the quoted passage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of operation, different from what belongs to ordinary contracts."

¹⁷ James Kent, Commentaries on American Law, 12th ed. by Oliver Wendell Holmes, Jr. (Boston: Little Brown, 1896), 2:76.

most essential foundation of religion, social purity, and domestic happiness.¹⁸

Likewise, the United States Supreme Court spoke repeatedly of marriage as "more than a mere contract," "a Godly ordinance, "a sacred obligation."¹⁹ In Murphy v. Ramsey (1885), one of a series of Supreme Court cases upholding the constitutionality of anti-polygamy laws, Justice Field declared for the Court:

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth ... than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement.²⁰

The Court elaborated these sentiments in Maynard v. Hill (1888), a case upholding a new state law on divorce, and holding that marriage was not a "contract" for purposes of interpreting the prohibition in Article I.10 of the United States Constitution: "No State shall ... pass any ... Law impairing the Obligation of Contracts." After rehearsing at length the theological and common law authorities of the day, Justice Field declared for the Court:

[W]hilst marriage is often termed ... a civil contract -- generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization -- it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and

¹⁸ W.C. Rogers, A Treatise on the Law of Domestic Relations (Chicago: T.H. Flood, 1891), sec.2 (page 2).

¹⁹ Maynard v. Hill, 125 U.S. at 210-11 (1888); Reynolds v. United States, 98 U.S. 145, 165 (1879); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Davis v. Beason, 133 U.S. 333, 341-342 (1890). For the context of these cases, see my Religion and the American Constitutional Experiment: Essential Rights and Liberties (Boulder/Oxford: Westview Press/Perseus Book Group, 2000), 102ff.

²⁰ Murphy v. Ramsey, 114 U.S. at 45.

liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.²¹

This famous passage has been quoted in 134 federal and state cases since its proclamation in 1888.

Not only the basic theology, but also the basic law of marriage inherited from earlier Protestant models found its way into early American law. With ample variations across state jurisdictions, a typical state statute in the nineteenth century defined marriage as a permanent monogamous union between a fit man and a fit woman of the age of consent, designed for mutual love and support and for mutual procreation and protection. The common law required that betrothals be formal, and, in some states, that formal banns be published for three weeks before the wedding. It required that marriages of minors be contracted with parental consent on both sides, and that all marriages be contracted in the company of two or more witnesses. It required marriage licenses and registration and solemnization before civil and/or religious authorities. It prohibited marriages between couples related by various blood or family ties identified in the Mosaic law. The common law discouraged -- and, in some states, annulled -- marriage where one party was impotent, sterile, or had a contagious disease that precluded procreation or gravely endangered the health of the other spouse. Couples who sought to divorce had to publicize their intentions, to petition a court, to show adequate cause or fault, to make permanent provision for the dependent spouse and children. Criminal laws outlawed fornication, adultery, sodomy, polygamy, incest, contraception, abortion, and other perceived sexual offenses against the natural goods and goals of sex and marriage. Tort laws held third parties subject to suit for seduction, enticement, loss of consortium, or alienation of the affections of one's spouse.²²

Marriage in the Enlightenment Tradition

The Contract Model of Marriage. The Enlightenment contractarian model of marriage was adumbrated in the eighteenth

²¹ Maynard v. Hill, 125 U.S. at 210-211.

²² See a comprehensive summary of laws in Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty-Eight States, 5 vols. (Stanford: Stanford University Press, 1931-1938).

century, elaborated theoretically in the nineteenth century, and implemented legally in the twentieth century.²³ Exponents of the Enlightenment introduced a theology of marriage that gave new, and sometimes exclusive, priority to the contractual perspective. The essence of marriage, they argued, was neither its sacramental symbolism, nor its covenantal association, nor its social utility for the community and commonwealth. The essence of marriage was the voluntary bargain struck between the two married parties. The terms of their marital bargain were not preset by God or nature, church or state, tradition or community. These terms were set by the parties themselves, in accordance with general rules of contract formation and general norms of civil society. Such rules and norms demanded respect for the life, liberty, and property interests of other parties, and compliance with general standards of health, safety, and welfare in the community. But the form and function and the length and limits of the marital relationship were to be left to the private bargain of the parties -- each of whom enjoyed full equality and liberty, both with each other and within the broader civil society. Couples should now be able to make their own marriage beds, and lie in them or leave them as they saw fit.

This contractarian model of marriage, already adumbrated ambivalently by John Locke in his Two Treatises of Government (1690), was elaborated in endless varieties and combinations in the eighteenth and nineteenth centuries.²⁴ The Enlightenment was no single, unified movement, but a series of diverse ideological movements, in various academic disciplines and social circles throughout Europe and North America. For all the variations on its basic themes, however, the Enlightenment was quite consistent in its formulation of marriage as contract and quite insistent on the reformation of traditional marriage laws along contractarian lines.

It must be emphasized that the inspiration for this model was not simply ideological fiat. The Enlightenment model was aimed at the abuses that sometimes attended traditional Christian doctrines of marriage in action. The traditional doctrine of parental consent to marriage, for example, gave parents a strong hand in the marital decisions of their children. Some enterprising parents used this as a means to coerce their children into arranged marriages born of their own commercial or diplomatic convenience, or to sell their consent to the highest bidder for

²³ See sources and discussion in FSC, 194-215, 268-273.

²⁴ John Locke, Two Treatises of Government (1690), ed., Peter Laslett (Cambridge: Cambridge University Press, 1960), I.9, I.47, I.98, II.2, II.77-83.

their children's affections. The traditional doctrine of church consecration of marriage gave clergy an effective instrument to probe deeply into the intimacies of their parishioners. Some enterprising clergy used this as a means to extract huge sums for their marital consecration, or to play the role of officious matchmaker in callous defiance of the wills of the marital parties or their parents. The traditional doctrine of common law coverture, which folded the person and property of the wife into that of her husband, gave husbands the premier place in the governance of the household. Some enterprising husbands used this as a license to control closely the conduct and careers of their wives, or, worse, to visit all manner of savage abuses upon them and upon their children, often with legal impunity. The traditional doctrine of adultery imposed upon innocent children the highest costs of their parents' extra-marital experimentation. Children conceived of such dalliances were sometimes aborted in vitro or smothered on birth. If they survived, they were declared illegitimate bastards with severely truncated civil, political, and property rights. It was, in part, these and other kinds of abuses manifest in the Christian models of marriage in action that compelled Enlightenment exponents to strip marriage and its law to its contractual core.

Exponents of the Enlightenment advocated the abolition of much that was considered sound and sacred in the Western legal tradition of marriage. They urged the abolition of the requirements of parental consent, church consecration, and formal witnesses for marriage. They questioned the exalted status of heterosexual monogamy, suggesting that such matters be left to private negotiation. They called for the absolute equality of husband and wife to receive, hold, and alienate property, to enter into contracts and commerce, to participate on equal terms in the workplace and public square. They castigated the state for leaving annulment practice to the church, and urged that the laws of annulment and divorce be both merged and expanded under exclusive state jurisdiction. They urged that paternal abuse of children be severely punished and that the state ensure the proper nurture and education of all children, legitimate and illegitimate alike.

This contractarian gospel for the reformation of marriage was too radical to transform much of American law in the nineteenth century. But this contractarian gospel anticipated much of the agenda for the reform of American marriage law in the twentieth century. The reform proceeded in two waves. The first wave of reform, that crested from 1910 to 1940, was designed to bring greater equality and equity to the traditional family and civil society, without denying the basic values of the inherited Western

tradition of marriage. The second wave of reform, which crested from 1965 to 1990, seems calculated to break the preeminence of traditional marriage, and the basic values of the Western tradition which have sustained it.

First Wave of Legal Reforms.²⁵ In the early part of the twentieth century, sweeping new laws eventually broke the legal bonds of coverture which bound the person and property of a married woman. A married woman eventually gained the right to hold independent title and control of, and exercise independent contractual and testimonial rights over, the property she brought into the marriage or acquired thereafter. She also gained the capacity to litigate in respect of her property, without interference from her husband. As their rights to property were enhanced, (married) women slowly gained broader rights to higher education, learned societies, trade and commercial guilds and unions, and various professions, occupations, and societies, and ultimately to the right to vote in political elections -- all of which had been largely closed to them, by custom or by statute.

Other new laws provided that, in cases of annulment or divorce, courts had discretion to place minor children in the custody of that parent who was best suited to care for them. This reversed the traditional presumption that child custody automatically belonged to the father, regardless of whether he was at fault in breaking the marriage. The wife could now gain custody after marriage, particularly when children were of tender years or when the husband was found to be cruel, abusive, or unfit as a caretaker. Courts retained the traditional power to order guilty husbands to pay alimony to innocent wives; they also gained new powers to make other "reasonable" allocations of marital property to the innocent wife for child support.

Other new laws granted greater protection to minor children, within and without the household. Firm new laws against assault and abuse of children offered substantive and procedural protections to children, particularly those who suffered under intemperate parents or guardians. Ample new tax appropriations were made available to orphanages and other charities catering to children. Abortion and infanticide were subject to strong new criminal prohibitions. Child labor was strictly outlawed.

²⁵ Among numerous overviews, see esp. Max Rheinstein, Marriage Stability, Divorce, and the Law (Chicago: University of Chicago Press, 1972); Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law," Michigan Law Review 83 (1985): 1803; Mary Ann Glendon, The New Family and the New Property (Toronto: Butterworths, 1981); Elaine Tyler May, Great Expectations: Marriage and Divorce in Post-Victorian America (Chicago: University of Chicago Press, 1980).

Educational opportunities for children, boys and girls alike, were substantially enhanced through the expansion of public schools. Illegitimate children could be more easily legitimated through subsequent marriage of their natural parents, and eventually also through adoption by any fit parent, even if not a blood relative. Annulments no longer automatically illegitimated children born of a putative marriage, particularly if the child remained in the custody of one of the two parents.

This first wave of legal reforms sought to improve traditional marriage and family life more than to abandon it. Most legal writers in the first half of the twentieth century still accepted the traditional Western ideal of marriage as a permanent union of a fit man and fit woman of the age of consent. Most accepted the classic Augustinian definition of the marital goods of fides, proles, et sacramentum -- sacrificial love of the couple, benevolent procreation of children, and structural stability of marriage as a pillar of civil society. The primary goal of these early reforms was to purge the traditional household and community of its paternalism and patriarchy and thus render the ideals of marriage and family life a greater potential reality for all.

Second Wave of Legal Reforms. The same judgment cannot be so easily cast for the second wave of legal reforms, which crested from 1965 to 1990. Since the 1960s, American writers have been pressing the Enlightenment contractarian model of marriage to more radical conclusions. The same Enlightenment ideals of freedom, equality, and privacy, which had earlier driven reforms of traditional marriage laws, are now being increasingly used to reject traditional marriage laws altogether. The early Enlightenment ideals of marriage as a permanent contractual union designed for the sake of mutual love, procreation, and protection is slowly giving way to a new reality of marriage as a "terminal sexual contract" designed for the gratification of the individual parties.²⁶

The Uniform Marriage and Divorce Act (1987) -- both a barometer of enlightened legal opinion and a mirror of conventional custom on marriage -- reflects these legal changes. The Uniform Act defines marriage simply as "a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential."²⁷

²⁶ The phrase is from Carole Pateman, The Sexual Contract (Stanford: Stanford University Press, 1988).

²⁷ See, e.g., Uniform Marriage and Divorce Act, 9 U.L.A. 147 (1987), sec. 201 [hereafter UMDA]. The Act is duplicated in Walter Weyrauch, Sanford N. Katz,

Historically, valid marriage contracts required the consent of parents or guardians, the attestation of two witnesses, church consecration, and civil licensing and registration. The Uniform Act requires only the minimal formalities of licensing and registration for all marriages, and parental consent for children under the age of majority. Marriages contracted in violation of these requirements are presumptively valid and immune from independent legal attack, unless the parties themselves petition for dissolution within ninety days of contracting marriage.²⁸ Historically, impediments of infancy, incapacity, inebriation, consanguinity, affinity, sterility, frigidity, bigamy, among several others would nullify the marriage or render it voidable and subject to attack from various parties. It would also expose parties who married in knowing violation of these impediments to civil and criminal sanctions. The Uniform Act makes no provision for sanctions, and leaves the choice of nullification to the parties alone. The Act does confirm the traditional impediments protecting consent -- granting parties standing to dissolve marriages where they lacked the capacity to contract by reason of infirmity, mental incapacity, alcohol, drugs, or other incapacitating substances, or where there was force, duress, fraud, or coercion into entering a marriage contract.²⁹ But the Act limits the other impediments to prohibitions against bigamy and marriages between "half or whole blood relatives" or parties related by adoption.³⁰ And, in many states that have adopted the Uniform Act, all impediments, save the prohibition against bigamy, are regularly waived in individual cases.

These provisions of the Uniform Marriage and Divorce Act reflect a basic principle of modern American constitutional law, first articulated clearly by the United States Supreme Court in Loving v. Virginia (1967): "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival...."³¹ Using that principle, the Court has struck down, as undue burdens on the right to marry, a state prohibition against interracial marriage, a requirement that noncustodial

and Frances Olsen, Cases and Materials on Family Law (St. Paul: West Publishing Co., 1994), 1092-1110.

²⁸ UMDA, secs. 202-206. Parents or guardians may seek dissolution of the marriage of their minor child or ward, provided the action is brought before the child reaches the age of majority. *Ibid.*, sec. 208.

²⁹ *Ibid.*, secs. 207-208.

³⁰ *Ibid.*, sec. 207.

³¹ Loving v. Virginia, 388 U.S. 1, 12 (1967).

parents obligated to pay child support must receive judicial permission to marry, and a requirement that a prisoner must receive a warden's permission to marry.³² This same principle of freedom of marital contract, the drafters of the Uniform Act report, has led state courts and legislatures to peel away most of the traditional formalities for marriage formation.

The Supreme Court has expanded this principle of freedom of marital contract into a more general right of sexual privacy within the household.³³ In Griswold v. Connecticut (1965), for example, the Supreme Court struck down a state law banning the use of contraceptives by a married couple as a violation of their freedom to choose whether to have or to forgo children.³⁴ In a 1972 case, the Court stated its rationale clearly: "The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals, each with a separate emotional and intellectual makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child."³⁵ In Roe v. Wade (1973), the Court extended this privacy principle to cover the right of abortion by a married or unmarried woman during the first trimester of pregnancy -- without interference by the state, her husband, parent, or other third party. Still today, a married woman cannot be required to obtain permission from her husband to have an abortion.³⁶ In Moore v. East Cleveland (1978), the Court struck down a municipal zoning ordinance that impaired members of an extended family from living together in the same household.³⁷ In Kirschberg v. Feenstra (1981), the Court struck down a state statute that gave the

³² Respectively Loving v. Virginia; Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safly, 482 U.S. 78 (1987).

³³ See analysis, from different perspectives, in E.R. Rubin, The Supreme Court and the American Family (Westport, CT: Greenwood Press, 1986); David J. Garrow, Sexuality and Liberty: The Right to Privacy and the Making of Roe v. Wade, rev. ed. (Berkeley/Los Angeles: University of California Press, 1998).

³⁴ 381 U.S. 479 (1965). The same principle has been extended to protect access of unmarried couples, and minors, to contraceptives. See Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services International, 431 U.S. 678 (1977).

³⁵ Eisenstadt, 405 U.S. at 453.

³⁶ 410 U.S. 113 (1973). In Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992), the Court upheld the right of abortion, and struck down a state requirement of notification of one's spouse or the natural father as an "undue burden" upon this right.

³⁷ 431 U.S. 494 (1977).

husband as "head and master" of the family the right unilaterally to dispose of property held in common with his wife.³⁸ In all such cases, the private contractual calculus of the parties was considered superior to the general state interest in the health, safety, and welfare of its citizens.

State legislatures and courts have extended these principles of freedom of contract and sexual privacy to other aspects of marriage. Many states, for example, have abandoned their traditional reticence about enforcing prenuptial and marital contracts. The Uniform Premarital Agreement Act, adopted in nearly half the states today, allows parties to contract, in advance of their marriage, all rights pertaining to their individual and common property and "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."³⁹ The Uniform Premarital Agreement Act does prohibit courts from enforcing premarital contracts that are involuntary, unconscionable, or based on less than full disclosure by both parties. But, within these broad strictures, marital parties are left free to define in advance their own personal and property rights during marriage or in the event of separation, dissolution, or divorce.

Similarly, many states have left marital parties free to contract agreements on their own, or with a private mediator, in the event of temporary or permanent separation. The Uniform Marriage and Divorce Act provides that "parties may enter into a written separation agreement containing provisions for disposition of property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children." Such agreements are presumptively binding on a court. Absent a finding of unconscionability, courts will enforce these agreements on their own terms, reserving the right to alter those contract provisions that bear adversely on the couple's children. If the separation ripens into divorce, courts will also often incorporate these separation agreements into the divorce decree, again with little scrutiny of the contents of the agreement.

The same principles of freedom of contract and sexual privacy dominate contemporary American laws of divorce. Until the mid-1960s, a suit for divorce required proof of the fault of one's spouse (such as adultery, desertion, or cruelty), and no evidence of collusion, connivance, condonation, or provocation by the other spouse. Today, this law of divorce has been abandoned. Every

³⁸ 450 U.S. 455 (1981).

³⁹ Uniform Premarital Agreement Act, sec. 3. The act is duplicated in Weyrauch, et al., Family Law, 1111-1113.

state has promulgated a "no-fault divorce" statute, and virtually all states allow for divorce on the motion of only one party. Even if the innocent spouse forgives the fault and objects to the divorce, courts must grant the divorce if the plaintiff insists. The Uniform Act and fifteen states have eliminated altogether consideration of the fault of either spouse -- even if the fault rises to the level of criminal conduct. The remaining states consider fault only for questions of child custody, not for questions of the divorce itself.

Virtually all states have also ordered a one-time division of marital property between the divorced parties. Parties may determine their own property division through prenuptial or separation agreements, which the courts will enforce if the agreements are not unconscionable. But, absent such agreements, courts will simply pool the entire assets of the marital household and make an equitable division of the collective property. These one-time divisions of property have largely replaced traditional forms of alimony and other forms of ongoing support -- regardless of the fault, expectations, or needs of either party.

These two reforms of the modern law of divorce served to protect both the privacy and the contractual freedom of the marital parties. No-fault divorces freed marital parties from exposing their marital discords or infidelities to judicial scrutiny and public record. One-time marital property divisions gave parties a clean break from each other and the freedom to marry another. Both changes, together, allowed parties to terminate their marriages as easily and efficiently as they were able to contract them, without much interference from the state or from the other spouse.

These principles of contractual freedom are qualified in divorce cases involving minor children. The fault of the marital party does still figure modestly in current decisions about child custody. The traditional rule was that custody of children was presumptively granted to the mother, unless she was found guilty of serious marital fault or maternal incompetence. Proof of marital fault by the husband, particularly adultery, homosexuality, prostitution, or sexual immorality, virtually eliminated his chances of gaining custody, even if the wife was also at fault. Today, the court's custodial decisions are guided by the proverbial principle of the "best interests of the child." According to the Uniform Marriage and Divorce Act, courts must consider at once the child's custodial preferences, the parents' custodial interests, "the interrelationship of the child with his [or her] parent or parents," "the child's adjustment to his [or her] home, school, or community", and "the mental and physical

health of all parties involved."⁴⁰ "The court shall not consider the conduct of a proposed custodian that does not affect his relationship to the child," the Uniform Act concludes, setting a high burden of proof for the party who wishes to make their spouse's marital fault an issue in a contested custody case. Under this new standard, the presumption of maternal custody is quickly softening, and joint and shared custody arrangements are becoming increasingly common.

Signposts of a Third Way

An Hegelian might well be happy with this dialectical story. Christian models of marriage that prioritized religious norms and ecclesiastical strictures squared off against Enlightenment models of marriage that prioritized private choice and contractual strictures. Christianity was exposed for its penchant for paternalism and patriarchy, and lost. The Enlightenment was embraced for its promise of liberty and equality, and won. Thesis gives way to anti-thesis. Such is the way of progress.

The story is not so simple. It is true that the Enlightenment ideal of marriage as a privately-bargained contract between husband and wife about all their rights, goods, and interests has largely become a legal reality in America. The strong presumption today is that adult parties have free entrance into marital contracts, free exercise of marital relationships, and free exit from marriages once their contractual obligations are discharged. Parties are still bound to continue to support their minor children, within and without marriage. But this merely expresses another basic principle of contract law -- that parties respect the reliance and expectation interests of their children, who are third party beneficiaries of their marital or sexual contracts.⁴¹

It is equally true, however, that undue contractualization of marriage has brought ruin to many women and children, as many nineteenth century conservatives had warned.⁴² Premarital,

⁴⁰ UMDA, sec. 402.

⁴¹ See Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers, and the Law (New York: Free Press, 1991).

⁴² See, for example, James Fitzjames Stephen, Liberty, Equality, and Fraternity (1857), ed. Stuart D. Warner (Indianapolis: Liberty Fund, 1993), 138-141, 150-153, arguing that to allow marriage to become "a simple bargained-for contract," without oversight by parents and peers and by church and state, "will inevitably expose women to great abuse." They will have no protection in forming the bargain with naturally superior men, nor protection from men who dismiss them

marital, separation, and divorce contracts too often are not arms-length transactions, and too often are not driven by rational calculus alone. In the heady romance of budding nuptials, parties are often blind to the full consequences of their bargain. In the emotional anguish of separation and divorce, parties are often driven more by the desire for short-term relief from the other spouse than by the concern for long-term welfare of themselves or their children. The economically stronger and more calculating spouse triumphs in these contexts. And in the majority of cases today, that party is still the man -- despite the tempting egalitarian rhetoric to the contrary.

"Underneath the mantle of equality [and freedom] that has been draped over the ongoing family, the state of nature flourishes," Mary Ann Glendon writes.⁴³ In this state of nature, contractual freedom and sexual privacy reign supreme. But also in this state of nature, married life is becoming increasingly "brutish, nasty, and short," with women and children bearing the primary costs. The very contractarian gospel that first promised salvation from the abuses of earlier Christian models of marriage now threatens with even graver abuse.⁴⁴

What is the way out of this dilemma? Surely, part of the way forward is to look backward -- back to the sources of our marriage traditions, but now newly enlightened! The achievements of the Enlightenment in reforming the traditional theology and law of marriage cannot be lost on us. It took the contractual radicalism of the Enlightenment to force the Western tradition to reform itself -- to grant greater respect to the rights of women and children, to break the monopoly and monotony of outmoded moral and religious forms and forums respecting sexuality, marriage, and the family. It took the bold step of stripping marriage and its law

when "barren, old, unattractive, troubled, or destitute." See also Bourne, Marriage Indissoluble, 24-25, 85-86, arguing that divorce "irrecoverably injures the youth, who are bereft by it of one parent's care, and generally of the other's tenderness" and renders "many females outcasts, deserted by their natural protectors, and bereft of their children's favours and affections ... the female experiences a total bankruptcy of comfort, character, and generally of hope."

⁴³ Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (Chicago: University of Chicago Press, 1989), 146.

⁴⁴ See, from different perspectives, Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children (New York: Free Press, 1985); Barbara Dafoe Whitehead, The Divorce Culture: How Divorce Became an Entitlement and How it is Blighting the Lives of our Children (New York: Alfred A. Knopf, 1997); Paul R. Amato and Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval (Cambridge, MA: Harvard University Press, 1997).

to its contractual core for the Western tradition to see the need to reform its basic doctrines of parental consent, church consecration, male headship, child illegitimation, and others. While some religious traditions may have retrieved or conceived their own resources to achieve these reforms, it was the Enlightenment critique that forced these traditions to reform themselves and the state to reform its laws. This was no small achievement.

Just as the Enlightenment tradition still has much to teach us today, so do the earlier Catholic and Protestant traditions of the West.

First, these Western Christian traditions have seen that a marriage is at once a contractual, religious, social, and natural association, and that in order to survive and flourish, this institution must be governed both externally by legal authorities and internally by moral authorities. From different perspectives, Catholic and Protestant traditions have seen that marriage is an inherently communal enterprise, in which marital couples, magistrates, and ministers must all inevitably cooperate. After all, marital contracts are of little value without courts to enforce them. Marital properties are of little use without laws to validate them. Marital laws are of little consequence without canons to inspire them. Marital customs are of little cogency without natural norms and narratives to ground them.

The modern lesson in this is that we must resist the temptation to reduce marriage to a single perspective, or to a single forum. A single perspective on marriage -- whether religious, social, or contractual -- does not capture the full nuance of this institution. A single forum -- whether the church, state, or the household itself -- is not fully competent to govern all marital questions. Marriage demands multiple forums and multiple laws to be governed adequately. American religious communities must think more seriously about restoring and reforming their own bodies of religious law on marriage, divorce, and sexuality, instead of simply acquiescing in state laws. American states must think more seriously about granting greater deference to the marital laws and customs of legitimate religious and cultural groups that cannot accept a marriage law of the common denominator or denomination. Other sophisticated legal cultures -- Denmark, England, India, and South Africa -- grant semi-autonomy to Catholic, Hindu, Jewish, Muslim, and Traditional groups to conduct their subjects' domestic affairs in accordance with their own laws and customs, with the state setting only minimum conditions and limits. It might well be time for America

likewise to translate its growing cultural pluralism into a more concrete legal pluralism on marriage and family life.⁴⁵

Second, the Western tradition has learned to distinguish between betrothals and espousals, engagements and weddings. Betrothals were defined as a future promise to marry, to be announced publicly in the local community and to be fulfilled after a suitable waiting period. Espousals were defined as the present promise to marry, to be celebrated in a public ceremony before civil and/or religious officials. The point of a public betrothal and waiting period was to allow couples to weigh the depth and durability of their mutual love. It was also to invite others to weigh in on the maturity and compatibility of the couple, to offer them counsel and commodities, and to prepare for the celebration of their union and their life together thereafter. Too long an engagement would encourage the couple to fornication. But too short an engagement would discourage them from introspection. Too secret and private a marriage would deprive couples of the essential counsel and gifts of their families and friends. But too public and routinized a marriage would deprive couples of the indispensable privacy and intimacy needed to tailor their nuptials to their own preferences. Hence the traditional balance of engagement and wedding, of publicity and privacy, of waiting and consummating.

The modern lesson in this is that we must resist collapsing the steps of engagement and marriage, and restore reasonable waiting periods between them, especially for younger couples. Today, in most states, marriage requires only the acquisition of a license from the state registry followed by solemnization before a licensed official -- without banns, with little waiting, with no public celebration, without notification of others. So sublime and serious a step in life seems to demand a good deal more prudent regulation than this. It may well not be apt in every case to invite parents and peers, ministers and magistrates to evaluate the maturity and compatibility of the couple. Our modern doctrines of privacy and disestablishment of religion militate against this. But, especially in the absence of such third parties, the state should require marital parties themselves to spend some time weighing their present maturity and prospective commitment. A presumptive waiting period of at least 90 days between formal engagement and wedding day seems to be reasonable, given the stakes involved -- particularly if the parties are under 25 years of age. Probationary waiting periods, particularly for

⁴⁵ See Joel A. Nichols, "Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law," Emory Law Journal 47 (1998): 929-1001.

younger parties, are routinely required to enter a contract for a home mortgage, or to procure a license to operate a motor vehicle or handgun. Given the much higher stakes involved, marital contracts should be subject to at least comparable conditions.

Third, the Western tradition has learned to distinguish between annulment and divorce. Annulment is a decision that a putative marriage was void from the start, by reason of some impediment that lay undiscovered or undisclosed at the time of the wedding. Divorce is a decision that a marriage once properly contracted must now be dissolved by reason of the fault of one of the parties after their wedding. The spiritual and psychological calculus and costs are different in these decisions. In annulment cases, a party may discover features of their marriage or spouse that need not, and sometimes cannot, be forgiven -- that they were manipulated or coerced into marriage; that the parties are improperly related by blood or family ties; that the spouse will not or cannot perform expected connubial duties; that the spouse misrepresented a fundamental part of his or her faith, character, or history. Annulment in such instances is prudent, sometimes mandatory, even if painful. In divorce cases, by contrast, the moral inclination (and, for some, the moral imperative) is to forgive a spouse's infidelity, desertion, cruelty, or crime. Divorce, in such instances, might be licit, even prudent, but it often feels like, and is treated as, a personal failure even for the innocent spouse. The historical remedy was often calculated patience; early death by one spouse was the most common cure for broken marriages. In the modern age of fitness and longevity, this remedy is usually less apt.

The modern lesson in this is that not all marital dissolutions are equal. Today, most states have simply collapsed annulment and divorce into a single action, with little procedural or substantive distinction between them. This is one (largely forgotten) source of our exponentially increased divorce rates; historically, annulment rates were counted separately. This is one reason that religious bodies have become largely excluded from the marital dissolution process; historically, annulment decisions were often made by religious bodies and then enforced by state courts. And this is one reason that "no fault" divorce has become so attractive; parties often have neither the statutory mechanism nor the procedural incentive to plead a legitimate impediment. Parties seeking dissolution are thus herded together in one legal process of divorce -- subject to the same generic rules respecting children and property, and prone to the same generic stigmatizing by self and others.

Fourth, the Western tradition has learned, through centuries of hard experience, to balance the norms of marital formation and

dissolution. There was something cruel, for example, in a medieval Catholic canon law that countenanced easy contracting of marriage but provided for no escape from a marriage once properly contracted. The Council of Trent responded to this inequity in the Tamesti decree of 1563 by establishing several safeguards to the legitimate contracting of marriage -- parental consent, peer witness, civil registration, and church consecration -- so that an inapt or immature couple would be less likely to marry. There was something equally cruel in the rigid insistence of some early Protestants on reconciliation of all married couples at all costs -- save those few who could successfully sue for divorce. Later Protestants responded to this inequity by reinstating the traditional remedy of separation from bed and board for miserable couples incapable of either reconciliation or divorce.

The modern lesson in this is that rules governing marriage formation and dissolution must be balanced in their stringency -- and separation must be maintained as a release valve. Stern rules of marital dissolution require stern rules of marital formation. Loose formation rules demand loose dissolution rules, as we see today. To fix the modern problem of broken marriages requires reforms of rules at both ends of the marital process. Today, more than twenty states have bills under discussion seeking to tighten the rules of divorce, without corresponding attention to the rules of marital formation and separation. Such efforts, standing alone, are misguided. The cause of escalating divorce rates is not only no-fault divorce, as is so often said, but also no faith marriage.

Fifth, the Western tradition has recognized that the household has multiple forms, that it can change over time and across cultures. The celebrated nuclear family of husband and wife, daughter and son is only one model that the Western tradition has cherished. It was common in the past to extend the theological and legal concept of the family to other kinds of units -- the single household with one parent alongside children, stepchildren, adopted children, or grandchildren; the extended household embracing servants, students, and sojourners or embracing three or four generations of relatives with obligations of mutual care and nurture among them; the communal household of siblings or friends, single or widowed, with or without children; the spiritual household of brothers and sisters joined in the cloister, chantry, or charity, and dedicated to service of God, neighbor, and each other.

The modern lesson in this is that we must not cling too dogmatically to an ideal form of household. It was common in the recent past for the establishment to look askance on the commune but approvingly on the community home, to look churlishly at the

divorcee but charitably on the widow, to look suspiciously on the spinster but benevolently on the spurned. Today, we accept, sometimes even admire, communes, divorcees, and spinsters -- and make provision for them in our laws of taxation, property, and zoning as well as in our pastoral, diaconal, and pedagogical ministries. We now have other targets of suspicion -- homosexuals and polygamists prominently among them.

Finally, the Western tradition has recognized that marriage and the family have multiple goods and goals. This institution might well be rooted in the natural order and in the will of the parties. Participation in it might well not be vital, or even conducive, to a person's salvation. But the Western tradition has seen that the marriage and family are indispensable to the integrity of the individual and the preservation of the social order.

In Catholic and Anglican parlance, marriage has three inherent goods, which St. Augustine identified as fides, proles, et sacramentum.⁴⁶ Marriage is an institution of fides -- faith, trust, and love between husband and wife, and parent and child, that goes beyond the faith demanded of any other temporal relationship. Marriage is a source of proles -- children who carry on the family name and tradition, perpetuate the human species, and fill God's Church with the next generation of saints. Marriage is a form of sacramentum -- a symbolic expression of Christ's love for his Church, even a channel of God's grace to sanctify the couple, their children, and the broader community.

In Lutheran and Calvinist parlance, marriage has both civil and spiritual uses in this life. On the one hand, the family has general "civil uses" for all persons, regardless of their faith. Marriage deters vice by furnishing preferred options to prostitution, promiscuity, pornography, and other forms of sexual pathos. Marriage cultivates virtue by offering love, care, and nurture to its members, and holding out a model of charity, education, and sacrifice to the broader community. Ideally, marriage enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare. Ideally, marriage also enhances the life of the child, by providing it with a chrysalis of nurture and love, with a highly individualized form of socialization and education. It might take a village to raise a child properly, but it takes a marriage to make one.

⁴⁶ Augustine, On Original Sin, chap. 39 [xxxiv], in Philip Schaff and Henry Wace, eds., A Select Library of Nicene and Post-Nicene Fathers of the Christian Church, Second Series, repr. ed. (Grand Rapids: Wm. B. Eerdmans, 1952), 5:251.

On the other hand, the family has specific "spiritual uses" for believers--ways of sustaining and strengthening them in their faith. The love of wife and husband can be among the strongest symbols we can experience of Yahweh's love for His elect, of Christ's love for His Church. The sacrifices we make for spouses and children can be among the best reflections we can offer of the perfect sacrifice of Golgatha. The procreation of children can be among the most important Words we have to utter.⁴⁷

⁴⁷ Cf. John E. Coons, "The Religious Rights of Children," in John Witte, Jr. and Johan van der Vyver, eds., Religious Human Rights in Global Perspective: Religious Perspectives (The Hague/Boston/London, 1996), 172 ("In a faint echo of the divine, children are the most important Word most of us will utter.").