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MARRIAGE: ITS RELATIONSHIP TO RELIGION, LAW, AND THE STATE

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`MARRIAGE: ITS RELATIONSHIP TO RELIGION, LAW, AND THE STATE[1]

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Preface:

Father John Lynch -- whom I have known fondly as "Fr. Lynch" for a quarter-century now -- was among the earliest influences on my own understanding of what an historian should be about when engaging the records of the past. Certainly, Fr. Lynch taught some valuable lessons about medieval canon law, as anyone who took his Gratian seminar or his course on the sources of canon law, can attest. But he brought to the classroom a pair of attributes that made the lessons he imparted singularly compelling. By training a philosopher, he appreciated that, in common with other legal systems, canon law was not a self-contained system of rules that should be studied in isolation from other intellectual currents. Second, he understood the pervasive influence canon law has had on western law generally, secular as well as sacred.

A review of his scholarship, of course, reveals these attributes in abundance. His studies on celibacy, the election of bishops, and the early history of the eastern churches are well known and need no comment.[2] And his history of canonical studies at Catholic University of America

[1] This article is dedicated to Fr. John Lynch of the Catholic University of America in honor of his many years as a teacher, writer, administrator, and pastor of souls and scholars at the Catholic University of America.

[2] See John E. Lynch, "Marriage and Celibacy of the Clergy in the Discipline of the Western Church: An Historico-Canonical Synopsis," *The Jurist* 32 (1972) 14-38, 189-212; John E. Lynch, "Co-Responsibility in the First Five Centuries: Presbyteral Colleges and the Election of

is similarly indispensable.[3] I would like, however, to comment on two of his lesser known, but still very significant articles. In "The Medieval Canon Law on Sanctuary With Particular Reference to England," Fr. Lynch considered a breath-taking panorama of sources in the course of studying the role of the Church in furnishing sanctuary to those accused of crimes, from the Christian Roman Empire through the *Corpus Iuris Canonici*, to the *Provinciale* of the English canonist William Lyndwood, up to the destruction of this ancient right by the English King James I.[4] And in "The Canonical Contribution to English Law," Fr. Lynch examines the medieval antecedents of some familiar English legal institutions.[5] About marriage, which is the subject of this study, Fr. Lynch notes in particular the profound hold medieval theories of indissolubility exercised over the English legal imagination until the latter half of the nineteenth century.[6] His larger point, of course, is to document this pervasive influence on the English legal order.

This Article draws inspiration from Fr. Lynch's own work, especially these latter studies of canonical influence on secular legal orders. While the paper's purpose is broad -- to examine the relationship of religion, the state, and marriage, it is largely historical in focus and concerned

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Bishops," *The Jurist* 31 (1971); and John E. Lynch, "The Eastern Churches: Historical Background," *The Jurist* 51 (1991) 1-17.

[3] John E. Lynch, "Laying Down the (Canon) Law at Catholic University," *The Jurist* 50 (1990) 2-57.

[4] John E. Lynch, "Medieval Canon Law on Sanctuary With Particular Reference to England," in *Unico Ecclesiae Servitio: L'études de droit canonique offertes Germain Lesage*, ed. M. Theriault and J. Thorn, 71-89 (Ottawa: University of St. Paul, 1991).

[5] John E. Lynch, "The Canonical Contribution to English Law," *Studia Canonica* 33 (1999) 505-525.

[6] Ibid., 511-513.

with the ways in which medieval canon law both directly and through the mediation of early-modern Anglican canon law, influenced American jurists and judges of the nineteenth and twentieth centuries. It has a philosophical dimension also, in its contention that this historical record reflects an inevitable human reality -- that law and religion, marriage and the state not only have historically influenced each other but that they must do so, as a condition of a healthy society.

I. Religion, Marriage, and the State: the Medieval Synthesis:

A necessary first step must be definitional. Religion has been defined variously by philosophers, anthropologists, historians and others. It has received different definitions depending on the faith commitments of the scholar who proposes a definition. A particularly compelling definition has been offered by Judge John Noonan, who has proposed that religion is fundamentally about the relationship between persons and "a heart not known, responding to our own."[7] This unknown presence, who shapes us, stands with us, whom we trust with our deepest intimacies, is God. "[L]iving communication" characterizes this relationship which must be approached with "empathy" and "imagination."[8] Religion, furthermore, is bound inextricably with the nature of the human person. Indeed, Noonan makes the point that religion is as ineradicable an aspect of the human experience as is the sexual impulse.[9] Religion is about

[7] John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley: University of California Press, 1998) 2.

[8] Ibid.

[9] Ibid.

nothing less than the meaning of ultimate existence -- "the problem of being and nonbeing, life and death."[10]

What is of interest to the legal scholar is the ways in which the collective insights into ultimate meaning formed by a particular society come to be translated into norms and rules for social existence. This paper is concerned with one particular aspect of this much larger question -- the nexus found at the confluence of three streams of human reality: religious belief, especially understood as collective social enterprise; the marital union; and the ways in which the state has used its authority and power to mediate and define the terms of the other two.

This paper will have its center of gravity in American legal history of the last two hundred years. But American legal history is not fully explicable without an appreciation of what went before. William Maitland said regarding English legal history: "Such is the unity of all history that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web."[11] This insight applies as much to American law as to the English law whose origins Maitland sought to explain and to explore. Indeed, to tell the story of the interaction of religion, law, and the state in American history requires us to go back in time at least to the twelfth century. This starting point helps to reveal the powerful relationship that has prevailed in Western history between religious faith and the legal structure of marriage. The twelfth century

[10] Edwin McDowell, "Professor Mircea Eliade, 79, Writer and Religious Scholar," *New York Times,* April 23, 1986, B 6 (quoting Mircea Eliade).

[11] F.W. Maitland and Frederick Pollock, *A History of English Law Before the Time of Edward I* (quoted in Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, UK: Harvard University Press, 1983) 49.

witnessed a renaissance in learning.[12] The first universities were founded and set as their goal not merely the conservation of the collected wisdom of the past but the actual creation of knowledge through a dialectical method that questioned received authority.[13] This development was made possible by a general settling down of society and the emergence of complex institutional structures after a half-millenium of transitory and failed experiments at political organization following the collapse of Roman power in the West. Indeed, it has been persuasively contended that the western legal tradition itself came into being in the twelfth century as canon lawyers, many of them teaching and writing at the new universities, reduced to systematic juridic forms the mass of ecclesiastical learning of the previous one thousand years.[14]

Historically, going as far back in time as the twelfth century, marriage was defined in terms of legal categories that were shaped fundamentally by Christian theological insight. It was in the twelfth and thirteenth centuries that canon lawyers at the major European universities began to put into systematic legal form the theological heritage of the previous thousand years with a focus in particular on the thought of St. Augustine and other patristic writers of the era.

St. Augustine, who wrote at the end of the fourth century and the beginning of the fifth, conceived of marriage as serving three basic goods: Procreation; permanence; and life-long

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[12] See generally Charles Homer Haskins, *The Renaissance of the Twelfth Century* (Cambridge, MA: Harvard University Press, 1927).

[13] Hastings Rashdall notes that Bologna and Paris, both established "during the last thirty years of the twelfth century," should be accounted the first universities. Bologna grew famous for its instruction in Roman and canon law; Paris for its theological and philosophical investigations. *The Universities of Europe in the Middle Ages*, ed. F.M. Powicke and A.B. Emden (Oxford: At the Clarendon Press, 1936) 1:17.

[14] See generally, Berman, *Law and Revolution*.

faithfulness or unity.[15] The medieval lawyers reduced these theological insights to legal categories and brought to their enforcement the coercive jurisdiction of the Church which had at its disposal a variety of spiritual sanctions.[16] Where parties to a marriage affirmatively excluded one or more of these Augustinian goods from their exchange of consent, the union itself failed. The state, for its part, by and large ceded control of the marital relationship to the Church and contented itself with regulating some of the incidents that accompanied valid marriage. In the context of medieval England this involved such "incidents" as the exaction of feudal dues at the time of the marriage and the adoption of rules governing the inheritance of real, but not personal, property.[17]

The medieval canonists were vigorous in fleshing out a theory of marriage that assigned theological significance to nearly every attribute of the marital relationship. They stressed, for instance, that only the consent of the parties themselves sufficed to make a marriage and gave as a reason the theological insight that marriage was an enduring union of souls that required a freely-chosen decision to enter precisely in order to convey its symbolic qualities to the world.[18] The canonists further distinguished between consent and consummation, and determined that

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[15] Two of St. Augustine's most important works on this subject now appear in a single volume -- the new edition with facing translation prepared by P.G. Walsh. See *De Bono Coniugali, De Sancta Virginitate* (Oxford: Oxford University Press, 2001).

[16] I have summarized some of these developments in "The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage," *BYU Journal of Public Law* 18 (2004) 449, 451-456.

[17] For the role played by the Crown and its law in medieval and early-modern England, see T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown, and Company, 1956) 535-537 (feudal incidents of marriage); and 528-530 (the emergence of primogeniture as the means of regulating the inter-generational transfer of land in England).

[18] Charles J. Reid, Jr., *Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids, MI: William B. Eerdmans, 2004) 43-44.

while consent made a marriage, consummation conferred on it a special firmness that no human power might break.[19] Again, a theological explanation was offered as the basis of this rule. Consummation transformed a human relationship into a living, earthly representation of Jesus Christ's unfailing marriage to His Church.[20]

The medieval canonists developed yet more refinements for their theologically-inspired analysis of marriage. They distinguished between grounds of nullity and grounds of divorce. This much was required by their theology of an unbreakable marital bond. Entry into a life-long commitment obviously required the observance beforehand of a high degree of freedom from coercion and an awareness of the nature of the contract and its obligations. Hence persons marrying one another had to be free of external coercion,[21] and they could not be the victims of fundamental error as to the person whom they were marrying.[22] Furthermore, they might be prevented from marriage with one another by any of a number of impediments that existed in the law.[23]

The recognition that a given marriage might be invalid, that it might be so radically flawed

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[19] James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987) 236 ("Consummation transformed the union into a 'sacrament' and hence made it indissoluble").

[20] The development of this idea is one of the themes of the book by Seamus Heaney, *The Development of the Sacramentality of Marriage from Anselm of Laon to Thomas Aquinas* (Washington, DC: The Catholic University of America Press, 1963).

[21] On the freedom to marry, see Reid, *Power Over the Body*, 37-50.

[22] John Noonan observes that error as to the person as well as the person's status (free or servile) invalidated consent. See John T. Noonan, Jr., *Power To Dissolve: Lawyers and Marriages in the Courts of the Roman Curia* (Cambridge, MA: Harvard University Press, 1972), 36.

[23] For a list of the basic impediments, see Richard H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge, UK: Cambridge University Press, 1974) 36.

that it could be considered never to have come into existence, led the canonists to develop a judicial system empowered to investigate such claims. Success before the ecclesiastical courts led to the granting of an annulment; and those who obtained annulments of their putative marriages were thereby freed to move to new partners. After all, they had not been married at all in the eyes of the Church.

On the other hand, parties whose marriages, although valid, failed for some fundamental reason such as adultery or a lapse into heresy, enjoyed the right to seek an ecclesiastical divorce, although such a decree carried no right of remarriage. In addition to adultery and heresy, one might also seek a decree of separation by reason of excessive violence and brutality (called *saevitia* by the canonists).[24] Again, what one sees at work here are the consequences of the doctrine of indissolubility -- the marital bond was held to be enduring, even where the parties found it impossible to live together and were granted by competent authority the right to live apart. Since the bond endured for so long as both parties remained alive, remarriage was theoretically impossible during the lifetime of the other party.

Nor were these the only rules the medieval canonists developed. The canonists were truly prolific in defining and developing any number of the other elements of domestic relations law as it evolved from the middle ages to the twentieth century. The English Reformation modified some aspects of the edifice constructed by the medieval canonists. The belief that marriage was a sacrament was done away with.[25] The Anglicans also followed the lead of their

[24] The grounds for divorce are discussed in Reid, *Power Over the Body*, 135-149. The ground of violence developed as a kind of equitable estoppel, as American lawyers would term it: the defendant wife would raise as a defense the husband's violence as a justification for her decision to separate and the Court would refuse to grant the husband's petition for reconciliation.

[25] John Witte, *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville, KY: Westminster/John Knox Press, 1997) 140-153.

Continental Protestant brethren in reposing ultimate authority in the male head of household while simultaneously diminishing the rights of women.[26]

But in other respects, the Anglican canonists did not greatly disturb the basic legal structure established by their medieval predecessors. English jurists continued to stress -- as had the medieval canonists -- that marriage was a contract that derived its efficacy from divine law. Thus John Ayliffe, writing in the early eighteenth century, wrote that marriage "was first instituted by God himself in Paradise."[27] It was ordained by God "for the Propagation of Mankind."[28] Indeed, the "Law of Nature" and "right Reason itself" taught that the "Necessity of human Propagation" was the obvious and transcendent purpose for which marriage was brought into being.[29]

Ayliffe's contemporaries echoed these sentiments. Lord Stair in the late seventeenth century described marriage in similarly transcendent terms. Marriage, he wrote, "Was *iure divino*" -- the product of divine law.[30] The marriage contract, Lord Stair added, "is not a human,

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[26] This diminution of the wife's rights is well-expressed in the common-law doctrine of coverture, by which the wife's legal personality was merged with that of her husband to create a single legal entity with the husband empowered to act in its name. William Blackstone described the consequences of this doctrine: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*." *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979) (reprint of the 1766 edition) 2: 430. The ways in which the Bible was used by American courts to justify this doctrine is discussed *infra*: --.

[27] John Ayliffe, *Parergon Juris Canonici Anglicani* (London: Thomas Osborne, 1734) 359.

[28] Ibid., 359-360.

[29] Ibid., 360.

[30] James Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland*, David M. Walker, ed. (Edinburgh: University Presse of Edinburgh and Glasgow, 1981) 105.

but a divine, contract."[31] The basic rules of marriage were also the product of divine law. Lord Stair gave the specific example of the incest prohibitions. "[T]here is," he stressed, "a natural abhorrence of that promiscuous commixtion of blood."[32]

English Protestant lawyers thus shared with their medieval forebears a belief in the divine origin of marriage, even while they eschewed its sacramental character. And even though they no longer considered marriage a sacrament, they continued to retain the older canonistic rules governing marital indissolubility. A party seeking to take leave of his or her marriage might, like his or her medieval ancestors, choose either to have the marriage declared invalid (styled by the English lawyers "divorce *a vinculo*"); or seek "a separation from bed and board" (divorce *a mensa et thoro*). A decree of nullity carried with it the right of remarriage, but separation from bed and board did not.[33] To obtain the right to marry following such an "ecclesiastical divorce," furthermore, one had to take the step of petitioning Parliament for permission, which, in practice was rarely sought and even more rarely granted.[34]

Until 1857, the English ecclesiastical courts retained jurisdiction over marriage and its incidents.[35] In the centuries between the Reformation and the abolition of ecclesiastical

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[31] Ibid.

[32] Ibid., 106.

[33] Lawrence Stone, *Road to Divorce: England, 1530-1987* (Oxford: Oxford University Press, 1990) 301-306.

[34] See generally Harvey Crouch, "The Evolution of Parliamentary Divorce," *Tulane Law Review* 52 (1978) 513-540.

[35] A good account of the Marital Causes Act of 1857, which removed jurisdiction over domestic relations from the ecclesiastical courts and placed it instead in the hands of royal judges, is Stephen Cretney, "Ending Marriage By Judicial Divorce Under the Matrimonial Causes Act of 1857." Chap. 5 in *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2003) 161-195.

jurisdiction, these courts had created an ornate structure of marriage law which would prove to have significant impact on the law of the nineteenth-century United States.

While the great bulk of this paper is concerned with exploring the relationship of religious belief and marriage in American law, it is necessary to understand the medieval and early-modern English background because it provides the deep structure to the American law of marriage. American lawyers continued to operate, well into the twentieth century, in a juristic universe that used the language of divine and natural law to describe the marital relationship and its peculiar attributes. Many peculiarities of the law of domestic relations as found in the nineteenth- and early-twentieth-century America can only be explained by a knowledge of the canon law that had come before. In short, the frame of reference that lawyers relied upon to define and defend the obligations of parties to a marriage was essentially medieval. Sacramentality may have disappeared, secular courts may have come to regulate the marital relationship, but still the medieval thought-world persisted in some very interesting ways.

But while the ideas and language frequently remained identical with the vocabulary and thought-world of much older times, the North American legal context was, of course, entirely different from early modern England or late medieval Europe. Perhaps the most important difference is the fact that early American courts operated in a universe in which ecclesiastical jurisdiction had been abolished. While English lawyers had to wait until the late 1850s to see ecclesiastical jurisdiction over marriage abolished, the jurisdiction of church courts had almost entirely vanished from America before the founding of the new Republic.

This, then, is the anomaly that informs the relationship of domestic relations law and the state in the context of American legal development -- the anomaly of secular courts applying

categories of thought that were given shape and substance by centuries of labor on the part of ecclesiastical canonists and courts. While I shall focus on the tripartite relationship described by my title -- marriage, religion, and the state -- it is a relationship defined not only by the use of religious categories to define marriage, but by the fact that it was secular, not religious, courts that had to make use of these essentially religious categories. How this anomaly played out in American history is the subject of the second part of this paper. The normative question -- does this historical record compel some sort of response? -- is deferred until the paper's final section.

II. Marriage and Religion in American Legal History:

A. Preliminary Considerations:

The title of this section lends itself to an expansive investigation. That temptation, however, must be resisted, enticing as it is. American domestic relations law has deep roots in the sort of medieval and early-modern Christianity discussed in Section I. To draw upon this material as deeply as one might wish would require a book-length treatment.

I shall, alas, content myself with a brief and impressionistic survey of the subject, looking at a few representative samplings of the ways in which American courts invoked, adapted, and utilized a religious frame of reference in resolving matrimonial disputes. I am concerned in particular with the use of a legal vocabulary -- distinctive turns of phrase or ideas -- that is traceable to medieval Christian or to Anglican canonistic antecedents. Such an undertaking has value in its own right and constitutes an interesting form of intellectual history -- an exercise that speaks not only to what early American courts thought about marriage, but also what they regarded as legitimate sources of law. Aside from its value as history, furthermore, the

investigation has value in widening the horizon of contemporary public policy debates that seem excessively dependent upon a variety of utilitarian calculations to the exclusion of larger questions about ultimate human goods.

As a preliminary matter, one must discuss briefly the early American understanding of the sources of law. A modern American law student is trained to read cases to search for their holdings; to read statutes in search of their scope and application; and to consider carefully the language of particular constitutional provisions. These are now the formal sources of law to the exclusion of almost everything else. This intensely positivistic reading of the law, however, was simply not known to lawyers in the early American Republic. One might take William Blackstone's account of the sources of law as representative of the ways in which early American lawyers viewed the most fundamental question a lawyer confronting the sources must ask, i.e., what is law? (Blackstone's *Commentaries,* although English, was considered the obligatory starting point for legal study in the United States even decades after the Revolutionary War).[36]

In his hierarchy of sources, Blackstone began with "the law of nature," which is nothing less than "[the] will of [man's] maker," God.[37] This natural law included "the eternal, immutable laws of good and evil."[38] The eternal natural law, Blackstone stressed, was superior to human law; indeed, "no human laws are of any validity, if contrary to this."[39] Natural law, furthermore, consisted of two sub-categories: That taught directly by God, through Scripture; and that

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[36] An important study of the influence of Blackstone on early American legal education is Steve Sheppard, "Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall," *Iowa Law Review* 82 (1997) especially pp. 547 to 564.

[37] Blackstone, *Commentaries*, 2:39.

[38] Ibid., 40.

[39] Ibid., 41.

deduced by the human person through the use of reason.[40] Blackstone followed this dictinction by insisting once again: "[N]o human law should be suffered to contradict these."[41]

After establishing the primacy of divine and natural law, Blackstone then turned his attention to the "municipal law," by which he meant the law binding within particular kingdoms and realms ('"a rule of civil conduct prescribed *by the supreme power in a state*"').[42] The British Constitution, which consisted of the monarchy, the lords spiritual and temporal, and the House of Commons, Blackstone claimed, was uniquely well-suited to exercise this authority.[43] Charged with law-making and law-interpreting powers, these constitutional offices oversee, conserve, and advance the municipal law of the realm -- not the common law only, but also the "ecclesiastical," the "military," the "maritime," and the "academical law."[44] Common law, which is both written and unwritten, consists finally in customs, judicial interpretation, and statutory enactment.

Blackstone's writings reflected an essentially theistic understanding of the law with deep roots in medieval thought. The proposition that human law mirrors and must be in conformity with the divine and natural law can be found in many medieval sources.[45] The relative degree of

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[40] Ibid., 42.

[41] Ibid. Closely related to these two types of natural law is a third branch of the law, the "law of nations" (*ius gentium*) which Blackstone understood as essentially derivative of these other laws. Blackstone explained the relationship: "Hence arises a third kind of law to regulate this mutual intercourse [among states], called 'the law of nations;' which . . . depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements . . . . ." Ibid., 43.

[42] Ibid., 46.

[43] Ibid., 50.

[44] Ibid., 84. Blackstone treats the "civil and canon laws" as a branch of these laws subordinate to the common law, which is the most exalted law of the English nation. Ibid.

[45] One might consult the opening passages of Gratian's *Decretum*. Gratian begins with the

deference he showed to the authority of king and Parliament reflected, no doubt, the sort of recognition an eighteenth-century Anglican had to pay to the status of king as supreme in church as well as state. But even with that qualification, it is clear that Blackstone understood the divine and natural law, whose main principles are knowable by human reason, to serve as an ultimate check on the potential arbitrariness of merely human rule.

Blackstone's *Commentaries* would prove immensely popular in the new United States and exercised a commanding authority over early American jurists. The study of Blackstone's *Commentaries* as an indispensable introduction to the study of law ensured that practitioners would acquire an awareness of the wholeness of the law and a sense of its jurisprudential foundations in a way that instruction from casebooks have failed to do, given the latter's tendency to move from doctrine to doctrine, while all the while focused on narrow questions of law.[46]

And these jurisprudential foundations were self-consciously Christian. In particular, early American lawyers and judges picked up and developed Blackstone's teaching that "Christianity is a part of the laws of England."[47] This assertion became so ubiquitous in the nineteenth century that one modern historian has been led to write:

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observation that humankind is governed by "law" and "customs." And by “law,” Gratian means the *ius naturae* which is found in the Gospels and in Jesus Christ's Golden Rule, "Do unto others as you would have them do unto you." D. 1, pr. Gratian followed this with an excerpt from Isidore of Seville that commenced: "*Omnes leges aut divinae sunt, aut humanae*" (All laws are either divine or human). D. 1. 1. Blackstone's own definition of law clearly fits within this larger tradition that had its origin in the twelfth century.

[46] See Harold J. Berman and Charles J. Reid, Jr., "The Transformation of English Legal Science," *Emory Law Journal* 45 (1996) 437-522, especially pp. 509-522.

[47] Stuart Banner, "When Christianity Was Part of the Common Law," *Law and History Review* 16 (1998) 27, 30.

"Nineteenth-century American judges and lawyers often claimed that Christianity was part of the common law. From Kent and Story in the early part of the century, to Cooley and Tiedeman toward the end, the maxim that 'Christianity is part and parcel of the common law' (or some variant thereof) was heard so often that later commentators could refer to it as a matter 'decided over and over again,' one which 'text writers have affirmed.'"[48]

B. The Survival of a Religious Vocabulary in the American Law of Marriage:

1. Marriage, the Divine Law, and the Law of God:

It is jarring and unexpected to find references to the divine law when reading the opinions of American courts that have undertaken to explain the foundations of the law of marriage. One might expect to see this sort of reasoning in a medieval discussion of marriage's sacramentality.[49] One might also expect to see such language in an early Anglican treatise on canon law, such as that of John Ayliffe, who insisted that the institution of marriage was a matter of "Divine Will and Command."[50] And, of course, one still encounters this sort of language in the official

[48] Ibid., 27.

[49] *Supra*: --. See e.g. the discussion of the divine plan for marriage as it applies to believers and non-believers in a canonist like Rufinus, *Summa Decretorum*, Heinrich Singer, ed. (Aalen: Scientia Verlag, 1963): 442-443.

[50] Ayliffe, *Parergon*, 360.

teaching of the Catholic Church, as, for example, the Second Vatican Council's affirmation that marriage "is an institution confirmed by divine law."[51] But to find such assertions in American judicial opinions seems entirely out of place.

One is nevertheless confronted with a group of cases that declare exactly that. In 1876, in language that was, at least in part, eerily reminiscent of the privacy decisions of the mid-1960s United States Supreme Court, the Supreme Court of New Hampshire wrote of marriage that "it is the most intimate and confidential of all human relations, and has always been sanctioned and protected by both human and divine law."[52] The Supreme Court of Washington declared in 1892 that "the married state is a most commendable one, and ought to be encouraged in all legitimate ways, having, as it does, its origin in divine law."[53] The Supreme Court of Indiana rejected the proposition that a married woman over the age of twenty-one required a guardian as something that "would be a violation of all our ideas of secular and divine law."[54] The Missouri Supreme Court spoke of marriage as a "sacred relation," held as much "in the common as in the Divine Law."[55]

This phraseology retained significance into the early and middle decades of the twentieth century. In 1958, the New York Supreme Court, Appellate Division, quoted with approval an

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[51] *Gaudium et Spes*, para. 48. I am here following the translation of Austin Flannery, O.P., *Vatican Council II: The Conciliar and Post-Conciliar Documents* (Collegeville, MN: The Liturgical Press, 1975) 950.

[52] *Drew's Appeal*, 57 N.H. 181, 182-183 (1876). The privacy cases, of course, retained the language about human intimacy but stripped away references to divine law.

[53] *In re Estate of McLaughlin*, 4 Wash. 570, 590, 30 P. 651, 658 (1892).

[54] *Ex parte Post*, 47 Ind. 142, 143 (1874).

[55] *Nichols v. Nichols*, 147 Mo. 387, 410, 48 S.W. 947 (1908).

earlier decision of the New Jersey Supreme Court:

> ""The human race was created male and female with the manifest purpose of perpetuating the race. Marriage without sexual intercourse utterly defeats its purpose, as sexual intercourse except in the marital relation is contrary to divine law . . . ."[56]

Perhaps the most interesting of these early- and middle-twentieth-century cases comes from Pennsylvania. At issue in *In re Enderle Marriage License*, decided in 1954, was a statute that prohibited marriage between cousins.[57] Frank, the petitioner, was adopted into the Enderle family and sought to marry his cousin by adoption, Adelheld.[58] The parties were not blood relations. The Court determined that the statute in question was intended to prevent incest between blood relations only, and not those related by adoption, and so permitted the issuance of the marriage license. What is interesting, however, was the reasoning the Court employed in reaching this conclusion. It offered two secular justifications for its reading of the statute, but gave primacy of place to an argument drawn explicitly from its understanding of the divine law:

> "The purpose of the legislature in prohibiting marriages within certain degrees of consanguinity and affinity is at least threefold: (1) To

[56] *Diemer v. Diemer*, 6 A.D.2d 822, 823, 176 N.Y.S.2d 231, 232-233 (quoting *Raymond v. Raymond*, 79 A. 430, 431 (N.J. Ch. 1909)).

[57] *In re Enderle Marriage License*, 1 Pa. D. & C. 2d 114 (1954).

[58] Ibid.

> maintain the Divine Law forbidding the marriage of close relatives; (2) for eugenic reasons, to preserve and strengthen the general racial and physical qualities of its citizens by preventing inbreeding; and (3) to maintain the sanctity of the home and prevent the disastrous consequences of competition for sexual companionship between members of the same family."[59]

Fifty years removed from *Enderle*, we no doubt would find different language when analyzing this problem. The invocation of racial improvement and eugenics, thankfully, is no longer a part of our public discourse, although a general desire to prevent inbreeding is certainly still a legitimate public policy. And a concern to limit sexual competition within a family unit would loom very large in our public justifications for the law. Divine law, however, would no longer be mentioned, let alone have the "D" and the "L" put in capital letters. What is remarkable, however, is how hardy such language has proven to be. The reasoning of the *Enderle* Court would have been recognizable by thirteenth-century canonists and by seventeenth- and eighteenth-century Anglican divines alike. *Enderle*'s language moved, in other words, in a very ancient thought-world.

Analytically nearly identical to divine law is the linguistic formula, "the law of God." In

[59] Ibid., 120. *Enderle*'s invocation of Divine Law was repeated with apparent approval by at least two subsequent Pennsylvania courts. In *Adameze v. Adameze*, the Court, relying on language in *Enderle*, determined, on its reading of the Book of Leviticus, that marriage between first cousins related by blood was not prohibited by divine law. 47 Pa. D. & C. 2d 445, 449 (Pa.Com.Pl. 1969). And in *Marriage of MEW and MLB.*, 4 Pa. D. & C. 3d 51, 58 (Pa.Com.Pl. 1977) the Court cited without discussion or disapproval, *Enderle*'s use of divine law.

addition to divine law, one encounters frequent invocations of "the law of God" in cases involving marriage and domestic relations. Thus one finds the Arkansas Supreme Court writing:

> "[W]e ought to say that marriage is a divine institution. As a consequence thereof, it is ordained by the laws of God and man that children shall be brought into the world. The family throughout all Christendom is the primal unit of society."[60]

Invocations of "the law of God," like invocations of the divine law, are not found only in cases arising from the Bible Belt. One sees, for example, the Connecticut Supreme Court upholding a lawyer's disbarment upon his adultery conviction because he chose "'to put his own ideas of law above what you might fairly call the laws of God and man.'"[61] The Supreme Judicial Court of Massachusetts denounced attempts at marriage that were "against the laws of God" and specifically referenced the incest provisions.[62] And a dissenting opinion from the Supreme Court of California described a man who chose to cohabit with a woman other than his wife as someone whose "relationship violates the laws of God and man."[63]

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[60] *Pryor v. Pryor*, 151 Ark. 150, 158 (1922).

[61] *Grievance Committee of the Hartford County Bar v. Broder*, 112 Conn. 269, 276, 152 A. 2d 292, 295 (1930) (quoting the sentencing judge at the time of the disciplined lawyer's conviction).

[62] *Sutton v. Warren*, 51 Mass. 451, 452 (1845).

[63] *Moore Shipbuilding Corporation v. Industrial Accident Commission*, 185 Cal. 200, 210, 196 P. 2d 257, 261 (1921)(Wilbur, J., dissenting). The language of Justice Wilbur was subsequently repeated and endorsed by the Indiana Court of Appeals. *Russell v. Johnson*, 112 Ind. App. 253, 266, 42 N.E.2d 392, 398 (1942). A subordinate California appellate tribunal made a similar statement in a case with unusual facts. Wife alleged that her ex-husband's parents

Like invocations of divine law, one finds references to the "laws of God," or "God's law," occurring with at least some frequency into the middle decades of the twentieth century. Thus a dissenting opinion in a 1947 case from the State of Washington denounced a couple living in adultery as "insensible to the laws of God and man."[64] The Texas Court of Criminal Appeals, meanwhile, sustained a bigamy conviction as a violation of "the laws of God and man."[65] Even a judge like Learned Hand invoked "God's law" in ruling that an immigrant couple consisting of an uncle and a niece were not guilty of any crime for having married one another in a foreign ceremony and were thus not subject to deportation.[66]

The question an historian must confront is how ought one to make sense of these cases? The following conclusions seem warranted: Many early American jurists seemed to think that marriage was something that had its origins in a natural law that in turn reflected a divine plan; this natural law exercised real power over human affairs even in the absence of the state or the state's laws. It fell to law makers and judges to interpret and apply this law, not to legislate out of whole cloth. More generally, one can also conclude that Christianity continued to exercise not only a cultural influence over the judiciary but a real intellectual and moral attraction. While I

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tortiously interfered with their marriage causing it to fail. The Court responded: "It is not unlikely in moments of resentment they said harsh and unkind things about her; but that fact alone does not justify an inference that they violated the laws of God and society by trying to break up the marriage relation of these young people." *Bourne v. Bourne*, 43 Cal. App. 516, 530-531, 185 P. 489, 495 (2d Dist. 1919).

[64] *Norman v. Norman*, 27 Wash. 2d 25, 34, 176 P.2d 349, 355 (1947)(Simpson, J., dissenting).

[65] *Harrison v. State*, 44 Tex. Crim. 164, 168, 69 S.W. 500, 502 (1902).

[66] *United States v. Francioso*, 164 F. 2d 163 (2d Cir. 1947). After noting that marriages between uncles and nieces were not forbidden under New York law until 1893, Hand asserted, "To be sure, its legality does not finally determine its morality, but it helps to do so, for the fact that disapproval of such marriages was so long in taking the form of law, shows that it is condemned in no sense as marriages forbidden by 'God's law.'" Ibid., 164.

am restricting this paper to marriage and domestic relations law, its thesis -- that the jurisprudential foundations laid down by generations of medieval and early-modern lawyers continued to influence the shape of American judicial thought until only a couple of generations ago -- seems capable of a broader application. I have explored some aspects of this influence in other work.[67]

This two-fold reading of the historical record, emphasizing both the general historical influence of Christianity and its specific applicability to the shape of American domestic relations law, is probably the most helpful explanation for the marital teaching of the early American jurist, Chancellor James Kent of New York, who declared that:

> "The primary and most important of the domestic relations is that of husband and wife. It has its foundation in nature, and is the only lawful relaton by which Providence has permitted the continuance of the human race."[68]

2. The Book of *Leviticus* and the Early American Judiciary:

General invocations of divine law or the law of God, a critic might insist, reveals nothing more than a decent respect for the common pieties of the age. It reveals little real influence of

[67] See Charles J. Reid, Jr., "The Disposal of the Dead: And What It Tells Us About American Society and Law," in *Figures in the Carpet: Finding the Human Person in the American Past*, ed. Wilfred M. McClay, 428-445 (Grand Rapids, MI: William B. Eerdmans, 2007).

[68] Chancellor James Kent, *Commentaries on American Law* (New York: E.B. Clayton and James Van Norden, 1836) 2:74.

Christian principle on actual legal practices or doctrines. Proof of influence only comes with evidence that a particular contemporary legal institution has assumed a certain shape *precisely because of* some particular Christian teaching. The acknowledgements of divine law so far discussed, this critic might continue, really shows only that some judges at least knew to appeal to popular Christian opinion in a more religious age.

Such a criticism is invalid. In fact, one can point to particular instances of influence on particular legal institutions. One might thus consider the law of incest. As the *Enderle* case reveals, multiple justifications might be cited as support for the incest prohibition.[69] In fact, however, nineteenth-century legal commentators tended to look to the Bible when arguing against incest. In introducing the subject of incestuous marriage to his readers in 1891, Joel Prentiss Bishop, one of the most prolific of the nineteenth-century treatise writers,[70] declared "[t]he law of this subject [to be] a compound of natural law and theological dogma."[71] Bishop went on to trace the history of the rules regarding incest and marriage, as they had developed in the Anglo-American context. A statute of King Henry VIII -- "which is common law in this country," Bishop assured his readers -- "declared lawful the marriage of all persons 'not prohibited by God's law to marry; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees."[72]

The Henrician statute's reference to the "Levitical degrees" proved especially fertile

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[69] See *In re Enderle Marriage License, supra* --.

[70] On Bishop's career and the great influence he enjoyed with his contemporaries, see Stephen A. Siegel, "Joel Bishop's Orthodoxy," *Law and History Review* 13 (1995) 215-260

[71] Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* (Chicago: T.H. Flood and Company, 1891) 316.

[72] Ibid., 318.

ground for nineteenth- and twentieth-century courts. Chapter Eighteen of the Book of *Leviticus* prohibited, among other liaisons, sexual intercourse between a parent and his or her children, between or among siblings, and, by implication, lineal descendants or ancestors in the parental line.[73] *Leviticus* also prohibited sexual relations between in-laws.[74] The term "consanguinity" was used generally in the law to describe those barred from marriage to one another by blood relationship, while "affinity" was used to describe those in-laws forbidden to marry one another. For much of American history, courts made regular use of the levitical degrees and the categories they established as a source of guidance in resolving a number of disputed questions concerning domestic relations law.

The extent to which the Henrician statute with its biblical foundation was considered an applicable source of law can be gauged by an early Kentucky opinion that engaged in what might look to contemporary readers as a fairly tortured reasoning process. The Kentucky Supreme Court in *Jenkins v. Jenkins' Heirs* rejected an expansive reading of the statute that permitted all those not related in the levitical degree to marry.[75] More was required to marry validly, the Court insisted: since marriage was a civil contract and, impliedly at least, was governed by the rules of contractual capacity, parties were required to enjoy the use of reason in order to consent.[76] Thus the Court concluded not only close relatives but also the insane were prohibited from marriage.[77] It is clear that the Court felt compelled to engage in this labored exegesis of

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[73] See Leviticus 18:6-18 for the entire list.

[74] Ibid.

[75] *Jenkins v. Jenkins' Heirs*, 32 Ky. 102 (1834).

[76] Ibid., 104-105.

[77] Ibid.

biblical precedent and the natural-law grounds of contractual capacity because it was painting on a largely blank canvas since it does not appear that there was a statute on point. The Court wished to make it clear that neither incest nor the marriages of the insane would be tolerated. And the rules established in *Leviticus* was the best source it could come up on the incest prohibition.

Other courts accepted the levitical degrees as a convincing foundation for the incest prohibition. The Supreme Judicial Court of Massachusetts in 1924 confronted the question whether parties related by the half-blood were prohibited from marriage.[78] The Court reviewed the history of the Commonwealth's incest prohibition from the acceptance of the levitical degrees as a source of law in sixteenth-century ecclesiastical law, and on through a succession of ecclesiastical and secular sources.[79] The Massachusetts Court concluded that it should accept the interpretation placed on the levitical degrees by the English ecclesiastical courts when they prohibited marriages among those related by the half-blood.[80]

The Louisiana Supreme Court, for its part, acknowledged that incest lacked "a fixed and definite meaning," but that the levitical degrees provided generally sound guidance.[81] In 1914, the Iowa Supreme Court justified its acceptance of the levitical degrees by noting that their use in resolving incest questions was endorsed by a leading legal encyclopedia.[82] And in 1929, the Supreme Court of Iowa reviewed the legal history of the levitical degrees and their importance to

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[78] *Commonwealth v. Ashey*, 248 Mass. 259, 142 N.E. 788 (1924).

[79] Ibid., 260, 142 N.E. at 788.

[80] Ibid., 261, 142 N.E. at 788.

[81] *State v. Smith*, 30 La. Ann. 846, 849 (1878).

[82] *State v. Andrews*, 167 Iowa 273, 278, 149 N.W. 245, 247 (1914).

domestic relations law in responding to an appeal of a criminal conviction for incest.[83]

The levitical degrees figured prominently in a variety of contexts, such as judicial efforts to define or clarify what is meant by "incest;" the determination of appeals of criminal convictions for incest; and the resolution of sometimes vexing and complex problems involving wills, trusts, and inheritances. Examples of each will be considered.

The degree to which courts unreservedly consulted *Leviticus* for guidance on definitional questions in domestic relations law can be illustrated by the case of *Brotherhood of Locomotive Firemen and Enginemen v. Hogan*, decided in 1934 by the Federal District Court for Minnesota.[84] At issue was the legal definition of "affinity." "Affinity," the Court wrote, "is generally defined by the relationship by marriage between a husband and his wife's blood relatives, or between a wife and her husband's blood relatives. Unlawful or forbidden marriages due to affinity are set forth in *Leviticus*, chapter XVIII."[85]

Courts also looked to the levitical degrees as a means of justifying convictions for incest. *Lipham v. State* involved a prosecution under Georgia law of a husband who had sexual relations with his step-daughter, the out-of-wedlock child of his wife.[86] The Georgia Supreme Court sustained his conviction:

> "If a man marry the mother of an illegitimate
>
> daughter, and take the daughter into his care and

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[83] *State v. Lamb*, 209 Iowa 132, 134, 227 N.W. 830, 831 (1929).

[84] *Brotherhood of Locomotive Firemen and Enginemen v. Hogan*, 5 F. Supp. 598 (D. Minn. 1934).

[85] Ibid., 604-605.

[86] *Lipham v. State*, 125 Ga. 52, 53 S.E. 817 (1906).

custody, he becomes charged with a duty towards her. His disregard of morality and decency in having sexual intercourse with her is a crime transcending a mere misdemeanor. The act has all the elements which constitute incest. As incest, it should be punished. 'Thou shalt not uncover the nakedness of a woman and her daughter.' *Leviticus*, XVIII, 17."[87]

The New York Court of Appeals was confronted with an even more reprehensible version of the question *Lipham* presented. The defendant in *People v. Lake* had fathered an out-of-wedlock daughter and some years later, when she had "just grown into womanhood," hired her as his "bookkeeper."[88] He took advantage of her sexually, and was charged and convicted of incest. The Court of Appeals sustained his conviction, relying for support in part upon its reading of English law and the Book of *Leviticus*: "It was early held to be unlawful for a bastard to marry within the Levitical degrees (*Hains v. Jeffel*, 1 Ld. Raymond 68); a doctrine which of necessity recognized relationships of consanguinity."[89] Since marriage was impossible by reason of incest, the Court reasoned, the defendant's illicit relationship should also be deemed incestuous and so punishable.[90]

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[87] Ibid., 54-55, 53 S.E. at 818.

[88] *People v. Lake*, 110 N.Y. 61, 62, 17 N.E. 146, 146 (1888).

[89] Ibid., 62-63, 17 N.E. at 147.

[90] Ibid. Cf. *Morgan v. State*, 11 Ala. 289, 291 (1847) (sexual relations between a parent and child "at variance with the laws of God and man" and a violation of the Henrician statute "prohibit[ing] all marriage within the Levitical degrees"); and *State v. Bartley*, 304 Mo. 58, 62,

Courts finally looked to the levitical degrees in establishing inheritance rights among close family members. This is especially evident in some lawsuits that sought to establish parental rights to inherit from illegitimate offspring or to represent their offspring's estates in wrongful-death actions. In these cases, those who opposed extending inheritance rights or the right to bring a cause of action tended to cite common-law rules derived in part from a reading of the "levitical degrees." In essence, it was claimed that illegitimate children were bound to observe the levitical degrees in their choice of marriage partners, but that this should be the only aspect of their relationship to their biological parents that should be given recognition by law. They should, on this reading of the sources, refrain from sexual intimacy with close blood relations but otherwise share none of the legal privileges that were derived from membership in the family. Courts tended to accept this argument unless statutory support could be found evincing a legislative intent to abolish the old common-law disabilities of bastardy. Where the old disabilities had been done away with, on the other hand, courts tended to permit these parental claims to go forward.[91]

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263 S.W. 95, 96 (1924) (relying on Joel Prentiss Bishop and its own reading of the Henrician statute to condemn "marriages bertween persons related by blood or marriage within the Levitical degrees").

[91] See e.g. *Marshall v. Wabash Railroad Company*, 120 Mo. 275, 281, 25 S.W. 179, 181 (1894) (distinguishing the common-law rule with its reliance on the levitical degrees to deny marital or inheritance rights and state statutory reform that reaches a contrary result respecting inheritance); *Brisbin v. Huntington*, 128 Iowa 166, 175, 103 N.W. 144, 147 (1905) (relying on language similar to *Marshall* to reach the same result); *Wheeler v. Southern Railway Company*, 111 Miss. 528, 538, 71 So. 812, 814 (1916) (the harshness of the common-law rules repealed by statute); *L.T. Dickason Coal Company v. Liddil*, 49 Ind. App. 40, 44, 94 N.E. 411, 412 (1911) (relying in part on the result in *Marshall* to reach a similar conclusion); and *Williams v. McKeene*, 193 Ill. App. 615, 618 (1915) (describing the law of Henry VIII as "God's law" but recognizing at the same time the possibility of statutory amendment where inheritance rights were concerned).

3. One Flesh and Putting Asunder: The Common-Law Reception of Biblical Ideals of Marital Unity:

So far, we have considered the ways in which courts invoked the language and authority of the divine law and the law of God in describing and defining the marital relationship; and the ways in which courts employed the Book of *Leviticus*, sometimes but not invariably as mediated through the law of Henry VIII, to resolve a variety of questions on incest. Next, we shall consider judicial usage of a particular biblical teaching, i.e., Jesus's declaration that marriage must be permanent, to address contemporary questions of separation and divorce.

The Book of *Genesis*, in the poetic diction of the King James Bible, declared: "A man shall leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh."[92] Close variations of this language and imagery were used by Jesus, as recorded in the Gospels of *Matthew* and *Mark*, to establish an ideal of unbreakable unity between husband and wife. In *Matthew*, Jesus declared:

> "Have ye not read, that he which made them at the beginning, made them male and female. And he said, 'For this cause a man shall leave father and mother, and shall cleave to his wife; and they twain shall be one flesh? Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder."[93]

Mark's account of this teaching represented a largely verbatim summary of that found in

[92] Genesis 2:24.

[93] Matthew 19:5-6.

Matthew.[94] St. Paul made use of similar imagery in *Ephesians*:

> "For we are members of his body, of his flesh, and
> of his bones. For this cause shall a man leave
> his father and mother, and shall be joined unto
> his wife, and they two shall be one flesh."[95]

This group of closely-related biblical texts exerted wide influence on judicial thought regarding marriage and divorce for the nineteenth and much of the twentieth centuries. One can find different variations on these biblical themes in any number of judicial contexts. One of the most important of these usages, obviously, was the defense of the integrity of the marital unit itself. Marriage was a sacred relationship that should be free from attack by third parties and respected and preserved by those who are joined by its yoke.

In a world of limited, fault-based divorce, where a party seeking a divorce needed to demonstrate some sort of marital misconduct on the part of one's spouse, at least some petitioners claimed that they were entitled to a divorce because their partners had never achieved any real degree of emotional separation from their parents. To paraphrase Jesus's teaching, they did not leave their mother and father, emotionally, and so were unable to cleave to their spouse and thereby become one flesh. This lack of independence, the claim went, so gravely disrupted the new household that it had no real chance of succeeding against the vicissitudes of fortune.

An Indiana case from 1897 illustrates the way this argument might be made and the way in

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[94] "But from the beginning of creation God made them male and female. For this cause shall a man leave his father and mother, and cleave to his wife. And they twain shall be one flesh, so then they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder" (Mark 10:6-9).

[95] Ephesians 5:30-31.

which a court might quote the Bible in response. The case involved a claim for alienation of affection brought by the former husband against his ex-mother-in-law.[96] The mother-in-law, it was alleged, had sought "to deprive [husband] of the society and services of his wife, and cause her to separate from him."[97] The Court responded with a mixture of biblical quotation and outright theology:

> "Marriage is the most sacred and holy relation known to Divine or human law. It is an institution ordained of God, sanctioned by all the nations of the earth, and recognized the world over as the foundation of society and the school of morals, and no one has a right to destroy and disrupt that relation, except for good and sufficient cause. It was early declared in the Mosaic law that a man should leave his father and mother, and cleave unto his wife, and that they should be one flesh. The Great Teacher said: 'But from the beginning of the creation, God made them male and female. For this cause shall a man leave his father and mother and cleave to his wife; and they twain shall be one flesh. What, therefore, God hath joined together let no man

[96] *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N.E. 656 (1897).

[97] Ibid., 600-601, 48 N.E. at 662.

put asunder."[98]

While most cases do not engage in this level of scriptural exegesis or theological speculation, any number of cases invoke the imagery of the child leaving his or her parents and cleaving to the spouse whenever a dispute involving the parents or in-laws came to be litigated. Thus the Vermont Supreme Court lectured a husband who would not move apart from his relatives in order to accommodate his wife's apparent strong desire for living arrangements independent of his old family ties: "Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed. This would be very far from compliance with the Scriptural exposition of the duty of husbands: 'For this cause, shall a man leave father and mother and cleave to his wife, and they twain shall be one flesh."[99]

Similarly, a Michigan case decided in 1928 pitted a husband who insisted that his mother reside in the family home and a wife who separated from him and sought a divorce on that account.[100] Again, one sees a court invoking Scripture to admonish a husband to perform his husbandly duties: "In this the plaintiff [husband] was wrong. In other circumstances, his devotion and loyalty to his mother would be commendable, but where the wife's interests intervene, his first duty is her welfare and happiness. 'For this cause shall a man leave father and mother, and shall cleave to his wife; and they twain shall be one flesh.'"[101]

One, in fact, finds this sort of scripturally-grounded analysis as recently as the late 1940s.

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[98] Ibid., 600, 48 N.E. at 662.

[99] *Powell v. Powell*, 29 Vt. 148, 150 (1856).

[100] *De Mauriac v. De Mauriac*, 243 Mich. 385, 220 N.W. 786 (1928).

[101] Ibid., 386-387, 220 N.W. at 787.

At issue in *Maricopa County v. Douglas* was a statute that required children to make contributions toward the needs of elderly and infirm parents.[102] The County Attorney sought to enforce the statute against community property owned by the elderly parent's daughter and her son-in-law. The couple asserted that such enforcement would run counter to the state's policy in favor of marriage. The Court agreed, using Scripture for support:

> "We must now decide which theory public policy favors most -- the support of the aged or the maintenance of the community. We think the latter is more important. The Holy Scripture tells us 'Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh.' *Genesis*, 2:24."[103]

The integrity of the marriage might also be attacked not by outsiders but by one of the parties, either by seeking a divorce that was unjustified in the eyes of the court or by engaging in acts of misconduct -- criminal or otherwise -- at the expense of an innocent spouse. *Humber v. Humber*, a Mississippi case from 1915, involved a husband who alleged that his wife had been excessively cruel to him, thus warranting the granting of a divorce.[104] The Court found the

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[102] *Maricopa County v. Douglas*, 69 Ariz. 35, 208 P.2d 646 (1949).

[103] Ibid., 43, 208 P.2d at 651. The word "community," standing alone as a noun in this quotation, is an interesting and perhaps deliberately ambiguous choice of words. In the context of a suit over the extent to which the State might invade community property, the Court clearly intended to say that the couple's property rights might not be so seized. But a more extensive reading of this noun is also possible. One might thus understand the Court to be protecting not the community property alone, but the "community" formed by the unity of husband and wife. Such a reading is supported by the Court's subsequent invocation of Genesis 2:24.

[104] "From the proof adduced by appellant it appears his purpose to show that the cruel and

husband's allegations of cruelty insufficient to justify a divorce and looked to the Bible for justification for its determination:

> "Marriage is a most solemn contract, provided for by the laws of the state and sanctified by the ceremonies of the church. The dissolution of its bonds is no light matter. The best sentiment of society is opposed to divorce. The law authorizing divorces for certain causes requires a strict compliance with its provisions. The church is guided by these words of eternal truth touching the subject:
>
> "'From the beginning of the creation God made them male and female. For this cause shall a man leave his father and mother, and cleave to his wife; and they twain shall be one flesh; so then they are no more twain but one flesh. What, therefore, God hath joined together, let no man put asunder.'"[105]

A much older case, *Logan v. Logan*, dating to 1841 Kentucky, reached a similar result in favor of the marriage, on a fact pattern the details of which the Court delicately refrained from

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inhuman treatment complained of consisted of the conduct of his wife in a number of incidents, during their travels, in which she displayed temper and dissatisfaction with him and his provisions for her comfort and entertainment, and wherein she was inconsiderate of his feelings, abusive to him, discourteous and rude to his friends and kinsfolk, and generally disagreeable in her demeanor." 109 Miss. 216, 219, 68 So. 161, 161 (1915).

[105] Ibid., 226-227, 68 So. at 164.

probing too explicitly.[106] In establishing the legal standard to be applied, the Court looked to ecclesiastical law's understanding of cruelty. There must be true "*saevitia*" -- "savagery" -- the Court wrote.[107] "Less severity than this will not authorize a court in this State to 'put asunder' those whom 'God hath joined together.' And were it otherwise, domestic quarrels might mischievously engross all the services of Courts of Justice."[108]

The use of the canonistic category of *saevitia* by a pre-Civil War Kentucky Supreme Court would by itself be a remarkable demonstration of the deep and continuing influence of the canon law on American legal forms.[109] Focused as we are on Scriptural influence, we might try to read *Logan* and *Humber* together as support for the proposition that when courts invoked biblical expressions like "one flesh" or "put asunder," they were generally willing to sustain the marriage in the face of a petition for divorce. *Lanier v. Lanier*, an 1871 Tennessee case, may or may not be seen as support for this hypothesis, depending upon the weight one assigns to the dissenting

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[106] 41 Ky. 142 (1841). The Court's delicacy is remarkable: "As might have been expected, [the couple] lived together in apparent harmony and happiness until early February, 1838, when, for the first time, so far as we are informed, their domestic peace was disturbed by intemperate complaints and upbraidings on her part for alleged grievances, neither satisfactorily established nor explained by proof; and by responsive conduct upon his part, sometimes neither conciliatory nor the most prudent, and which tended rather to exasperate than to soothe the deeply moved feelings of his discontented and irritated wife. Their discord, soon becoming clamorous, attracted public observation which, instead of stifling, seemed only to inflame her heated passions. The intervention of friends, in and out of the church, invoked by Mr. Logan ostensibly for pacification, having failed and only added fuel to the flame, the prospect of cordial reconciliation became almost hopeless; and the irritability and wretchedness of the parties seemed so fixed and extreme as to indicate either the existence of some untold and deep-rooted grief or a destitution of that love and confidence which alone can happily cement the conjugal union, and without which wedlock is a curse." Ibid., 143.

[107] Ibid., 147.

[108] Ibid.

[109] *Saevitia* is briefly noted *supra* --.

opinion filed in that case.[110]

The facts in *Lanier* can described as extreme. The husband alleged that his wife had succeeded in poisoning him; that he became deathly ill thanks to the effects of the poison; and that she deserted him during his hour of illness and need.[111] Even if these facts were not literally true, the majority of the Court agreed, the wife's desertion was sufficient to justify the granting of the divorce.[112]

This result caused Justice Peter Turney to dissent. Turney (1827-1903) had been a colonel in the First Tennessee Infantry, demonstrating remarkable bravery at Antietam and Fredericksburg. After the War, he was elected to the Tennessee Supreme Court in 1870 and became Chief Justice in 1886. He would subsequently be elected governor of the State of Tennessee.[113] Turney's dissent put front and center the Christian character of marriage including especially his biblically-grounded understanding of its indissoluble character.

Sounding very like St. Augustine, Turney wrote that marriage subsists first in friendship between the parties. Turney, however, wished to apply this first principle directly to the case at hand. Thus, he observed that marital friendship:

> "thrives under constraint, and never rises to such
>
> a height as when any strong interest or necessity

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[110] *Lanier v. Lanier*, 52 Tenn. 462 (1871).

[111] Ibid., 463-464.

[112] Ibid., 464-465.

[113] Daniel M. Robinson, "Tennessee Politics and the Agrarian Revolt, 1886-1896," *Mississippi Valley Historical Review* 20 (1933) 365, 373-378, provides a useful thumbnail sketch of Turney's career in Tennessee's gubernatorial politics. Because of his interest in prison reform, a correctional institution for young offenders would later be named in his honor.

binds two persons together and gives them some common object of pursuit. We need not, therefore, be afraid of drawing the marriage knot, which chiefly subsists by friendship, the closest possible."[114]

Having built a foundation sufficient at least in his own mind to sustain further argument, Turney chose the last part of this sentence -- on the drawing of the "closest possible" marital knot -- for further comment.[115] There are good social reasons, Turney asserted, for rigorously enforcing the indissolubility of marriage. There was a public interest in the proper selection of marriage partners, and the enforcement of a rigorous standard of indissolubility, Turney believed, would concentrate the minds of young people contemplating marriage. "[W]e will find male and female not only more cautious, thoughtful and honorable in their affiances and marriages, but much of other crime will fail to publish itself through the Courts, because it shall have passed away."[116]

After reviewing the significance of human friendship to marriage and the social benefits derivable from a strict enforcement of indissolubility, Turney turned his attention to the question of religious faith:

"Every lawyer in the land has been taught not only that the Bible is law, but that it is the source of law. It is found in every complete law library as part thereof, and the standard work

[114] 52 Tenn. at 466 (Turney, J., dissenting). Turney continued, "The amity between the persons, where it is solid and sincere, will rather gain by [constraint]; and where it is wavering and uncertain, this is the best expedient for fixing it." Ibid., 466-467.

[115] Ibid., 467 and repeated again at 468.

[116] Ibid., 468.

therein."[117]

Lawyers, judges, officers of the court, must all take an oath of office upon the Bible.[118] Turney emphasized that this is "so because the Bible is the supreme law."[119] And the Bible contained the fundamental rules that should govern marriage for all days and ages, including our own:

> "In this authority, from which every well defined right of person and property is derived, we find -- *Matthew*, chp. 19, verses 3 to 10, inclusive -- the law of divorce stated in these words, by our Saviour:
>
> > '"The Pharisees also came unto him, tempting him and saying unto him, 'Is it lawful for a man to put away his wife for every case?' And he answered and said unto them, 'Have ye not read, that he which made them at the beginning made them male and female, and said, 'for this cause shall a man leave father and mother and cleave to his wife; and they twain shall be one flesh.
> >
> > "They said unto him, 'Why did Moses then

[117] Ibid., 470.

[118] Ibid.

[119] Ibid., 471.

command to give a writing of divorcement and

to put her away?'

"He saith unto them, "Moses, because of the

hardness of your hearts, suffered you to put

away your wives; but from the beginning it was not so.

"'And I say unto you, whosover shall put

away his wife, except it be for fornication,

and shall marry another, commiteth adultery,

and whoso marrieth her which is put away,

doth commit adultery.'"[120]

Turney viewed the Court as being put to a choice: The Court must select between "a statutory regulation demoralizing in its every influence and tendency" and "an express divine law."[121] Turney made it clear that he opted for the Bible and God's law.[122]

This constellation of biblical phrases played a major role in justifying other distinctive aspects of the Anglo-American law of domestic relations. Judges and jurists were particularly keen to use the Bible to support arguments in favor of *feme covert* -- the doctrine that held a

[120] Ibid., 471-472.

[121] Ibid., 472.

[122] Another instance in which divine law is invoked is the *sui generis* case of *Armstrong v. Berwick Borough Overseers*. At issue was an attempt by overseers of a poor house to separate a husband and wife. The Court rejected this possibility, reasoning: "The common law declares against it, and the divine law says that after marriage, they are no longer twain but one flesh, and what therefore God hath joined together let no man put asunder." 10 Pa.C.C. 337 (Pa.Com.Pl. 1891).

woman's legal personality to be absorbed into that of her husband's at the time of marriage.[123] Another area of law that looked to this biblical text for justification was the doctrine of spousal immunity, by which husbands and wives might be prohibited from testifying against each other in judicial proceedings,[124] or otherwise forbidden from bringing any cause of action against one

[123] See e.g. *Bear's Administrator v. Bear*, 33 Pa. 525, 526 (1859) ("The doctrine of the common law was, that the husband and wife are one person, the twain have become one flesh"); *Jaques v. Trustees of the Methodist Episcopal Church in New York*, 17 Johns. 548, 582 (1820) (Platt, J., concurring and dissenting) ("I confess that I love and venerate the primeval notion of that mystical and hallowed union of husband and wife: when 'they twain become one flesh'"); *Byrd v. Vance*, 158 Ga. 787, 790, 124 S.E. 705, 707 (1924) (looking to the biblical language of "the twain are one flesh" to justify wife's legal disabilities); *Madden v. Hall*, 21 Cal. App. 541, 549, 132 P. 291, 294 (1913) ("'The oneness constituted by the marriage relation at common law doubtless is based upon the statement of the Christ, 'For this cause a man will leave his father and his mother and cleave unto his wife, and they twain become one flesh' (quoting *Warr v. Honeck*, 8 Utah 61, 66, 29 P. 1117, 1118 (1892)); *Pelzer, Rodgers and Company v. Campbell and Company*, 15 S.C. 581, 588 (1881) ("To speak in general terms, husband and wife are a unity, or, as it was expressed by the great law-giver, 'they twain shall be one flesh'"); *Drake v. Birdsall and Company*, 10 Ohio Dec.Reprint 56 (Ohio Com.Pl. 1887) (speaking of a legislative act that had the effect of limiting the common-law disability placed on wives' contractual capacity, the Court wrote: "[I]t is not to be assumed . . . that the Ohio Legislature has undertaken to annihilate nature, nullify science, enact as law that which is condemned by the Divine Law, by human reason, by the common law which is the 'perfection of reason.'"); cf. *Corn Exchange Insurance Company v. Babcock*, 42 N.Y. 613, 645 (1870) (rejecting "[t]he old religious idea of a mystic union in marriage, by which 'they twain shall become one flesh'" and the doctrine of *feme-covert* consequent upon this teaching).

[124] John Wigmore, in his treatise on the law of evidence, asserted that the oldest justification for the spousal testimonial immunity was Sir Edward Coke's (1552-1634) declaration that "[i]t hath been resolved by the justices that a wife cannot be produced either for or against her husband, *quia sunt duae animae in carne sua*" (John Henry Wigmore, *Evidence in Trials at Common Law*, rev. by James H. Chadbourn, (Boston: Little, Brown, and Company, 1979) 2:857 (quoting Sir Edward Coke, *Commentary Upon Littleton* (1628) 6b)). Older cases, generally quoting Coke's Latin, echoed this sentiment. Thus *Smith v. Boston and Maine Railroad* asserted that Coke's maxim reflected a broader public policy "which regards as of vital importance the preservation of domestic peace and harmony, and the promotion of the unreserved confidence between the husband and wife which the sanctities of that relation require." 44 N.H. 325, 334 (1862). In *Handlong v. Barnes* a New Jersey Court also defended *in carne una* "upon the broad ground of the importance of preserving the sanctity of the marriage relation." 30 N.J.L. 69, 71 (1862). Cf. *Reeves v. Herr*, 59 Ill. 81, 83-84 (1871). On the other hand, Judge Charles Edward Clark, principal draftsman of the Federal Rules of Civil Procedure, wrote in 1949: "Admittedly the common-law principle that 'a wife cannot be produced either for or against her husband, *quia*

another.[125]

III. Marriage and the State:

A. Marriage is Religious:

This review of the Christian sources of American marriage law reveals a remarkable consistency that has endured over centuries, from the twelfth century until the last two or three decades of the twentieth. From the twelfth century to the middle twentieth, it was acceptable for jurists to refer to marriage as something brought into being through divine inspiration or guidance. Marriage was of "divine institution." It belonged not only to the law of man to regulate but to the law of God, which brought it into being. From the twelfth century to the

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sunt duae animae in carne una . . . is gone; indeed, there is none now so poor as to do it reverence." 176 F.2d 564, 569 (2d Cir. 1949) (Clark, J., dissenting). Cf., *In re Grand Jury Matter* which presented the question whether an offer of prosecutorial immunity overrode the spousal privilege. The Court's majority ruled that the spousal immunity continued to serve important social goods, such "marital harmony." 673 F.2d 688, 693 (3d Cir. 1982). Writing in dissent, Judge Arlin Adams reviewed the history of the privilege, beginning with Coke, to conclude that it should be strictly construed when applicable at all. Ibid., 696-699 (Adams, J., dissenting).

[125] The history of spousal immunity from suit, including its foundation in the scriptural interpretation of the early common lawyers as well as early case law, is reviewed in the following articles: Carl Tobias, "Interspousal Tort Immunity in America," *Georgia Law Review* 23 (1989): 359, 361-441 (a thoroughly researched argument for the abolition of the immunity that cites many early materials). Stephen Kelson, "The Doctrine of Interspousal Immunity: Does It Still Exist in Utah?" *Journal of Law and Family Studies* 3 (2001) 161, 161-163; Laura Wannamaker, "Note: *Waite v. Waite*: The Florida Supreme Court Abrogates the Doctrine of Interspousal Immunity," *Mercer Law Review* 45 (1994) 903-910, are shorter studies that also look to the religious origins of the doctrine. Reliance on "one flesh" has now largely disappeared, but the philosophy that it expressed -- a desire for harmony and unity between the spouses -- can still be found in some cases. Thus the Virginia Supreme Court wrote in 1975: "We are not concerned with the outmoded fiction that a husband and wife are of 'one flesh.' We are concerned . . . with a policy and with a rule of law that are designed to protect and encourage the preservation of marriages. Interspousal immunity is only a part of a whole system of laws and policies which recognizes the mutual obligations arising from a marriage and which encourages both marital and family harmony." *Korman v. Carpenter*, 216 Va. 86, 90, 216 S.E. 2d 195, 197 (1975).

middle twentieth, legal writers were willing to look to Scripture for guidance, or at the very least nod in the direction of Scripture when rendering particular judgments. To be sure, some of this might have been rhetorical posturing or conventional piety. But the use of this body of words and phrases, imagery and ideas, spoke to a set of shared cultural understandings that viewed marriage in an expressly Christian context. The presence in American judicial decisions of the nineteenth and early- and mid-twentieth centuries of this older vocabulary, in other words, bespoke a connectedness to a cultural reality that had been formed and nurtured through the rich deposit of historical Christianity.

But while this body of material holds fascination as a worthy subject for an historical investigation in intellectual or cultural history, it also raises profound questions for contemporary lawyers who recognize that law is inevitably an historical process. We have been through upheavals in the last half-century that make this particular body of case law and principles seem as odd and quaint as any museum piece one is likely to encounter at the Smithsonian. No judge, writing in her public capacity, would today speak of the divine institution of marriage, although, obviously, religious traditions continue to subscribe to such beliefs and judges who belong to such traditions might give private acknowledgement to this truth.[126]

Why, then, should we recall this history today? What relevance does it have, outside of discrete and insular communities of believers? I might suggest that if we acknowledge the historical reality that western lawyers for a span of years running from the middle twelfth to the early twentieth centuries quite automatically accepted the proposition that marriage had a religious grounding worthy of respect if not enforcement, one is led to ask another question: Is

[126] The 1983 Code of Canon Law of the Catholic Church, c. 1059, declares that Christian marriages are regulated by the divine law and the canon law.

there something about marriage that is irreducibly religious? Does this larger western historical experience, only abandoned within the lifetimes of many of the readers of this essay, connect to something more universal about the human person and the nature of marriage?

One might attempt an answer to this question by considering findings from the discipline of anthropology. Bronislaw Malinowski (1884-1952) is still widely considered to be among the most important of the founders of anthropological studies. Born to a Polish university professor and his wife and a member by birth of Poland's landed aristocracy,[127] Malinowski was at home throughout Europe, studying not only in his native Poland but also at Leipzig and teaching for most of his career at the University of London and the London School of Economics. He would, in fact, become a leader of English academic anthropology. He did important field work among the natives of Papua, New Guinea, and the Trobriand Islanders, and even though details of this field work have been questioned, his larger conclusions -- on questions like the necessary relationship between religion, ritual, and the great transitions of human life -- birth, marriage, death -- remain persuasive today.

Bronislaw Malinowski's research program converged on two of the principal themes of this essay -- the centrality of religious belief for human society; and the transcendent significance of marriage to society's perpetuation.

Malinowski was raised Catholic and was a graduate of the Jagellonian University, where his father taught.[128] His earliest published writings reflected on religious themes. One of his

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[127] Grazyna Kubica, "Malinowski's Years in Poland," in *Malinowski Between Two Worlds: The Polish Roots of an Anthropological Tradition*, eds. Roy Ellen, Ernest Gellner, Grazyna Kubica, and Janusz Mucha, 88-90 (Cambridge, UK: Cambridge University Press, 1988).

[128] Michael W. Young, *Malinowski: Odyssey of an Anthropologist, 1884-1920* (New Haven, CT: Yale University Press, 2004) 73-86.

first essays proposed a definition of religion that would remain remarkably constant, with appropriate refinements, through his later work: "*Religion*: This is a system of traditions explaining and justifying the world, and a system of norms regulating our conduct."[129]

Although a confirmed agnostic, Malinowski's own work remained saturated with a kind of cultural Catholicism. He thought in terms of the faith of his youth no matter the time and space he put between himself and his childhood. He appreciated that all religious belief had in common a desire to put the believer in contact with the deity.[130] He used a distinctively Catholic vocabulary to describe the social phenomena he observed.[131] And when he witnessed a husband beating his wife while conducting field research in aboriginal Australia, he was moved to think of his own wife and recorded in his diary: "association: marriage and spiritual harmony."[132]

Malinowski was moved to address marriage as an outgrowth of his field work. In his work, Malinowski encountered a great variety of "human marriage." Marriage might come in the form of "monogamy, polygyny, and polyandry; matriarchal and patriarchal unions;

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[129] Bronislaw Malinowski, "Religion and Magic: *The Golden Bough*," in *The Early Writings of Bronislaw Malinowski*, eds. Robert J. Thornton and Peter Skalnik, tr. Ludwik Krzanowski, 118 (Cambridge, UK: Cambridge University Press, 1993).

[130] "In all revealed dogma there is always one pragmatic truth: it not only tells us that totems, spirits, saints, and gods exist, it also demonstrates how by prayer, sacrifice, sacrament, and moral communion we can reach the Divinity" (Bronislaw Malinowski, *Freedom and Civilization* (New York: Roy Publishers, 1944) 209).

[131] See, for instance, his use of "sacrament" to describe marriage. *Infra*: --.

[132] Bronislaw Malinowski, *A Diary in the Strict Sense of the Term* (Stanford, CA: Stanford University Press, 1989) 176. Malinowski's daughter recalled, regarding her parents' faith and their marriage: "It was a civil, not a religious, wedding, because neither of them were Christian believers. Bron[islaw], like most Poles, had been brought up in all the rites and beliefs of the Roman Catholic Church but lost his faith at an early age, an instance where his devout mother's influence failed." Helena Wayne, "Bronislaw Malinowski: The Influence of Various Women on His Life and Works," *American Ethnologist* 12 (1985) 529, 535.

households with patrilocal and matrilocal residence."[133] Not every society taught that marriage was the sole legitimate outlet for human sexual expression. In many societies, "unmarried boys and girls are free to mate in temporary unions, subject to the barriers of incest and exogamy, and of such social regulations as prevail in their community."[134] "There are," he acknowledged, "a number of communities in which the marriage bond is broken as regards the exclusiveness of sex with the consent of both partners and with the sanction of tribal law, custom, and morality."[135]

In all of this diversity, Malinowski recognized some common elements. Grounding his work on the insights of his old professor Edvard Westermarck,[136] Malinowski asserted: "Even in its biological aspect, . . . 'marriage is rooted in the family rather than the marriage in family.'"[137] "Marriage," Malinowski continued, "on the whole is rather a contract for the production and maintenance of children than an authorization of sexual intercourse."[138] It is this agreement, Malinowski argued, that carried transcendent significance. Marriage, so understood, "has to be concluded in a public and solemn manner, receiving, as a sacrament, the blessings of religion and, as a rite, the good auspices of magic."[139]

Malinowski elaborated on this theme in a debate he had with Robert Briffault in the early

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[133] Bronislaw Malinowski, *Sex, Culture, and Myth* (New York: Harcourt, Brace, and World, Inc., 1962) 3.

[134] Ibid., 4.

[135] Ibid., 7.

[136] On Malinowski's relationship to Westermarck, see Michael W. Young, "Introduction," in *The Ethnography of Malinowski: The Trobriand Islands, 1915-1918*, ed. Michael W. Young, 4 (London: Routledge and Kegan Paul, 1979).

[137] Malinowski, *Sex, Culture, and Myth*, 3.

[138] Ibid., 4.

[139] Ibid., 3.

1930s, which was subsequently edited and published posthumously by Ashley Montagu in 1956.[140] Under the chapter heading "Marriage as a Religious Institution," Malinowski began:

> "Marriage is regarded in all human societies as a sacrament, that is, as a sacred transaction establishing a relationship of the highest value to man and woman. In treating a vow or an agreement as a sacrament, society mobilises all its forces to cement a stable union."[141]

In using the term "sacrament," Malinowski did not intend to refer to the religious observances of the Catholic Church. His intention, rather, was to use this familiar language to make the larger point that historically and anthropologically all societies have attached symbolic significance to the act of joining parties in marriage. In every society, Malinowski can be understood to have asserted, marriage carries some "sacramental," i.e., religious significance. Symbols freighted with meaning are used to signify the enduring connection formed by the parties -- rings, perhaps or special garments.[142] The families of the parties are usually intimately involved in making the arrangements and planning the ceremonies.[143] Some level of community participation is also expected in solemnizing the special event.[144] The parties utter special words

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[140] *Marriage Past and Present: A Debate Between Robert Briffault and Bronislaw Malinowski*, ed. M.F. Ashley Montagu (Boston: Porter Sargent Publishers, 1956).

[141] Ibid., 64.

[142] Ibid., 65.

[143] Ibid.

[144] Ibid.

signifying their commitment and thereby magically transforming the relationship.[145] These symbols, these ceremonies, these exchanges of promises, are intended to mark the union off as something of transcendent value, something that the larger society stands ready to protect and preserve, indeed, something for which God or the gods can and must serve as guarantors.

Malinowski, furthermore, admonished those in his own day who wished to desacralize the marital relationship:

> "Are we to secularise marriage completely and withdraw it from the control of religion, and perhaps even of law, as is the tendency in the Soviet legislation and in the program of many would-be reformers?"[146]

Malinowski warned against the danger inherent in an intense and complete secularization of marriage. Marriage had been "sanctioned by religion, as well as by law . . . throughout humanity."[147] Indeed, in Malinowski's mind, religion and law had always been interconnected in deep and almost primal ways:

> "[T]he religious sanctions embrace the legal character of marriage, that is, they make it binding, public, and enforced by the organised interests of the community."[148]

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[145] Ibid., 68.

[146] Ibid., 66.

[147] Ibid., 67.

[148] Ibid., 70.

Malinowski acknowledged that he himself did not belong to an identifiable religious persuasion.[149] He admitted that agnostics might dispute the connections between religion and marriage, but even agnostics would acknowledge the importance of marriage to community order.[150] Even the agnostic, Malinowski asserted, "must endow the institution of marriage and the family with new values, and so make them stable in his own fashion."[151]

B. The Law Teaches Values:

Not only is marriage in some irreducible sense religious; law, in some fundamental sense inevitably teaches values. This is a major argument made by Mary Ann Glendon in her book *Rights Talk.*[152] Professor Glendon, of Harvard Law School, did not take up marriage in her book; she wrote, rather, about rights and the ways in which American courts have miseducated the public on the relationship of rights and duties. Her argument, however, is capable of broader application. We should therefore pay attention to her treatment of the judiciary's mistreatment of the question of communal responsibility and rights, in order to draw some lessons for the domestic relations materials we have already reviewed.

Americans are fond, Glendon observed, of seeing rights as divorced from duties; when they invoke rights, it is usually because they want to satisfy some individual preference with

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[149] Ibid., 71.

[150] Ibid., 72.

[151] Ibid.

[152] *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

little thought to larger social consequences.[153] We live, she writes, in "[t]he high season of rights."[154] Comparative law, Glendon notes, quickly reveals how very idiosyncratic American legal rhetoric is on the subject of rights. She compares and contrasts naturalization ceremonies in the United States and Canada.[155] New citizens of each country are commonly addressed by the government official who swears them in. In the United States, such a speech is likely to emphasize the transcendent significance of individual rights,[156] while in Canada, in contrast, it is likelier that one will be called to take up the responsibility of being a good neighbor to others.[157] Such a ceremony, Glendon notes, is likely to make a lasting impression on one's mind.[158]

An analysis of the no-duty-to-rescue rule and its impact on American legal and political thinking comprises a central core of Glendon's book.[159] She traces the ways in which this anomaly of American law slowly migrated from private law to constitutional law. Teaching that citizens did not owe to others the affirmative duty to come to their assistance in moments of crisis, the no-duty-to-rescue rule taught lessons not only about the narrow principles of tort law,[160] such as the distinction between acts and omissions as a matter of causation, but broader

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[153] Ibid., 3-4.

[154] Ibid., 4.

[155] Ibid., 12-13.

[156] Ibid., 12.

[157] Ibid., 13.

[158] "Like the words of the marriage ritual, they etch themselves on our memory." Ibid.

[159] Chap. 4, "The Missing Language of Responsibility," 76-108.

[160] Glendon, *Rights Talk*, 83.

lessons about the relationship of individualism to social responsibility.[161]

An important part of this larger discussion is Glendon's review of the lessons imparted by the Supreme Court case of *DeShaney v. Winnebago County Department of Social Services*.[162] *DeShaney* involved a tragic set of facts: Joshua DeShaney was a ten-year-old boy who had been systematically abused by his father and was ultimately diagnosed with severe brain trauma as a result of this abuse.[163] Throughout the period he was abused, officials of the County Department of Social Services stood by, documenting the abuse but failing to take effective action even when Joshua's father failed to comply with conditions he agreed to as the result of recommendations made by a "Child Protection Team" that had investigated conditions in Joshua's home.[164]

Chief Justice William Rehnquist authored the majority opinion. Sharply distinguishing between negative and affirmative rights and declaring that the "Due Process Clauses [of the Fifth and Fourteenth Amendments] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, libety, or property,"[165] the Chief Justice's opinion

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[161] See Glendon's discussion of the case of *Jackson v. City of Joliet*, 715 F. 2d 1200 (7th Cir., 1983): 89. In that case, a federal court, influenced by the no-duty-to-rescue rule, denied recovery to the families of two automobile accident victims where the suit had been brought against a police officer who, having happened upon the accident scene, failed to check for victims or summon assistance, such as paramedics or an ambulance. Citing specifically to *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959), Judge Richard Posner announced in *Jackson* that the Constitution was intended to safeguard negative liberties and was not meant to provide protection for affirmative rights, even the right to be aided by an officer of the law.

[162] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

[163] Joshua suffered "a series of hemorrages causes by traumatic injuries to the head inflicted over a long period of time"). Ibid., 193.

[164] Ibid., 192.

[165] Ibid., 196.

can be read very nearly as a constitutionalization of the no-duty-to-rescue rule.[166] Although the County's social service agency had commenced intervention in Joshua's home life, it was under no constitutional obligation to ensure a favorable outcome -- it had, in other words, no constitutionally cognizable duty to rescue Joshua from his violent surroundings.

What makes this case relevant to our concerns is the method Mary Ann Glendon used to draw lessons from it. She criticized Rehnquist's opinion less on its substance than on the errors it was likely to teach the American public.[167] Supreme Court opinions have a wide audience: not only lawyers, but journalists, intellectual and social historians, and a large number of literate laypersons now read leading Supreme Court opinions. And these readers are likely to understand *DeShaney* to stand for the proposition that there is a sharp separation between a public order, where government is responsible for policing its own business, and a world of private ordering, where "the weak [are] completely at the mercy of the strong."[168] And by implying that the no-duty-to-rescue rule governs the government's relationship to its citizens, "the *DeShaney* case miseducates the public about the American version of the welfare state, and about the role of citizens in shaping and reshaping it."[169] *DeShaney*, in other words, while perhaps correct as to its legal reasoning, is a failure because of the lessons the larger American public may derive from it.

Transposed to marriage, Glendon's methodology has much to offer us. If legal opinions necessarily educate, what are the lessons to be learned from the cases and material covered in

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[166] Glendon, *Rights Talk*, 97.

[167] Glendon, *Rights Talk*, 94-97.

[168] Ibid., 95.

[169] Ibid., 97.

this essay? The first, most obvious, lesson is the primacy of marriage in the ordering of society. Marriage was so important that a whole series of divine invocations was considered necessary to explain it. Marriage was a part of the divine plan for the world; it was a feature of the divine law; its particular attributes, such as the levitical degrees, were a feature not only of the law of man but of the law of God. Proper marital conduct was not only a matter of one's relationship with the state, but with the deity. Marriage, one can conclude, was seen as supremely important to social well-being.

There were yet other lessons taught by these cases and materials. It can safely be said that America in the nineteenth century was still governed by a Protestant establishment, whose presence was felt *de facto* if not always *de jure*. Christianity was accepted as a source of the common law and judges and jurists were not shy about drawing from conventional Christian sources to explain whole areas of law.[170] Christian, biblically-grounded modes of discourse thus helped to cement this Protestant hegemony with respect to marriage law and transmit it forward in time, to the next generation. And in a nation most of whose citizens were also Protestant, this must have seemed like a natural mode of discourse. This Christian foundation, furthermore, was not something recent, made up by the courts in response to the exigencies of current events, but had deep roots in the distinctive legal tradition of medieval canon law particularly as mediated through Anglicanism.

If the body of opinions and texts examined in this paper taught one lesson with respect to marriage and its centrality to society and faith, it taught another lesson with respect to the authority of the state. To speak of divine law is to speak at the same time of a law placed above

[170] An important new study of some these themes is Michael V. Hernandez, "A Flawed Foundation: Christianity's Loss of Preeminent Influence on American Law," *Rutgers Law Review* 56 (2004) 625-710.

the positive enactments of the state. It was Peter, after all, who proclaimed to the Sanhedrin "We must obey God rather than men."[171]

Marriage, seen as a matter of divine or natural law, understood as a matter of divine institution, explained as the product of divine command, explicated by the Jesus of the New Testament as conferring deep and solemn duties on its participants, necessarily stood to some extent beyond the state's authority to harm, destroy, or alter. Marriage was not a creation of the state. Its existence pre-dated the state. It was something state authorities were charged with conserving. The judicial invocations of divine law that accompanied so many domestic relations decisions can be understood as reinforcing these propositions and commitments to state officials from governors, to legislators, to administrators, all the way to local justices of the peace and town clerks.

One can contrast the lessons these historical materials teach with the lessons one might derive from a passage in *Goodridge v. Department of Public Health*, the Massachusetts same-sex marriage case of 2003.[172] About the relationship of marriage to the state, this Court wrote: "Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution."[173] This statement, like the majority opinion in *DeShaney*, miseducates the public. As a description of the historical reality this article has been discussing, *Goodridge*'s claim can be seen to be patently false. Its temporal framework is bizarre. One literally cannot make sense of the assertion that civil marriage has been a creation of the state since "pre-Colonial days."

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[171] Acts 5:29.

[172] *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

[173] Ibid., 321, 798 N.E.2d at 954.

Surely, the Court cannot mean to refer to the forms of marriage that prevailed among the Narragansett Indians who greeted the first European settlers, although that is what the Court must literally be understood to say.

The *Goodridge* Court's description of marriage, furthermore, is erroneous on at least two other counts. The sharp distinction between "civil" marriage and something else, which the Court *Goodridge* Court never names but must presumably be religious marriage, similarly misrepresents the early sources we have reviewed. The nineteenth-century American law of domestic relations, even in Massachusetts, was heavily dependent upon Christian sources, especially canonistic sources. This paper has reviewed a few of those sources. It is a distortion of the historical record to call marriage "a wholly secular institution."

It is wrong, finally, to assert, as a matter of historical record, that the state creates civil marriage. As the evidence we have reviewed makes clear, this is not the way the nineteenth-century mind understood the origin of marriage. Indeed, the forms of legal discourse we have been exploring, invocations of divine law or the law of God to explain particular features of the law of marriage, were not unknown to Massachusetts. Massachusetts jurists were not unlike their contemporaries in borrowing from Christian understandings of marriage, especially as mediated through the ecclesiastical courts, to explain the shape and content of their domestic relations law.[174]

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[174] See e.g. *Martin v. Commonwealth*, 1 Mass. 347, 398 (1805) (addressing the obligations of women married to British sympathizers during the Revolutionary War, this opinion declared that by "they owed [a duty of obedience] to their husbands" "by the law of God," and were thus under no obligation to abandon them as a condition of retaining property rights in Massachusetts); *Sutton v. Warren*, 51 Mass. 451, 452 (1845) (declaring incestuous marriages invalid as "against the laws of God"); *Pratt v. Pratt*, 157 Mass. 503, 506 (1892) (declaring an intention to incorporate into Massachusetts divorce law the rules governing "collusion, connivance, condonation or recrimination, all of which we have adopted into our procedure from the canon and ecclesiastical law of England").

Goodridge, in its own way, is thus at least as pernicious as the *DeShaney* opinion in its miseducation of the public. Its history lesson, regrettably, will not be confined to the practising bar of Massachusetts. Lawyers and literate lay people alike, all over the country, will understand it to be a roughly accurate depiction of historical truth. In reality, it is as flawed as *DeShaney*'s attempt to constitutionalize the no-duty-to-rescue rule.

C. Law Has a Religious Dimension:

At the outset of this paper, I proposed a definition of religion borrowed from John Noonan which had as its core the relationship of the believer with the divine presence.[175] Harold Berman, in his book, *The Interaction of Law and Religion*, has proposed a different definition that is also appropriate for analyzing the relationship of religion and law.[176] Religion, Berman writes:

> "is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life -- it is a shared intuition of and commitment to transcendent values."[177]

Law, Berman continues, must necessarily partake of religious values, understood in this broad, anthropological sense. Through the use of ritual, through appeal to tradition and

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[175] *Supra*: --.

[176] Harold J. Berman, *The Interaction of Law and Religion* (Nashville, TN: Abingdon Press, 1974).

[177] Ibid., 24.

authority, through invocation of universal values, law attempts to concretize and apply a given society's set of beliefs about ultimate values.[178] Berman challenges those who would view law in purely secular terms. The great fallacy to a purely secular account of the law is its abandonment of ultimate values: "The law of the modern state, it is said, is not a reflection of any sense of ultimate meaning and purpose in life; instead, its tasks are finite, material, impersonal -- to get things done, to make people act in certain ways."[179]

Berman further characterizes this understanding of law as "instrumentalist."[180] The law-giver -- whether legislator or judge -- takes a narrow view of those subject to the law. Persons, the law-giver surmises, will respond in certain predictable ways to laws intended to appeal to widely-held notions of cost/benefit analysis. Laws are tailored accordingly, to place incentives on desirable conduct and to discourage the undesirable. Such efforts, furthermore, always carry with them a sense of tentativeness: the law comes to be seen as "experimental;" its values, its norms, its prohibitions and permissions, are seen as always subject to revision, based on the latest fashionable economic or political theory of what society should be about.[181]

The problem with this sort of instrumentalism, in Berman's estimation, is its failure to conform with human nature. Instrumentalists generally assume that law gains its force through its threat of coercive force.[182] This assumption has been part and parcel of modern legal positivism since John Austin first formulated his command theory of law in the early nineteenth

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[178] Ibid., 25.

[179] Ibid., 26-27.

[180] Ibid., 27.

[181] Ibid., 27-28.

[182] Ibid., 28.

century. Such a theory of law, however, runs afoul of the natural human tendency to obey law not because of the threats that accompany disobedience, but because of the belief that one thereby does something affirmatively good by obeying:

> "As psychological studies have now demonstrated, far more important than coercion in securing obedience to rules are such factors as trust, fairness, credibility, and affiliation."[183]

The sense of trust, furthermore, is enhanced by the very nature of law:

> "Law itself, in all societies, encourages the belief in its own sanctity. It puts forward its claim to obedience in ways that appeal not only to the material, impersonal, finite, rational interests of the people who are asked to observe it, but also to their faith in a truth, a justice that transcends social utility -- in ways, that is, that do not fit the image of secularism and instrumentalism presented by the prevailing theory."[184]

Berman concludes that instrumentalist understandings of law -- theories of law that rest,

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[183] Ibid.

[184] Ibid., 29. Berman adds, "Even Joseph Stalin had to reintroduce into Soviet law elements which would make his people believe in its inherent rightness -- emotional elements, sacred elements; for otherwise the persuasiveness of Soviet law would have totally vanished, and even Stalin could not rule solely by threat of force." Ibid.

fundamentally, not on a shared sense of right and wrong but only on second order pragmatic principles -- will ultimately prove unworkable.[185] To be successful, to command respect and allegiance, the law must embody what Berman terms "transrational" values, including a sense of tradition and authority. Neither, Berman asserts, can be explained exclusively in secular terms. Tradition necessarily carries a religious dimension as mythic significance is ascribed to past events,[186] while invocations of authority usually carry with them some sense of judgment about ultimate right and wrong.[187]

This understanding of the deep interconnectedness of law and religion helps to explain the survival of references to divine law and the law of God in early American judicial thought. Appeals to rules ordained by God, articulated in a world where ownership and knowledge of the King James Bible was perhaps the single strongest common bond among persons, can certainly be understood as an effort to inculcate in the populace a deeply internalized sense of proper and improper marital conduct.

Berman's insights also reveal the deep incoherence of contemporary philosophical liberalism, especially when applied to reform of the marriage law to accommodate the same-sex marriage movement. One might consider a recent essay by Linda McClain.[188] Her target was Congresswoman Marilyn Musgrave of Colorado's Fourth District, a Pentecostal and a principal sponsor of an amendment to the United States Constitution that would have the effect of

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[185] Ibid., 30.

[186] Ibid., 34.

[187] Ibid., 34-35.

[188] "'God's Created Order,' Gender Complementarity, and the Federal Marriage Amendment," *BYU Journal of Public Law* 20 (2006) 313-343.

enshrining in fundamental law the proposition that true marriage only exists between a male and female. The particular focus of McClain's criticism was Musgrave's assertion, made in defense of the amendment, that it was needed to preserve "'God's created order.'"[189]

McClain rejected the premise on which these statements rested: that there is no tight boundary line separating religious from secular conceptions of marriage. Looking in part to *Goodridge*, McClain countered:

> "[I]n a pluralistic constitutional democracy, citizens owe each other certain duties of civility and mutual respect concerning the forms of argument they make. Thus, government's interest in defining, regulating, and supporting the institution of civil marriage must be explained in terms of public reasons and political (or public) values that are accessible to other citizens regardless of whether they share each other's

[189] Ibid., 314 (quoting Marilyn Musgrave). Musgrave was not alone in the 2006 congressional debate over same-sex marriage to make such a claim. McClain also identifies Congressman Steven King of Iowa and Mike Pence of Indiana, who made similar claims. Ibid., 317-319. In her House testimony, Musgrave declared: "The self-evident differences and complementary design of men and women are part of [the] created order. We were created as male and female, and for this reason a man will leave his father and mother and be joined with his wife, and the two shall become one in the mystical, spiritual, and physical union we call 'marriage.'" House Judiciary Committee, Subcommittee on the Constitution, Hearing Testimony, May 13, 2004, 108th Congress (statement of Marilyn Musgrave, Chairman). Her Senate testimony for the most part tracks closely her House statement, although Musgrave added: "[M]arriage is a sacred institution, designed by the Creator [as] the union of a man and a woman." Senate Judiciary Committee Hearing on Same-Sex Marriage, June 22, 2004 (2004 W.L. 1413039 (F.D.C.H.).

religious convictions."[190]

McClain is far from alone in advancing such claims. William Eskridge, Professor of Law at Yale University and a leading advocate for same-sex marriage, relies on a robust theory of philosophical liberalism to argue that the Constitution was intended to create a liberal state agnostic as to claims about fundamental goods or ends.[191] Like McClain and like many others in the field, Eskridge relies on claims about "public reason" that have the effect of prohibiting in advance the possibility of distinctively religious voices even entering the public square.[192]

The not-so-hidden danger in these claims is precisely the risk Berman warned against -- the replacement of norms that reflect deeply-held convictions of right and wrong with a series of second-order, instrumentalist claims about the shape marriage law should take.

From a constitutional perspective, perhaps the most appropriate answer is John Noonan's response that the believer who relies on religious belief to reach a particular public policy position does nothing different from "any conscientious citizen or politician who consults the source of truth he holds in highest regard."[193] What is protected by the Constitution, in Noonan's estimation, is the right all persons to participate in the political process, not the right of the non-believer to be free of the annoyance of having to confront religious claims of truth.[194]

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[190] 20 BYU J. Pub. L. at 328-329. See also McClain's older essay, "The Relevance of Religion to a Lawyer's Work," *Fordham Law Review* 66 (1998) 1241-1252.

[191] William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (New York and London: Routledge, 2002) 129-131.

[192] Ibid., 129.

[193] John T. Noonan, Jr., "The Bishops and the Ruling Class: The Moral Formation of Public Policy," in *Religion, Science, and Public Policy*, ed. Frank T. Birtel, 138, 141 (New York: Crossroad, 1987).

[194] Noonan continues, "Every public policy is an imposition on some persons, some groups.

Were this a longer study, we might develop this point. We should content ourselves with the observations that if marriage is religious, not necessarily in a confessional but at least in a larger anthropological sense of that word, so then is law. Law reform that seeks to desacralize marriage, to make it subject to ordinary contract rules, to separate its religious dimension from its civil effects, will probably fail. Indeed, the crisis over out-of-wedlock births, the levity with which the marital commitment is taken, the easy availability of divorce, might all be seen as outgrowths of this desacralization.

Desacralization of the law, however, may carry even deeper consequences. The separation of law from deeply-cherished beliefs about right and wrong might lead to societal demoralization as the people become alienated from the law.

Let us consider for a moment the issue of alienation. The concluding pages of Alasdair MacIntyre's *After Virtue* draw a stark picture of the role alienation played in the collapse of the civil polity of the Western Roman empire, as people turned their back on imperial rule:

> "A crucial turning point in that earlier history occurred when men and women of good will turned aside from the task of shoring up the Roman *imperium* and ceased to identify the continuation of civility and moral community with the maintenance of that *imperium*. What they set themselves to achieve -- often not recognizing fully what they were doing -- was the construction

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Pluralist democracy does not mean freedom from such impositions, but freedom to participate in the process. The Church, through the actions of Catholics, is free to be a participant." Ibid.

of new forms of community within which the moral

life could be sustained . . . ."[195]

Where the state and its law fails, where it has grown so out of touch with human needs and emotions that it ceases to command loyalty, one might read MacIntyre as saying, then it falls to the people to build their own communities responsive to their own values, independent of state authority. The marriage debate may hold within it the seeds of this extreme form of alienation from the realm.

IV. Conclusion:

This paper has touched on themes drawn from legal history, anthropology, and from jurisprudence. If there is a common thread to this paper, it is this: That the separation of marriage from religion, or from the state, is a much more difficult task than it might at first blush appear. Marriage has been associated, within the western tradition, for nearly two millennia, with religious insight, particularly that drawn from or inspired by the Jewish and Christian holy books collectively called "The Bible." Much of this paper has been concerned with exploring various aspects of the relationship of this larger western tradition with the idiom of American domestic relations law.

Even apart from this historically peculiar feature of the West, all marriage has a religious dimension to it that is probably unavoidable. In all societies, marriage is signified by some form of symbolic action or exchange; it reflects commitments not only by the individuals involved, but by larger communities, whether they be family, church, locality, or something larger or

[195] Alasdair MacIntyre, *After Virtue*, 2d ed. (Notre Dame, IN: Notre Dame University Press, 1984) 263.

smaller than these groups. Marriage is a commitment that embraces not only the good of the parties, but points to something larger -- a given society's sense of the ultimate.

The lessons that law-givers seek to inculcate in those subject to the law, furthermore, are also important. Law teaches values -- this is an insight as true for the law of marriage as for any other branch of the law. How society structures the laws governing coupling, commitment, child-rearing, and other essential functions of the reproductive process teaches values about these aspects of daily life. The current debate over the future path of marriage is at least in part a struggle over the proper lessons to be taught by the law.

Finally, law itself points to a larger substantive vision of the good. For this reason, some, like Harold Berman, argue that the law itself has a religious dimension that we deny at the risk of imperiling the soundness of a society's legal order. And this religious dimension of law, this sense that the law must embody some larger, more transcendent understanding of right and wrong, also lies behind and animates much of the contemporary debate over marriage. Legislative or judicial attempts to sever the traditional bonds among marriage, religion, and law, are, for these reasons, doomed to failure, in either the short or the long term.