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The Goods and Goals of Marriage

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In the past decade, a substantial new body of social science literature has emerged seeking to make the statistical case that marriage is a good institution. The central thesis of this new literature is that, on the whole, it is healthier: (1) to be married or remarried than to remain single, widowed, or divorced; (2) to have two parents raising a child rather than one or none; and (3) to have marital cohabitation rather than non-marital cohabitation for couples who are planning to be together for the long term. On average, a number of recent studies show, married adults are less likely than non-married adults to abuse alcohol, drugs, and other addictive substances. Married parties take fewer mortal and moral risks, even fewer when they have children. They live longer by several years. They are less likely to attempt or to commit suicide. They enjoy more regular, safe, and satisfying sex. They amass and transmit greater per capita wealth. They receive better personal health care and hygiene. They provide and receive more effective co-insurance and sharing of labor. They are more efficient in discharging essential domestic tasks. They enjoy greater overall satisfaction with life measured in a variety of ways. Men, on average, enjoy more of these health benefits of marriage than women. The presence of children in the household decreases the short-term benefits but increases the long-term benefits of marriage for both spouses. Most children reared in two-parent households perform better in their socialization, education, and development than their peers reared in single- or no-parent homes.¹

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¹ See LINDA J. WAITE AND MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); Linda J.

These general data on the health benefits of marriage do not pretend to describe all particular cases. There are plenty of happy singles. Sometimes widow(er)s and divorcees thrive after surviving or escaping miserable marriages. There are plenty of successful single parents. Sometimes their children thrive in the absence of perennial parental abuse or conflict and/or upon negotiation of a suitable joint custody or visitation arrangement. There are plenty of committed couples that transfer smoothly from non-marital to marital cohabitation. Sometimes such experiments convince couples to forgo marriage and to spare themselves and their prospective children the painful costs of divorce. But the recent social science data suggest strongly that these exceptions, though ample and diverse in number, do not overcome the basic presumptions about the superior utility and healthiness of monogamous marital unions and intact two-parent families.²

I read these new social science data on the health benefits of marriage as an historian of Western law and theology. In my view, these data help to corroborate and to elaborate a number of ancient and enduring teachings on the goods and goals of marriage that have undergirded the law and theology of the Western tradition. The aim of this Article is: (1) to compare these new social science data with some of the traditional Western legal and theological formulations of the goods and goals of marriage; and (2) to explore the role of law in defining and defending these marital goods and goals.

This Article is dedicated to Judge John T. Noonan, Jr. with great admiration and appreciation for his monumental contributions to the law and theology of marriage in the Western tradition. Judge Noonan has written several dozen articles and several important volumes on point, notably Contraception, Power to Dissolve, The Church and Contraception, A Private Choice: Abortion in America in the Seventies. These writings have done much to deepen our historical understanding of the development of Western marital teachings. They have also done much to reshape Catholic theology and canon law of marriage in the aftermath of the Second Vatican Council as well as broader ecumenical discussions of the common enduring postulates of the Western classical and Christian

Waite, *Does Marriage Matter?* 32 DEMOGRAPHY 483 (1995); Barbara DaFoe Whitehead, *Dan Quayle was Right*, 271(4) THE ATLANTIC MONTHLY 47-84 (April, 1993); id., *The Failure of Sexual Education*, 272(10) THE ATLANTIC MONTHLY 55-80 (October, 1994); DAVID POPENOE AND BARBARA DAFOE WHITEHEAD, *THE STATE OF OUR UNIONS* 1999 (2000); ID., *THE STATE OF OUR UNIONS* 1998 (1999); STEPHEN G. POST, *MORE LASTING UNIONS: CHRISTIANITY, THE FAMILY, AND SOCIETY* 5-42 (2000).

² What has apparently not yet been closely studied by social scientists are the comparative health benefits of (1) monogamous v. polygamous unions; (2) committed married lives v. committed monastic lives; or (3) committed heterosexual v. committed homosexual unions.

tradition of marriage.³ This Article is, in no small measure, a little bundle of flowers picked from Judge Noonan's own vast gardens of knowledge.

The Goods and Goals of Marriage: Classical Formulations

It has long been common in the Western Christian tradition to speak of the end (finis) of marriage. The Latin term finis is a term both of ontology and of teleology. It describes both the goods of marriage (its virtue, its reason for being, its intrinsic worth) and the goals of marriage (its purposes, its expected consequences, its instrumental value). To signal this distinction, early Catholic canonists and moralists sometimes spoke of the purpose (causa) and effect (effectus) of marriage, or its inherent goods (finis operis) and its actualized goals (finis operantis).⁴ Early Protestant jurists and theologians repeated these distinctions but also spoke of the reason (ratio) and use (usus) of marriage. Most Western Christian writers -- Patristic, Catholic, and Protestant alike -- analyzed both the goods and the goals, the intrinsic and the instrumental values, of marital institutions and activities. But Catholics have tended to emphasize the intrinsic goods of marriage, its ontology.⁵

³ JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS* (1966); *ID.*, *POWER TO DISSOLVE: LAWYERS AND MARRIAGE IN THE COURTS OF THE ROMAN CURIA* (1972); *ID.*, *THE CHURCH AND CONTRACEPTION: THE ISSUES AT STAKE* (1967); *ID.*, *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* (1979); *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* (John T. Noonan, Jr., ed., 1976). For articles, see *ID.*, *CANONS AND CANONISTS IN CONTEXT* (1997) (containing several earlier essays on Roman and canon laws of marriage); *id.*, *The Family and the Supreme Court* 23 *CATH. U. L. REV.* 255-274 (1973); *id.*, *Genital Good*, 8 *COMMUNIO: INT'L CATH. REV.* 198-228 (1981); *id.*, *Natural Law, The Teachings of the Church and the Regulation of the Rhythm of Human Fecundity*, 25 *AM. J. JURISPR.* 16-37 (1980); *id.*, *Authority, Usury, and Contraception*, 16 *CROSS CURRENTS* 55-80 (1966); *id.*, *Indissolubility of Marriage and Natural Law*, 14 *AM. J. JURISPR.* 79-94 (1969); *id.*, *History and the Values of Christian Marriage*, in *MARRIAGE IN LIGHT OF VATICAN II* 1-12 (J.T. McHugh, ed., 1968); *id.*, *Sexual Freedom and the Three Functions of Law*, in *SEXUALITY: A SEARCH FOR PERSPECTIVE* 159-173 (D.L. Grummon and A.M. Barclay, eds., 1971); *id.*, *Freedom, Experimentation, and Permanence in the Canon Law of Marriage*, in *LAW FOR LIBERTY: THE ROLE OF LAW IN THE CHURCH TODAY* 52-68 (James E. Biechler, ed., 1967).

⁴ See sources and discussion in FRANCIS W. CARNEY, *THE PURPOSES OF CHRISTIAN MARRIAGE* (1950); THEODOR MACKIN, *WHAT IS MARRIAGE* (1982); ALAIN MATTHEUWS, *UNION ET PROCRÉATION: DÉVELOPPEMENTS DE LA DOCTRINE DES FINS DU MARIAGE* (1989); DIETRICH VON HILDEBRAND, *MARRIAGE* (1942).

⁵ See, e.g., GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE*, 556-659 (1993); Robert P. George and Gerard V. Bradley, *Marriage and the Liberal*

Protestants have tended to emphasize the instrumental goals of marriage, its teleology.⁶

The Western Christian tradition inherited this idea of marital goods and goals from classical Greece and Rome.⁷ A number of Greek and Roman writers regarded marriage as a natural institution that served the couple, the children, and the community at once. In a suggestive passage in the Republic, for example, Plato (ca.428-ca.347 B.C.) said it was "obvious" that a "just republic" "must arrange [for] marriages, sacramental so far as may be. And the most sacred marriages would be those that were the most beneficial."⁸ In his Laws, when advising young men on how to choose a wife, Plato wrote: "A man should 'court the tie' that is for the city's good, not that which most takes his own fancy."⁹ Once married, the man should restrict "procreative intercourse to its natural function" for such "moderation" will bring "untold good. It is dictated, to begin with, by nature's own voice, leads to the suppression of the mad frenzy of sex, as well as marriage breaches of all kinds, and all manner of excess in meats and drinks, and wins men to affection of their wedded wives. There are also numerous other blessings which will follow...."¹⁰

Aristotle (384-321 B.C.) viewed marriage as the foundation of the republic and the prototype of friendship. "[M]an is a political animal" who forms states and other associations "for the purpose of attaining some good," Aristotle wrote famously in his Politics: "[E]very state is composed of households." Every household, in turn, is composed of "a union or pairing of those who cannot exist without one another. A man and woman must unite for the reproduction of the species -- not from deliberate intention, but from the natural impulse ... to leave behind something of the same nature as themselves."¹¹ Aristotle extended this view in his Ethics, now emphasizing goods of marriage beyond its political and social expediency:

Imagination, 84 GEO. L.J. 301, 305 (1995). See JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987), for medieval prototypes.

⁶ See *sources and discussion* in JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION*, chs. 2-4 (1997) [hereafter FSC].

⁷ I have not addressed the use of Judaic sources in the early Christian church, ably and amply discussed in LEO G. PURDUE, ET AL., *FAMILIES IN ANCIENT ISRAEL* (1997); CAROLYN L. OSIEK AND DAVID BALCH, *FAMILIES IN THE NEW TESTAMENT WORLD: HOUSEHOLDS AND HOUSE CHURCHES* (1997).

⁸ PLATO, *Republic*, V.458e, in *THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS* at (Edith Hamilton and Huntington Cairns, eds., 1961).

⁹ PLATO, *Laws* VI.773b, in *THE COLLECTED DIALOGUES OF PLATO*, supra note 8.

¹⁰ *Id.* at VIII.839a-b.

¹¹ ARISTOTLE, *THE POLITICS OF ARISTOTLE*, I.1.1, I.2.2, I.2.9 (Ernest Barker, trans., 1962).

The love between husband and wife is evidently a natural feeling, for Nature has made man even more of a pairing than a political animal in so far as the family is an older and more fundamental thing than the state, and the instinct to form communities is less widespread among animals than the habit of procreation. Among the generality of animals male and female come together for this sole purpose [of procreation]. But human beings cohabit not only to get children but also to provide whatever is necessary to a fully lived life. From the outset, the partners perform distinct duties, the man having one set, the woman another. So by pooling their individual contributions [into a common stock] they help each other out. Accordingly there is general agreement that marital affection combines the useful and the pleasant. But it may also embody a moral ideal, when husband and wife are virtuous persons. For man and woman have each their own special excellence, and this may be a source of pleasure to most. Children, too, it is agreed, are a bond between the parents -- which explains why childless unions are more likely to be dissolved. The children do not belong to one parent more than to another, and it is the joint ownership of something valuable that keeps people from separating.¹²

To ensure that marital couples would remain bonded together for the sake of their children, Aristotle (emulating Plato, in part) prescribed a whole series of laws on the ideal ages, qualities, and duties of husband and wife to each other and to their children.¹³

The Roman Stoics repeated and glossed these classical Greek views about marriage, even while many of them celebrated celibacy as the higher ideal. Cicero (106-34 B.C.), for example, the leading jurist and moralist of his day, called marriage a "natural sharing" of the person and property of husband and wife that served for the procreation of children, for companionship, and ultimately for the broader cultivation of "dutifulness, goodness,

¹² ARISTOTLE, *THE ETHICS OF ARISTOTLE*, VIII.12 (J.A.K. Thomson, trans., repr. ed. 1965). (The interpolation "into a common stock" is an alternative translation that appears in several other editions of *the Politics*).

¹³ ARISTOTLE, *supra* note 12, at VII.16-17; see also PLATO, *supra* note 8, at V.457d, 459-461; PLATO, *supra* note 9, at 772d-e, 774a-b. See further sources and discussion in SARAH POMEROY, *FAMILIES IN CLASSICAL AND HELLENISTIC GREECE: REPRESENTATIONS AND REALITIES* (1997), and the discussions of comparable sentiments in Xenophon in SARAH POMEROY, *XENOPHON OECONOMICUS: A SOCIAL AND HISTORICAL COMMENTARY* (1994).

liberality, kindness, courtesy, and similar virtues."¹⁴ Musonius Rufus (b. ca. 30 A.D.), an influential moralist, described marriage in robust companionate terms, anticipating by many centuries the familiar language of the Christian marriage liturgy:

The husband and wife ... should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as, quite apart from marriage, it could result from any other sexual union, just as in the case of animals. But in marriage there must be above all perfect companionship and mutual love of husband and wife, both in health and in sickness and under all conditions, since it was with desire for this as well as for having children that both entered upon marriage.¹⁵

Musonius further insisted that sexual intercourse was "justified only when it occurs in marriage and is indulged in for the purpose of begetting children," and he praised those lawgivers who "consider the increase of the homes of the citizens [through procreation] the most fortunate thing for the cities and the decrease of them [through infanticide] the most shameful thing."¹⁶ Indeed, he wrote, "whoever destroys human marriage destroys the home, the city, and the whole human race."¹⁷

Musonius's student, Hierocles [add his dates], argued more strongly than his teacher that it was incumbent upon all men, even

¹⁴ CICERO, DE FINIBUS, III.20, V.65; CICERO, DE REPUBLICA, I.43, IV.5, V.5; CICERO, DE OFFICIIS, I.17.54.

¹⁵ MUSONIUS RUFUS, *Fragment 13A, What is the Chief End of Marriage?*, reprinted and translated in MUSONIUS RUFUS: THE ROMAN SOCRATES 88 (Cora E. Lutz, ed. 1997). Musonius is aware that this is an ideal of marriage, which is not always realized: "Where, then, this care for each other is perfect, and the two share it completely, each striving to outdo the other, this marriage is, therefore, proper and is worthy of envy, for such an association is beautiful. But where each looks only to one's own interests and neglects the other, or, by God, when one holds the other thus, and lives in the same house but fixes one's attention outside, not willing to tend toward one's yoke fellow or to achieve unity, then of necessity the association is destroyed and their common interests fare badly, and either they are separated entirely or they hold their staying together as worse than solitude." *Id.* at 89.

¹⁶ RUFUS, *Fragment 12, On Aphrodisia*, *supra* note 16, at 86; RUFUS, *Fragment 15, Should Every Child that is Born be Raised?*, *supra* note 16, at 96. See further ROY B. WARD, *Musonius and Paul on Marriage*, NEW TESTAMENT STUDIES 36, 281-289 (1990).

¹⁷ RUFUS, *Fragment 14, Is Marriage a Handicap to the Pursuit of Philosophy?*, *supra* note 16, at 92.

philosophers seeking quiet contemplation, to marry and to maintain a household. For "marriage is the basis of the household, and the household is essential to civilization."¹⁸ While procreation remained the ultimate ideal of marriage, in Hierocles' view, the consistent companionship and mutual care of husband and wife was no less important, even in the absence of children:

[T]he beauty of the household consists in the yoking together of a husband and wife who are united together by fate, are consecrated by the gods who preside over weddings, births and houses, agree with each other and have all things in common, including their bodies, or rather their souls, and who exercise appropriate rule over their household and servants, take care in rearing their children, and pay an attention to the necessities of life which is neither intense nor slack, but moderate and fitting.¹⁹

The great Roman historian and moralist, Plutarch (46-120), though a critic of Stoicism on many points, wrote much like a Stoic on the pleasures of love, intimacy, and friendship within the marital household. The ideal marriage, he wrote, is "a union for life between a man and a woman for the delights of love and the getting of children." "In the case of lawful wives, physical union is the beginning of friendship, a sharing as it were, in great mysteries. The pleasure [of sexual intercourse] is short, but the respect and kindness and mutual affection and loyalty that daily spring from it ... [renders] such a [marital] union a 'friendship'."²⁰ And again: "No mutual pleasures are greater, no mutual services more constant, no form of affection is more enviable and estimable for its sheer beauty than when 'when man and wife in harmony of mind keep house together.'"²¹

¹⁸ JUDITH EVANS GRUBB, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE'S MARRIAGE LEGISLATION* 59 (1995).

¹⁹ HIEROCLES, *quoted in* ANDREW MALHERBE, *MORAL EXHORTATION: A GRECO-ROMAN SOURCEBOOK* 102 (1986).

²⁰ PLUTARCH, *LIFE OF SOLON*, 20.4 (editorial info?); PLUTARCH, *EROTIKOS*, 769 (editorial info?). See John Finnis, *Law, Morality, and Sexual Orientation*, 69 *NOTRE DAME L. REV.* 1049, 1063-1064 (1994); John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 1, 12-17 (Robert P. George ed., 196).

²¹ PLUTARCH, *EROTIKOS*, 770A (quoting in part HOMER, *ODYSSEY*, 6.183-183). See Lisette Goessler, *Advice to the Bride and the Groom: Plutarch Gives a Detailed Account of His Views of Marriage*, in *PLUTARCH'S ADVICE TO THE BRIDE AND GROOM AND A CONSOLATION TO HIS WIFE* 97, 112-114 (Sarah B. Pomeroy ed., 1999). See also PLUTARCH, *supra* at 769E ("In marriage, it is more important to love than to be loved. It helps us to rid ourselves of so many mistakes—indeed from all the errors that corrupt and destroy marriages.") *Id.*

The ideal marital household, Plutarch continued in his Advice to the Bride and Groom, is a sharing of the person, property, and pursuits of its members, under the gentle leadership of the paterfamilias:

When two notes are struck together, the melody belongs to the lower note. Similarly, every action performed in a good household is done by the agreement of the partners, but displays the leadership and decision of the husband....

Plato says that the happy and blessed city is one in which the words "mine" and "not mine" are least to be heard, because the citizens treat everything of importance, so far as possible, as their common property. Even more firmly should these words be banished from a marriage. Doctors tell us that an injury on the left side refers the sensation to the right. Similarly, it is good for a wife to share her husband's feelings, and a husband his wife's, so that, just as ropes gain strength from the twisting of the strands, so their communion may be the better preserved by their joint effort, through mutual exchanges of goodwill. Nature joins you together in your bodies, so that she may take a part of each, and mixing them together give you a child that belongs to you both, such that neither of you can say what is his or her own, and what the other's. Community of resources also is particularly appropriate for the married; they should pour everything into one fund, mix it all together, and not think of one part as belonging to one and another to the other, but of the whole as their own, and none of it anyone else's.²²

Plutarch also wrote at length on the natural affinity and affection of parents, especially mothers, to their children. Among the "the first mothers and fathers, there was no law ordering them to have families, no expectation of advantages or return to be got out of them." "But the love of one's offspring implanted by nature, moves and influences" parents even then to have and nurture children, much like it moves many other animals. "[T]here is no power or advantage to be got from children, but that the love of them, alike in mankind as among the animals,

²² PLUTARCH, *Advice to the Bride and Groom*, Precepts 11, 20, reprinted and translated in PLUTARCH'S *ADVICE TO THE BRIDE AND GROOM AND A CONSOLATION TO HIS WIFE*, *supra* note 21, at 6, 8. See also Precept 34, *supra* at 10, and PLUTARCH, *EROTIKOS*, *supra* note 21, at ch. 21, 767DE, quoted in *supra* at 112-113.

proceeds entirely from nature."²³ Nature also teaches that mothers should nurse and nurture their own infant children, and that both mother and father should cooperate in the upbringing, discipline, and education of their children.²⁴

Some of these views about marriage entered classical Roman law, well before the conversion to Christianity of the Roman emperor and empire in the fourth century. For example, two mid-third century legal texts define marriage thus: "Marriage is a union of a man and a woman, and a sharing for the whole of their life [or a sharing for their whole life] (consortium omnis vitae), in accordance with divine and human law." And again: "Marriage, or matrimony, is a union of a man and a woman that involves a continuous or undivided sharing of life."²⁵ Other second and third century Roman law texts emphasized that marriage was a "sacred and enduring" union, voluntarily contracted for the sake of "marital affection" and the propagation of offspring.²⁶ These and many other texts to the same effect eventually found their way into the Corpus Iuris Civilis (c. 529), a foundational text for both the civil law and the canon law of the West.²⁷

Such were some of the sentiments about marriage among pre-Christian writers. These classical sources illustrate that the West has long recognized that marriage has natural goods and benefits for the couple, their children, and the broader community. Particularly perceptive were Aristotle's insights that marriage is a natural institution fundamental and foundational to any republic; that marriage is at once "useful," "pleasant," and "moral" in its own right; that it provides efficient pooling and division of specialized labor and resources within the household; and that it serves both for the fulfillment and happiness of spouses and for the procreation and nurture of children. Also influential was the Stoic and Roman natural law idea that marriage is a "sacred and enduring union" that entailed a complete sharing of the persons, properties, and pursuits of husband and wife in

²³ Plutarch, *Affection for One's Offspring*, in 5 THE COMPLETE WORKS OF PLUTARCH 21, 25, 27 (Kelmscott Society ed., 1909).

²⁴ Plutarch, *The Training of Children*, *supra* note 23, at 5:1-20.

²⁵ DIGEST 23.2.1, quoting Modestinus (c. 224) ("Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divine et humani iuris communicatio"); JUSTINIAN, INSTITUTES I.9.1, quoting Ulpian (d. c. 228) ("Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens").

²⁶ See GAIUS, INSTITUTES, 1.56ff.; DIGEST, *supra* note 21, at 24.1.32, 35.1.15, 25.1.3; JUSTINIAN, *supra* note 21, at 1.10.pr. For a full study of Roman law texts, before and after Christianization, see SUSAN TREGGIARI, ROMAN MARRIAGE: *IUSTI CONJUGES* FROM THE TIME OF CICERO TO THE TIME OF ULPIAN esp. 1-13, 183-319 (1991); GRUBB, *supra* note 18; JANE F. GARDNER, FAMILY AND *FAMILIA* IN ROMAN LAW AND LIFE (1998).

²⁷ add noonn on martial affection

service of marital affection and friendship, mutual caring and protection, and mutual procreation and education of children.

These classical sources also illustrate that the Christian tradition, from the beginning, had at its disposal an ample natural logic and language about the goods and goals of marriage. To be sure, when compared to the modern social science data about the health benefits of marriage, these classical reflections were more avuncular than statistical, more anecdotal than inductive, more prudential than scientific. And, to be sure, these classical reflections were only very small fragments within a vast Graeco-Roman literature that sometimes also condoned sexual norms and habits that the Christian tradition would later condemn--prostitution, concubinage, pedophilia, homosexuality, polygamy, mixed bathing, communal propagation, anonymous parentage, casual consortium with slaves, and more.²⁸ But in these classical sources, the Christian tradition found ready touchstones about the natural goods and goals of marriage that would prove helpful to their broader theological formulations about marriage. Natural arguments about marriage could not provide the Christian tradition with a complete theology of marriage. But a theology of marriage could not be complete, or cogent, without some natural foundation and corroboration.

Early Christian Formulations

Thus the Western Christian tradition has always included a natural perspective on marriage in its theology of this institution. Marriage is more than a natural institution in Christian theology. The Christian tradition has also understood it to be a spiritual, social, economic, and contractual association -- subject to the church, state, community, and couple at once. But, at its foundation, marriage is a natural institution, subject to the laws of nature communicated in Scripture, reason, and conscience, and reflected in tradition, custom, and experience.

Patristic, Catholic, and Protestant writers alike taught that marriage was created and ordered by God. Already in Paradise, God had brought the first man and the first woman together, and commanded them to "be fruitful and multiply." God had created them as social creatures, naturally inclined and attracted to each other. God had given them the physical capacity to join together and to beget children. God had commanded them to love, help, and nurture each other and to inculcate in each other and in their children the love of God, neighbor, and self. These duties and

²⁸ See PHILIP L. REYNOLDS, *MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MODERN PERIODS* (1994); BRUNDAGE, *supra* note 5, at 10-123.

qualities of marriage, the Christian tradition has long taught, continued after the fall into sin. After the fall, however, marriages also become a remedy for lust, a balm to incontinence. Rather than allowing sinful persons to burn with lust, God provided the remedy of marriage, in order for parties to direct their natural drives and passions to the service and love of the spouse, the child, and the broader community.

On this common foundation about the created origin and natural order of marriage, Christian writers over the centuries devised various formulas to define the goods and goals of marriage. The most famous and enduring formulation came from St. Augustine (354-430), the Bishop of Hippo. Like his classical predecessors, Augustine called marriage a "true and loyal partnership," the "seedbed of the city," the "first step in the organization of men."²⁹ He also quoted his Greek contemporary, St. John Chrysostom (345-407) about the political and social utility of marriage: "The love of husband and wife is the force that welds society together. Because when harmony prevails, the children are raised well, the household is kept in order, and neighbors and relatives praise the result. Great benefits, both for families and states, are thus produced."³⁰

In its essence, however, Augustine wrote, marriage has three goods (bona). Marriage "is the ordained means of procreation (proles), the guarantee of chastity (fides), and the bond of permanent union (sacramentum)."³¹ As a created, natural means of procreation, Christian marriage rendered sexual intercourse licit. As a contract of fidelity, marriage gave husband and wife an equal power over the other's body, an equal right to demand that the other spouse avoid adultery, and an equal claim to the "service, in a certain measure, of sustaining each other's weakness, for the avoidance of illicit intercourse."³² As a "certain sacramental bond" marriage was a source and symbol of permanent union between Christians.³³ "[M]arriage bears a kind of sacred bond," Augustine wrote; "it can be dissolved in no way except by the death of one of the parties. The bond of marriage remains, even if offspring for which the marriage was entered upon, should not follow because of a clear case of sterility, so that it is not lawful for married

²⁹ AUGUSTINE, *CITY OF GOD*, XIV.10, 21, 22; XV.16; XIX.7, 14.

³⁰ John Chrysostom, *Homily 20 on Ephesians 5:22-33*, in ST. JOHN CHRYSOSTOM ON MARRIAGE AND FAMILY LIFE 43-44 (1986).

³¹ Augustine, *On Original Sin*, chap. 39, in 5 A SECOND LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 251 (Philip Schaff and Henry Wace eds., 2nd ser. repr. ed., 1952).

³² AUGUSTINE, *De bona conjugali*, in ST. AUGUSTINE: TREATISES ON MARRIAGE AND OTHER SUBJECTS chs. 4-7 (R.J. Deferrari ed., 1955).

³³ AUGUSTINE, *On Marriage and Concupiscence*, chs. 11, 19, in FATHERS LIBRARY, supra note 31, at 5:261, 271.

people who know they will not have any children to separate and to unite with others even for the sake of having children."³⁴

Procreation, fidelity, and sacrament: These were the three goods of marriage, in Augustine's view. They were why the institution of marriage was good. They were why participation in marriage was good. They were the goods and goals that a person could hope and expect to realize upon marrying. Augustine usually listed the goods of marriage in this order, giving first place to the good of procreation. At least twice, he underscored this priority by writing that "the institution of marriage exists for the sake of procreation; for this reason did our forebears enter into the union of marriage and lawfully take to themselves their wives, only because of the duty to beget children."³⁵

Augustine, however, did not call procreation the primary good of marriage, and the others secondary. He sometimes changed the order of his list of marital goods to "fidelity, procreation, and sacrament" -- passages that inspired later canonists and theologians to develop theories of "marital affection" as the primary marital good.³⁶ Even when he listed procreation as the first marital good, Augustine made clear that spousal fidelity and sacramental stability were essential for a marriage to be good -- and sufficient when married couples were childless or their children had left the household. And in doing so, he followed the classic authors in highlighting some of the benefits of marriage to the couple themselves:

[Marriage] does not seem to me to be a good solely because of the procreation of children, but also because of the natural companionship (societas) between the two sexes. Otherwise, we could not speak of marriage in the case of old people, especially if they had lost their children or had begotten none at all. But, in a good marriage, although one of many years, even if the ardor of youth has cooled between man and woman, the order of chastity still flourishes between husband and wife.... [T]here is observed that promise of respect and of services due to each other by either sex, even though both members weaken in health and become moribund, the chastity of souls rightly joined together continues the

³⁴ AUGUSTINE, *supra* note 32, ch. 15.

³⁵ AUGUSTINE, *De incompetentibus nuptiis*, *supra* note 32, II.12 at 116. See also AUGUSTINE, *Contra Faustum Manichaeum*, *supra*, ch. 19, n.26.

³⁶ AUGUSTINE, *Commentary on the Literal Meaning of Genesis*, *supra* note 32, bk. 2, ch. 7, n.12. See later medieval theories in John T. Noonan, Jr., *Marital Affection Among the Canonists*, 14 *STUDIA GRATIANA* 489 (1967); JEAN LECLERQ, *MONKS ON MARRIAGE: A TWELFTH CENTURY VIEW* 12-39, 72-81 (1982).

purser, the more it has been proved, the more secure, the more it has been calmed.³⁷

Augustine's account of the goods of marriage was more positive than most early Christian formulations. Many other Church Fathers, before and after him, not only treated marriage as less virtuous than chastity and celibacy, but also spoke of marriage and of sexual intercourse even within marriage in increasingly deprecatory and discouraging terms. Augustine's views ultimately also proved more enduring in the Western tradition. Both Catholic and Protestant writers took Augustine as their touchstone, and his formulation of the goods of marriage was subject to endless repetition and elaboration.

Roman Catholic Formulations

One of the most important transmissions and elaborations of St. Augustine's views of marital goods came during the Papal Revolution of ca. 1075-1300. This was the era when the Catholic clergy, led by Pope Gregory VII (1073-1085), threw off their royal and civil rulers and established the Roman Catholic Church as an autonomous legal and political corporation within Western Christendom. The Church's revolutionary rise to power triggered an enormous transformation of Western society, politics, and culture. The West was further transformed through the rediscovery and study of the ancient texts of Greek philosophy, Roman law, and Patristic theology. The first modern Western universities were established in Italy, France, and England, with their core faculties of law, theology, and medicine.³⁸

It was in this revolutionary context that the Church developed a systematic theology and law of marriage. From the twelfth century forward, the Church's doctrine of marriage was categorized, systematized, and refined, notably in Hugh of St. Victor's On the Sacraments of the Christian Faith (ca. 1143), Peter Lombard's Book of Sentences (1150), and Thomas Aquinas' Summa Theologiae (ca. 1265-1273) -- and the scores of thick glosses and commentaries on these texts published in subsequent centuries. From the twelfth century forward, the Church's canon law of marriage was also systematized, first in Gratian's Decretum (ca. 1140), then in a welter new papal and conciliar laws that eventually would form the Corpus Iuris Canonici and the backbone

³⁷ AUGUSTINE, *De bona conjugali*, supra note 32, ch. 3. See further JOHN J. HUGO, ST. AUGUSTINE ON NATURE, SEX, AND MARRIAGE 126ff. (1969); Augustine Regan, *The Perennial Value of Augustine's Theology of the Goods of Marriage*, 21 STUDIA MORALIA 351-378 (1983).

³⁸ See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

of a massive body of canon law jurisprudence. These core theological and legal texts of medieval Catholicism repeated St. Augustine's formulation of the marital goods of procreation, faith, and sacrament. Each of them gave Augustine's formulations a new accent and application -- medieval canonists and civilians often adducing Roman law texts in so doing, medieval theologians and philosophers often adducing Aristotle and the Stoics.

Thomas Aquinas's formulations of the three marital goods, which systematized more than a century of high medieval legal and theological thought, provides a good illustration of emerging Catholic teaching. Thomas wrote at great length on the theology and law of marriage. Especially important were his commentaries on Peter Lombard and Aristotle.³⁹ He included in the former commentary a long discussion of marital goods, in the latter a number of glosses on Aristotle's notions of marriage as an institution of nature and a prototype of friendship. These latter themes came in for further commentary in his Summa Contra Gentiles.⁴⁰

Thomas first dealt with objections that Augustine's list of faith, children, and sacramentality (fides, proles, et sacramentum) might be "insufficiently enumerated."⁴¹ After all, critics of the day argued, Augustine had not taken into sufficient account Aristotle's insights that marriage is not only for procreation but also for spouses to enjoy a common life, a common stock, and companionship. Maybe love, charity, and sacrifice between spouses would be a better understanding of a "marital good" than fides. Maybe proles should be considered a derivative good, since children are not essential to marriage, and many married folks do not have them. Maybe sacramentum is not really a marital good at all, since Augustine is referring to the indissolubility of marriage, and indissolubility does not seem to be an essential feature of a sacrament. Maybe marriage should also have a good of justice, since it involves the discharge of

³⁹ *Scriptum super Libros Sententiarum Petri Lombardiensis*, in 7.2 OPERA OMNIA SANCTI THOMAE AQUINATIS DOCTORIS ANGELICI (1882) [hereafter COMM. SENT.] This commentary recurs almost verbatim in the Supplement to Aquinas, *Summa Theologica*, qq. 49-68, in 5 ST. THOMAS AQUINAS, SUMMA THEOLOGICA: COMPLETE ENGLISH EDITION IN FIVE VOLUMES (Fathers of the English Dominican Province, trans. 1948) [hereafter S.T. SUPP.]. Thomas's commentary on Aristotle's *Ethics* and *Politics*, appear in his *Opera Omnia*, supra, volumes 47 and 48, but the *Commentary* on the *Ethics* breaks off at chapter 6, just before Aristotle's crucial passage on marital love quoted above. See discussion in THEODORE MACKIN, WHAT IS MARRIAGE?, 176-191 (1982); JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 143-154 (1998).

⁴⁰ THOMAS AQUINAS, SUMMA CONTRA GENTILES, Bk. III, Pt. II, ch. 122-126 (Vernon Bourke, trans., repr. ed., 1975) [hereafter S.C.G.].

⁴¹ Thomas generally renders the list in this order. See COMM. SENT., supra note 34, IV. Dist. 31, q. 1; S.T. SUPP., supra note 39, q. 49, art. 2.

marital rights and conjugal debts. Maybe the goods of marriage would be better if listed as those qualities of marriage that are "useful" rather than "virtuous."⁴²

Thomas defended Augustine's three goods as a sufficient and complete account of the essential goods of marriage: "The goods which justify marriage belong to the nature of marriage, which consequently needs them, not as extrinsic causes of its rectitude, but as causing in it that rectitude which belong to it by nature." "From the very fact that marriage is intended as an office or as a remedy [from sexual sin] it has the aspect of something useful and right; nevertheless both aspects belong to it from the fact that it has these goods by which it fulfills the office and affords a remedy to concupiscence."⁴³ "Matrimony is instituted both as an office of nature and as a sacrament of the church. As an office of nature it is directed by two things, like every other virtuous act. One of these is required on the part of the agent and is the intention of the due end, and thus the offspring (proles) is accounted a good of marriage; the other is required on the part of the act, which is good generically through being about a due matter; and thus we have faith (fides), where a man has intercourse with his wife and with no other woman. Besides this it has a certain goodness as a sacrament, and this is signified by the word sacrament (sacramentum)."⁴⁴

Thomas elaborated these three Augustinian goods of marriage, however, in a way that both integrated them more fully than Augustine had done and resolved more clearly the question of their priority. While his views were not fully developed, he argued effectively that marriage is a three-dimensional institution and that each of the marital goods anchors one of these three dimensions.

If marriage is viewed as a natural institution, Aquinas argued, procreation (proles) is the primary good. Building on both Augustine and Aristotle, Aquinas argued that man and woman are naturally inclined to come together for the sake of having children, and that nature teaches the licit means of doing so is through a voluntary act of marriage.⁴⁵ Procreation, however, means more than just conceiving children. It also means rearing and educating them for spiritual and temporal living -- a common Stoic

⁴² COMM. SENT., *supra* note 39, IV. Dist. 31, art. 2, q. 1; S.T. SUPP., *supra* note 39, q. 49, art. 2, obj. 1-7.

⁴³ S.T. SUPP., *supra* note 39, q. 49, art. 1; COMM. SENT., *supra* note 39, IV. Dist. 26, art. 1, 2.

⁴⁴ S.T. SUPP., *supra* note 34, q. 49, art. 2.

⁴⁵ COMM. SENT., *supra* note 39, IV. Dist. 26, q. 1 and Dist. 33, q. 1. See MACKIN, *supra* note 39, at 182-183; GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS VI: CHRISTIAN MORAL PRINCIPLES* 558-560 (1983).

sentiment. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife for the sake of their children. In this natural sense, the primary good of marriage is procreation; the secondary goods are faith and sacramental stability.⁴⁶

If marriage is viewed as a contractual association, faith (fides) is the primary good. Marital faith is not a spiritual faith, but a faith of justice, Aquinas argued. It means keeping faith, being faithful, holding faithfully to one's promises made in the contract of marriage. Marital faith requires, as Augustine had said, forgoing sexual intercourse with another and honoring the connubial debt (that is, yielding to the reasonable sexual advances of one's spouse). But marital faith also involves, as Aristotle and the Stoics had said, the commitment to be indissolubly united with one's spouse in body and mind, to be the "greatest of friends," to be willing to share fully in the person, property, lineage, and reputation -- indeed, in the "whole life" -- of one's spouse. It is to be and bear with each other in youth and in old age, in sickness and in health, in prosperity and adversity. Marital faith, in this richer understanding, is a good in itself, Aquinas insisted. It need not necessarily be expected or intended for the procreation of children; indeed, a marriage promise need not even be consummated to be valid and binding. If it is consummated faithfully, sexual intercourse is a good act in itself, even if procreation is a natural impossibility.⁴⁷ In this contractual sense, the primary good of marriage is faith (fides); the secondary goods are sacrament and procreation.⁴⁸

⁴⁶ COMM. SENT., *supra* note 39, IV. Dist. 26, q. 1; S.T. SUPP., *supra* note 39, q. 49, art. 2-3, 5; S.C.G., *supra* note 40, III.II.123.1-10; *ibid.*, 124.3. In S.T. SUPP. q. 49, art. 3, Thomas writes: "[F]aith and offspring may be considered as in their principles so that offspring denote the intention of having children and faith the duty of remaining faithful, and there can be no matrimony without these also, since they are caused in matrimony by the marriage compact itself, so that if anything contrary to these were expressed in the consent which makes a marriage, the marriage would be invalid. Taking faith and offspring in this sense, it is clear that offspring is the most essential thing in marriage, secondly faith, and thirdly sacrament; even as to man it is more essential to be in nature than to be in grace, although it is more excellent to be in grace." S.T. SUPP., *supra* note 39, q. 49, art. 3. See further DON S. BROWNING, ET AL., FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE 113-124 (1997); Don S. Browning, *Altruism and Christian Love*, 27(4) ZYGON 421-436 (1992).

⁴⁷ COMM. SENT., *supra* note 39, IV. Dist. 26, q. 2; 27, q. 1; 31, q. 1; 33, q. 1; 41, q. 1; S.T. SUPP., *supra* note 39, q. 42, 47, 49; S.C.G., *supra* note 40, III.II.123.3,4, 8; 124.4-5; 125.6; 126.1-6. See FINNIS, *supra* note 39, at 143-148.

⁴⁸ While Thomas spoke explicitly of ways in which *proles* and *sacramentum* could be viewed as primary and the other goods secondary, he never, so far as I have

If marriage is viewed as a spiritual institution, sacramentum is the primary good. Marriage between baptized Christians is a sacrament of grace, Aquinas argued citing Lombard -- much like the sacraments of baptism, eucharist, penance, and others. The temporal union of body, soul, and mind within the marital estate at once symbolizes the eternal union between Christ and the Church, and confers sanctifying grace upon the couple, their children, and the community. Viewed as a spiritual institution, Aquinas wrote, "sacrament is in every way the most important of the three marriage goods, since it belongs to marriage considered as a sacrament of grace; while the other two belong to it as an office of nature; and a perfection of grace is more excellent than a perfection of nature."⁴⁹

A sacramental marriage, once properly contracted between Christians in accordance with the laws of nature and of the church, is an indissoluble union, Aquinas insisted, a permanently open channel of grace. For marriage partakes of the quality that is symbolizes, namely, the indissoluble bond between Christ and the Church:

[S]ince the sacraments effect what they figure, it is to be believed that grace is conferred through this sacrament on the spouses, whereby they might belong to the union of Christ and the Church. And this is very necessary to them so that as they concern themselves with carnal and earthly matters, they do not become detached from Christ and the Church. Now since the union of husband and wife designates the union of Christ and the Church, the figure must correspond with that which it signifies. Now the union of Christ and the church is a union of one to another, and it is to last

found, spoke explicitly of *fides* as the primary end. But this a natural implication of his argument about the faith of the marriage contract, and the friendship of the marital institution. Thomas comes close to saying this in his argument that the marriage of Mary and Joseph was "perfect" even though not consummated: "Marriage or wedlock is said to be true by reason of its attaining its perfection. Now perfection of anything is two-fold. The perfection of a thing consists in its very form from which it receives its species; while the second perfection of a thing consists in its operation, by which in some way a thing attains its end. Now the form of matrimony consists in a certain inseparable union of souls, by which husband and wife are pledged by a bond of mutual affection that cannot be sundered. And the end of marriage is the begetting and upbringing of children, the first of which is attained by conjugal intercourse; the second by the other duties of husband and wife, by which they help one another in rearing their offspring. Thus we may say, as to the first perfection, that the marriage of the Virgin Mother of God and Joseph was absolutely true, because both consented to the nuptial bond but not to the bond of flesh." S.T. SUPP., *supra* note 39, q. 29, art. 2.

⁴⁹ COMM. SENT., *supra* note 39, IV. Dist. 31, q. 2; S.T. SUPP., *supra* note 39, q. 49, art. 3.

in perpetuity. For there is only one Church, ... and Christ will never be separated from His Church. As he himself says in the last chapter of Matthew, "Behold I am with you even unto the end of the world..." It follows necessarily then that a marriage, in so far as it is a sacrament of the Church, must be one holding to another indivisibly.⁵⁰

Aquinas' understanding of the good of sacramentum went well beyond the formulations of Augustine. Augustine called marriage a sacrament to demonstrate its symbolic stability. Aquinas called marriage a sacrament to demonstrate its spiritual efficacy. Augustine said that marriage, as a perennial symbol of Christ's bond to the church, should not be dissolved. Aquinas said that marriage, as a permanent channel of sacramental grace, could not be dissolved. Augustine called marriage a sacrament because it was indissoluble. Aquinas called marriage indissoluble because it was a sacrament.

This understanding of the good of sacramentum also elevated and integrated the goods of procreation and faith. On the one hand, the sacramental quality of Christian marriage helped to elevate the natural acts of marriage to spiritual significance. At minimum, it helped to remove the stigma of sin in sexual intercourse and to elevate the procreation and nurture of children into an act useful for the Church. More fully conceived, the sacramental quality effectively placed the natural institution of marriage into the hierarchy of church orders as something of an institution and instrument of grace -- though one clearly subordinate to the celibate clerical and monastic orders. On the other hand, the sacramental quality of Christian marriage helped to elevate the marriage contract into more than just a bargained-for exchange between two parties. At minimum, it rendered marriage a natural "adhesion contract" that was indissoluble: the terms of the marital bargain were already set by nature, and as a symbol of Christ's bond with the church, the marital bond was per force indissoluble. More fully conceived, the exchange of consent between the couple also signified an exchange of consent of the couple with God and the Church. In essence, the parties consented to bind themselves to each other and to God and the Church and thus to accept God's sacramental grace and the Church's spiritual nurture for their marriage.

Thomas Aquinas' elegant integration of the three goods of marriage found a growing team of champions in the fourteenth through sixteenth centuries. The fresh rise and extension of Thomism among such sixteenth-century Spanish luminaries as

⁵⁰ S.C.G., supra note 40, IV.78.

Francisco de Vitoria, Francisco Suarez, and Thomas Sanchez eventually helped to transmit Aquinas' understanding of marriage and its goods very widely, not only in Catholic and Protestant Europe, but also among the many new Latin American colonies.⁵¹

These views also entered the canon law and catechism of the Catholic Church. The Council of Trent (1545-1563) -- the most important council of the Catholic Church between the Fourth Lateran Council (1215) and the Second Vatican Council (1962-1965) -- took Thomas' and related medieval views of marriage as dispositive, and reflected them in a series of canons under the decree Tametsi of 1563.⁵² The Catechism, commissioned by the Council and issued in 1566, spoke directly to the goods of marriage. Citing the "general opinion of the theologians," the Catechism defined marriage, much as Aquinas had done -- "as a natural union, since it was not invented by man but instituted by nature" and "as a Sacrament, the efficacy of which transcends the order of nature." As a natural union, created by God in Paradise, marriage has "three reasons" (causae) for its existence -- (1) the "companionship" of husband and wife," (2) "an antidote to avoid sins of lust" and (3) "the desire of family, not so much, however, with a view to leave after us heirs to inherit our property and fortune, as to bring up children in the true faith and service of God." As a sacramental union, marriage "is far superior ... and aims at an incomparably higher end." "For as marriage, as a natural union, was instituted from the beginning to propagate the human race; so was the sacramental dignity subsequently conferred upon it in order that a people might be begotten and brought up for the service and worship of the true God and of Christ our Savior."⁵³

Marriage brings "three goods" (bona) to the couple, the 1566 Catechism states: (1) "offspring, if it is the Lord's will"; (2) faith, which is "a special, holy, and pure love"; and (3) "sacrament," now used in the Augustinian sense of stability and permanence. God confers those blessings where couples abide by his duties for marriage -- set out in the natural law and elaborated in the Bible. "It is the duty of the husband to treat his wife generously and honorably," to be "constantly occupied in some honest pursuit with a view to provide necessaries for his family and to avoid idleness, the root of almost every vice." Wives, in turn, must "never forget that next to God they are to

⁵¹ See THOMAS SANCHEZ, *DE SANCTO MATRIMONII SACRAMENTO* (1637). For other neo-Thomist writers of Spain and Portugal, see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS*, esp. 255-315 (1997).

⁵² Reprinted in H.J. SCHROEDER, *COUNCILS AND DECREES OF THE COUNCIL OF TRENT* (1941).

⁵³ *CATECHISM OF THE COUNCIL OF TRENT FOR PARISH PRIESTS*, 338-55 (John A. McHugh and Charles J. Callan trans., Tan Books and Publishers 1982).

love their husbands, to esteem them above all others, yielding to them in all things not inconsistent with Christian piety, a willing and ready obedience."

Both the nuance and the balance of these medieval and Tridentine formulations of marital goods were increasingly lost on the Church after the sixteenth century. By the later nineteenth century, many of the Church's doctrinal statements and legal texts treated procreation as the primary good, sometimes even the exclusive good, of marriage, and outlawed with increasing sternness contraception, abortion, and other actions that obstructed or compromised the good of procreation.⁵⁴ The good of marital faith, in the full sense that Thomas and others had described it, was reduced to a dispensable means to the end of procreation.⁵⁵ The good of the marital sacrament, in the rich integrating sense that medieval and Tridentine theology had defined it, was reduced to simple platitudes about grace and the Church's jurisdiction over its instruments.

The 1918 Code of Canon Law sealed this shift in perspective, stating repeatedly the priority of the good of procreation: "The primary good or end [finis] of marriage is procreation and the nurture of children; its secondary end is mutual help and the remedying of concupiscence." "Marital consent is an act of the will by which each party gives and accepts a perpetual and exclusive right over the body for acts which are of themselves suitable for the generation of children." And again: "[M]arriage is a permanent society for the procreation of children."⁵⁶

Pope Pius XI's encyclical letter Casti connubi (1930) underscored this shift in perspective: "Among the blessings of marriage, offspring holds the first place," Pius wrote, citing selectively from Augustine. "The conjugal act is of its very nature designed for the procreation of offspring" and any acts to the contrary are condemned.⁵⁷ Pius also confirmed a ruling of the Holy Office that condemned "certain modern writers," who gave priority to marital love and companionship in expression of new European personalist and phenomenological theories. Such views were considered anathema, for they "either deny that the primary end of marriage is the generation and education of children, or teach that the secondary ends are not essential to the primary

⁵⁴ See generally NOONAN, *supra* note 3; MACKIN, *supra* note 39, at 192-224.

⁵⁵ GRISEZ, *supra* note 45, 2:561.

⁵⁶ CODE OF CANON LAW (1918), Title VII, Canons 1013, 1081.2, 1082.1, reprinted in T. LINCOLN BOUSCAREN, ET AL., CANON LAW: A TEXT AND COMMENTARY 466, 565-67 (4th rev. ed. 1966).

⁵⁷ POPE PIUS XI, PAPAL TEACHINGS: MARRIAGE item 11, at 224-25 (M.J. Byrnes trans., 1963).

end."⁵⁸ Marital love must be viewed as a means to the end (or good) of procreation, not as an end in itself.

At the end of Casti Connubi, however, Pius XI offered several pastoral sentiments about marital love that would help to return the Church to the more nuanced position of the Council of Trent, and indeed to go beyond it: "The action in the home is not confined to mutual help," Pius wrote; "it must have as its higher and indeed its chief objective that of shaping and perfecting the interior life of husband and wife. Their life partnership must help them to increase daily in the practice of virtue, and above all to grow in the true love of God and their neighbor...."⁵⁹ And then, more generously still: "This mutual interior formation of husband and wife, this persevering endeavor to bring each other to the state of perfection, may in a true sense be called, as the Roman Catechism calls it, the primary cause and reason of marriage, so long as marriage is considered not in the stricter sense as the institution designed for the creation and education of children, but in the wider sense as a complete and intimate life-partnership and association."⁶⁰

Pius XI's pastoral aside eventually became a doctrinal priority. The Second Vatican Council (1962-1965), after anguished and angry debate, returned to the fuller formulation of the goods of fides, proles, et sacramentum that had been adumbrated by Augustine and elaborated by Thomas and the Tridentine reformers. In its pastoral constitution, Gaudium et spes, the Council declared: "God himself is the author of matrimony, endowed as it is with various goods (bona) and ends (finis). All of these have a very decisive bearing on the continuation of the human race, on the personal development and eternal destiny of the individual members of a family, and on the dignity, stability, peace, and prosperity of the family itself and human society as a whole."⁶¹

The Second Vatican Council amplified this latter concern for the role of the family within broader society, elaborating, as no

⁵⁸ Quoted and critically discussed in Lisa Sowle Cahill, *Marriage: Institution, Relationship, Sacrament*, in ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT 103, 108 (John A. Coleman ed., 1991). Cahill elaborates her reconstructive critique in LISA SOWLE CAHILL, *SEX, GENDER, AND CHRISTIAN ETHICS* (1996). The most influential of these European writers, whose work was censored, was HERBERT DOMS, *VOM SINN UND ZWECK DER EHE* (Breslau: Ostdeutsche Verlagsanstalt 1935), translated (imprecisely) as HERBERT DOMS, *THE MEANING OF MARRIAGE* (1939).

⁵⁹ PAPAL TEACHINGS: MARRIAGE, *supra* note 57, item 23, at 231.

⁶⁰ *Id.* See also MACKIN, *supra* note 39, at 215-218.

⁶¹ Second Vatican Council, *Gaudium et Spes*, in THE DOCUMENTS OF VATICAN II para. 48, at 250 (Walter M. Abbott and Joseph Gallagher eds. and trans., 1966). The Council cites, *inter alia*, to the passages from Augustine, Aquinas, and *Casti connubi* quoted above. *Gaudium et Spes*, *supra*, n. 154. The translation renders the phrase "bona et fines" as "benefits and purposes"; I have rendered it "goods" and "ends".

Church Council before had done, the social and political goods of marriage. "The well being of ... human and Christian society is intimately linked with the healthy condition of that community produced by marriage and family."⁶² "The family is a kind of school of deeper humanity," holding out a model of love, charity, stewardship, authority, dignity, faithfulness, education, nurture, discipline, and care for each new generation of children to learn, and for other institutions to emulate. "Thus the family is the foundation of society. In it the various generations come together and help one another to grow wiser and to harmonize personal rights with the other requirements of social life. All those, therefore, who exercise influence over communities and social groups should work effectively for the welfare of marriage and the family. Public authority should regard it as a sacred duty to recognize, protect, and promote their authentic nature, to shield public morality, and to favor the prosperity of domestic life."⁶³ In Lumen et Gentium, the Council pronounced famously: "The family is, so to speak, the domestic Church." The parents are "the first preachers" who nurture the faith not only of their children but of broader society as well.⁶⁴

Gaudium et spes was even more expansive in its treatment of marital love and affection as indispensable to the "well being of the individual person."⁶⁵ In Vatican II's formulation, marital love was no longer simply a form and function of marital faith as was traditional. It was the good that permeated and integrated all three of the classic goods of faith, children, and sacrament:

The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is rooted in the marriage covenant of irrevocable personal consent.... [A] man and a woman, who by the marriage covenant of conjugal love "are no longer two but one flesh" (Mt. 19:6), render mutual help and service to each other through an intimate union of their persons and of their actions. Through this union they experience the meaning of their oneness and attain to it with growing perfection day by day. As a mutual gift of two persons, this intimate union, as well as the good of children, imposes total fidelity on the spouses, and argues for an unbreakable oneness between them. Christ the Lord abundantly blessed this many-faceted love, welling up as it does from the fountain of divine

⁶² *Gaudium et Spes*, *supra* note 61, para. 47.

⁶³ *Gaudium et Spes*, *supra* note 61, para. 48, 49, 52.

⁶⁴ Second Vatican Council, *Lumen et Gentium*, in DOCUMENTS OF VATICAN II para. 11, at 29 (Walter M. Abbott and Joseph Gallagher eds. and trans., 1966).

⁶⁵ *Gaudium et spes*, *supra* note 61, para. 47.

love and structured as it is on the model of His union with the Church. For as God of old made himself present to His people through a covenant of love and fidelity, so now the Savior of men and the Spouse of the Church comes into the lives of married Christians through the sacrament of matrimony.⁶⁶

Marital love involves "the good of the whole person," Gaudium et spes continued. It "ennobles" those "special ingredients and signs of the friendship distinctive of marriage." It impels spouses to make "a free and mutual gift of themselves, a gift proving itself by gentle affection and by deed." It expresses in sexual intercourse, which is "good," "noble and worthy" regardless of any procreative promise, intent, outcome. It is structured through the "equal personal dignity of husband and wife, a dignity acknowledged by mutual and total love." Marital love brings to the couple "the needed cultural, psychological, and social renewal" that they need daily to survive, flourish, and indeed to perfect themselves.⁶⁷

In an Appendix to Gaudium et spes, the Council again underscored that marriage was "a covenant of love" formed voluntarily. "Marital consent of its essence intends the unity of this covenant, its indissolubility and the love that is devoted to the service of life. The stronger and purer the marital love, the more strongly and perseveringly will the spouses accept and realize marriage's specific traits and its essential goods.... No one is aware of how seriously necessary it is that love be fully present in the act of consent, and increase throughout the married life. For love will fulfill, and cause to be fulfilled what the consent has said and has promised."⁶⁸

A number of subsequent doctrinal and canonical documents have repeated Vatican II's integrative theory of the three goods of the covenant of marriage.⁶⁹ But several recent Church statements, particularly on abortion and contraception, have emphasized anew the marital good of procreation.⁷⁰ In his encyclical Humane Vitae

⁶⁶ *Gaudium et spes*, *supra* note 61, para. 48.

⁶⁷ *Gaudium et spes*, *supra* note 61, para. 49.

⁶⁸ *Gaudium et spes*, *supra* note 61, app., quoted in MACKIN, *supra* note 39, at 261.

⁶⁹ See, e.g., CODE OF CANON LAW (1983), Title VII, Canon 1055: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ to the dignity of a sacrament." See also John Paul II, *Familiaris consortio*, 74 AAS 92 (1982): 92, OR, 21-28 December 1981, 3 and discussion in POPE JOHN PAUL II AND THE FAMILY (Michael J. Wrenn, ed., 1983).

⁷⁰ For various interpretations, see JANET E. SMITH, HUMANAE VITAE: A GENERATION LATER 267-295 (1991); WHY HUMANAE VITAE WAS RIGHT: A READER (Janet E. Smith,

(1968), for example, Pope Paul VI speaks favorably of "total, faithful, and exclusive" conjugal love and mutual self-giving and self-perfection in and through marriage.⁷¹ But these familiar refrains from Vatican II seem almost drowned out in the robust new orchestrations on procreation. Marital union and procreation, are "inseparable," *Humanae Vitae* reads, and it "is necessary that each matrimonial function (matrimonii usus) remain ordained in itself to the procreating of human life." "[C]onjugal love requires that spouses be fully aware of their mission (manus) of responsible parenthood." Through marital union "the spouses perfect each other so that they might share with God the task of procreating and educating new living beings."⁷² There follows a series of pronouncements against abortion, contraception, sterilization, and other interruptions of the natural "generative" and "procreative process." Critics have viewed *Humanae Vitae* and its ample progeny as a retreat from the integrative theory of marital love developed by Vatican II. In particular, they see in these documents a tacit reassertion of an instrumentalist view of marriage and of the primacy of the good of procreation over that of marital faith and love -- a trend underscored, in their view, by the Church's many recent pronouncements against committed homosexual unions.⁷³ Defenders view this language as further confirmation of the Church's new understanding of the covenant of marriage as a basic or intrinsic human good ordained by God for the mutual blessing of the couple, their children, and the broader communities of which they are a part.⁷⁴

Protestant Formulations

The recent emphasis among Roman Catholics on love and companionship within the covenant of marriage and on the individual and social utility of marriage was a dominant theme of Protestant theology and law from the very beginning. The Protestant Reformation was inaugurated by Martin Luther of Wittenberg (1483-1546), in his famous posting of the Ninety-Five Theses in 1517 and his burning of the canon law and confessional books in 1520. The Reformation, however, was the culmination of more than two centuries of dissent within the medieval Church

ed., 1993); GRISEZ, *supra* note 45, at 561-584; GERMAIN GRISEZ, ET AL., *THE TEACHINGS OF HUMANAЕ VITAE: A DEFENSE* (1988).

⁷¹ Paul VI, *Humane Vitae*, 8, 9, 60 AAS 485-486 (1968), PE, 277, following translation from Latin edition in SMITH, *supra* note 70, 269-295.

⁷² *Ibid.*, 8, 11, 12.

⁷³ See, e.g., MARK D. JORDNA, *THE SILENCE OF SODOM: HOMOSEXUALITY IN MODERN CATHOLICISM* (2000).

⁷⁴ See sources in notes 3, 4, 19, and 37.

against some of its sacramental theology, liturgical practice, canon law, and ecclesiastical administration. The Reformation ultimately erupted in various quarters of Western Europe in the early sixteenth century, settling into Lutheran, Calvinist, Anglican, and Free Church branches.

The leading sixteenth-century Protestant reformers -- Martin Luther and Philip Melanchthon, John Calvin and Martin Bucer, Thomas Cranmer and Heinrich Bullinger -- all wrote at length on marriage. In their view, God had created and ordered marriage to achieve three purposes (causae) or goals (fines): (1) the mutual love and support of husband and wife; (2) the mutual procreation and nurture of children; and (3) the mutual protection of both spouses from sexual sin -- usually put that in that order of priority.⁷⁵

This early Protestant formula of the marital goods of love, procreation, and protection was no invention of the sixteenth century. This trilogy had already appeared more than a millennium before in Roman law and in Isidore of Seville's early seventh century Etymologies (though Isidore made procreation the first good).⁷⁶ By the sixteenth century, it had also become a standard formula among Catholic canonists and theologians to describe the purposes or reasons for marrying (causae), as opposed to the inherent goods (bona) of marriage itself. Most early Protestants rejected this medieval distinction between the purposes and goods of marriage. From God's point of view, they argued, marriage has built-in purposes that God wishes to see achieved among his creatures. From humanity's point of view, these are the created goods that we need to realize. To make fine distinctions between the goods and purposes, or causes and effects of marriage, most early Protestants believed, is ultimately to engage in idle casuistry. For most Protestants, love, procreation, and protection was the essential formula.

This formula of love, procreation, and protection overlapped with Augustine's formula of faith, children and sacramentality, but amended it in critical ways.

First, like Augustine, evangelical reformers emphasized the good of marital faithfulness (fides). Parties were to be faithful to their marital promises, and loyal to their spouses. A marriage once properly contracted was presumptively binding on both parties for life. Infidelity to the marriage contract--whether sexual,

⁷⁵ See sources in FSC, *supra* note 6, at 96-108, 143-50. See also the interplay of the theology and practice of marital and familial love copiously documented in STEVEN E. OZMENT, *ANCESTORS: THE REMAKING OF THE PREMODERN EUROPEAN FAMILY* (2001); ID., *FLESH AND SPIRIT: PRIVATE LIFE IN EARLY MODERN EUROPE* (1999); ID., *WHEN FATHERS RULED: FAMILY LIFE IN REFORMATION EUROPE* (1983).

⁷⁶ ISIDORE OF SEVILLE, *ETYMOLOGIAE*, 9.7.27, quoted in GRISEZ, *supra* note 45, 2:558ff.

physical, spiritual, or emotional--was a sin against this good of fidelity. The breakup of a marriage was also a sin against this good, even if sometimes justified as the lesser of two evils.

Unlike Augustine, however, the reformers often cast this good of fides in overt terms of marital love, intimacy, friendship, and companionship--adducing passages from Aristotle, the Roman Stoics, and Thomas Aquinas to drive home their point.⁷⁷ Luther was among the strongest such proponents of the good of marital love. "Over and above all [other loves] is marital love," he wrote. Marital love drives husband and wife to say to each other, "'It is you whom I want, not what is yours. I want neither your silver nor your gold. I want neither. I want only you. I want you in your entirety, or nor at all.'" All other kinds of love seek something other than the loved one: this kind wants only to have the beloved's own self completely. If Adam had not fallen, the love of bride and groom would have been the loveliest thing."⁷⁸ "There's more to [marriage] than a union of the flesh," Luther wrote, although he considered sexual intimacy and warmth to be essential to the flourishing of marriage.⁷⁹ "There must [also] be harmony with respect to patterns of life and ways of thinking."⁸⁰

The chief virtue of marriage [is] that spouses can rely upon each other and with confidence entrust everything they have on earth to each other, so that it is as safe with one's spouse as with oneself.... God's Word is actually inscribed on one's spouse. When a man looks at his wife as if she were the only woman on earth, and when a woman looks at her husband if he were the only man on earth; yes, if no king or queen, not even the sun itself sparkles any more brightly and lights up your eyes more than your own husband or wife, then right there you are face to face with God speaking. God promises to you your wife or husband, actually gives your spouse to you, saying: "The man shall be yours; the woman shall be yours. I am pleased beyond measure! Creatures earthly and heavenly are jumping for joy." For there is no jewelry more precious than God's Word; through it you come to regard your spouse as a gift of God and, as long as you do that, you will have no regrets.⁸¹

⁷⁷ See sources in FSC, supra note 6, at 96-108, 143-50.

⁷⁸ 2 D. MARTIN LUTHERS WERKE: KRITISCHE GESAMTAUSGABE 167 (1883-1987) [hereafter WA]. See further WA 13:11; WA 17/2:350ff.

⁷⁹ WA, supra note 78, Tidschreden, No. 3530. See further OLAVI LAEHTENMAEKI, SEXUS UND EHE BEI LUTHER (1955).

⁸⁰ WA, supra note 78, Tidschreden, No. 5525.

⁸¹ WA, supra note 78, 34:52.5-9, 12-21.

Luther did not press these warm sentiments to the point of denying the traditional headship of husband to wife and the traditional leadership of the paterfamilias within the marital household. Luther had no modern egalitarian theory of marriage. But Luther also did not betray these warm sentiments to the point of becoming the grim prophet of patriarchy, paternalism, and procreation uber alles that some modern critics make him out to be. For Luther, love was a necessary and sufficient good of marriage. He supported marriages between loving couples, even those between young men and older women beyond child-bearing years or between couples who knew full well that one party was sterile or infertile.⁸² He stressed repeatedly that husband and wife were spiritual, intellectual, and emotional "partners," each to have regard and respect for the strengths of the other. He called his own wife Katherine respectfully "Mr. Kathy" and said more than once of her: "I am an inferior lord, she the superior; I am Aaron, she is my Moses."⁸³ He repeatedly told husbands and wives alike to tend to each other's spiritual, emotional, and sexual needs and to share in all aspects of child-rearing and household maintenance—from changing their children's diapers to helping their children establish their own new homes when they had grown up.⁸⁴

Several other Protestant reformers wrote with equal flourish about the good of marital love and fidelity. The Zurich reformer, Heinrich Bullinger, for example, who was influential both on the Continent and in England, wrote similarly that God planted in a married man and woman "the love, the heart, the inclination and natural affection that is right to have with the other.... Marital love ought to be (next unto God) above all loves," with couples rendering to each other "the most excellent and unstinting service, diligence and earnest labor, ... one doing for another, one loving, depending, helping, and forbearing another, always rejoicing and suffering one with another."⁸⁵ The Strasbourg reformer Martin Bucer, who was also influential on both sides of the English Channel, wrote effusively about marital love. Marital couples, he wrote, must be

united not only in body but in mind also, with such an affection as none may be dearer and more ardent among all the relations of mankind, nor of more efficacy to the mutual offices of love, and of loyalty. They must communicate and consent in all things both divine and

⁸² WA, supra note 78, Tidschreden, No. 5212.

⁸³ See sources and discussion in OZMENT, ANCESTORS, SUPRA NOTE, 75, ___.

⁸⁴ 45 LUTHER'S WORKS 39ff. (Jarsolav Pelikan et al., trans. and ed., 1955-1968) [hereafter LW].

⁸⁵ HEINRICH BULLINGER, THE CHRISTEN STATE OF MARRIAGE folios iii.b-iiii (Myles Coverdale, trans. 1541) (spelling modernized).

human, which have any moment to well and happy living. The wife must honor and obey her husband, as the Church honors and obeys Christ her head. The husband must love and cherish his wife, as Christ his Church. Thus they must be to each other, if they will be true man and wife in the sight of God, whom certainly churches must follow in their judgment. Now the proper and ultimate end of marriage is not copulation, or children, for then there was no true matrimony between Joseph and Mary the mother of Christ, nor between many holy persons more, but the full and proper and main end of marriage is the communicating of all duties, both divine and humane, each to the other, with utmost benevolence and affection.⁸⁶

Second, like Augustine, the Protestant reformers emphasized the good of children (proles), if such a blessing were naturally possible and divinely granted. But the reformers amended Augustine's account with Aquinas' gloss that the good of procreation included the Christian nurture and education of children, a responsibility that fell on husband and wife alike.⁸⁷ They underscored this amendment by insisting on the creation of schools for the religious and civic education of all children, and by producing a welter of catechisms, textbooks, and household manuals to assist in the same.⁸⁸

The Protestant reformers did sometimes describe this good of procreation in strong and traditional terms. They also sometimes referred misogynistically to women's "private parts" as simple relief stations for randy husbands and simple vessels for bearing children.⁸⁹ But these inflammatory passages must be balanced against those elegies on marital love already quoted, as well as the many softer and more typical descriptions of the good of procreation. "[T]he true definition of marriage," Luther put it, "is a divine and legitimate union of a husband and woman in the hope of offspring or at least the avoidance of fornication and sin for the sake of the glory of God. The greatest end is to obey God and avoid sin, to invoke God, pray, love, educate offspring to the glory of God, live with one's wife in fear of the Lord, and bear the cross. And if no offspring result, then you, wife, should still live content and avoid wandering desires."⁹⁰ Luther wished

⁸⁶ Martin Bucer, *De Regno Christi* (1550), bk. II, chap. 38, in MELANCHTHON AND BUCER (Wilhelm Pauck, ed. 1969).

⁸⁷ WA, supra note 78, Tidschreden, No. 5513.

⁸⁸ See JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION*, chap. 7 (2001).

⁸⁹ WA, supra note 78, Tidschreden, No. 3921.

⁹⁰ WA supra note 78, 2:168-9, 43:310.

for all married couples the joy of having children, not only for their own sakes but for the sake of God as well. Indeed, for a pious couple, procreation was effectively a work of creation and salvation at once, Luther believed. Child-rearing, he wrote, "is the noblest and most precious work, because to God there can be nothing dearer than the salvation of souls.... [Y]ou can see how rich the estate of marriage is in good works. God has entrusted to its bosom souls begotten of its own body on whom it can lavish all manner of Christian works. Most certainly, father and mother are apostles, bishops, [and] priests to their children, for it is they who make them acquainted with the gospel. See therefore how good and great is God's work and ordinance."⁹¹

Third, unlike Augustine, the early Protestant reformers emphasized protection from sexual sin as a good in itself, not just a function of fides. Since the fall into sin, humankind has become totally depraved, the reformers insisted. Lust has pervaded the conscience of every person. Participation in marriage has become an absolute necessity. For without marriage, the person's distorted sexuality becomes a force capable of overthrowing the most devout conscience. A person is enticed by nature to prostitution, masturbation, voyeurism, and other sexual sins. The "good gift" of marriage, Luther wrote, should thus be declined only by those who have received God's gift of continence. "Such persons are rare, not one in a thousand, for they are a special miracle of God." The Apostle Paul has identified this group as the permanently impotent and the eunuchs; few others can claim such a unique gift.⁹²

This understanding of the protective good of marriage undergirded the reformers' bitter attack on the traditional canon law rules of mandatory celibacy for clerics and monks.⁹³ To require celibacy of clerics, monks, and nuns, the reformers believed, was beyond the authority of the church and ultimately a source of great sin. Celibacy was for God to give, not for the church to require. It was for each individual, not for the church, to decide whether he or she had received this gift. By demanding monastic vows of chastity and clerical vows of celibacy, the church was seen to be intruding on Christian freedom and violating Scripture, nature, and common sense.⁹⁴ By institutionalizing and encouraging celibacy the church was seen to prey on the immature and the uncertain. By holding out food,

⁹¹ LW, *supra* note 84, 45:46.

⁹² LW, *supra* note 84, 45:18-22; *see also* LW, *supra*, 28:9-12, 27-31.

⁹³ LW, *supra* note 84, 44:243-400, 46:139ff. and more generally BERNARD LOHSE, *MOENCHTUM UND REFORMATION: LUTHERS AUFEINANDERSETZUNG MIT DEM MOENCHSIDEAL DES MITTELALTERS* (1963).

⁹⁴ This is the heart of Luther's 1521 diatribe against monastic vows in LW, *supra* note 84, 44:243, 46:139.

shelter, security, and opportunity, the monasteries enticed poor and needy parents to condemn their children to celibate monasticism. Mandatory celibacy, Luther taught, was hardly a prerequisite to true service of God. Instead it led to "great whoredom and all manner of fleshly impurity and ... hearts filled with thoughts of women day and night."⁹⁵ For the consciences of Christians and non-Christians alike are infused with lust, and a life of celibacy and monasticism only heightens the temptation.

Furthermore, to impute superior spirituality and holier virtue to the celibate contemplative life was, for the reformers, contradicted by the Bible. The Bible, as the Protestant reformers understood it, teaches that each person must perform his or her calling with the gifts that God provides. The gifts of continence and contemplation are but two among many, and are by no means superior to the gifts of marriage and child-rearing. Each calling plays an equally important, holy, and virtuous role in the drama of redemption, and its fulfillment is a service to God. Luther concurred with the Apostle Paul that the celibate person "may better be able to preach and care for God's word." But, he immediately added: "It is God's word and the preaching which makes celibacy--such as that of Christ and of Paul--better than the estate of marriage. In itself, however, the celibate life is far inferior."⁹⁶

This understanding of the good of marriage as a protection against sexual sin also undergirded the reformers' repeated counsel that widows and widowers, as well as divorcees, could and sometimes should remarry, after a suitable period of grieving. Medieval writers, building on St. Paul and some of the Church Fathers, had discouraged all such remarriages, arguing that these were forms of "digamy" or "serial polygamy." The reformers taught the opposite. A grieving and lonely widow, widower, or divorcee often benefits from a new spouse, especially if he or she still has children to care for. Even more important, this now-single party who has known the pleasures and warmth of sexual intimacy will be doubly tempted to sexual sin in its sudden absence. St. Paul's instruction that "it is better to marry than to burn," becomes doubly imperative for them.⁹⁷

Fourth, unlike Augustine, Protestants gave no place to the marital good of sacramentum -- either in the Augustinian sense of symbolic stability, or in the medieval Catholic sense of a permanent channel of sanctifying grace. For most early Protestants, marriage was neither a sacrament of the Church on the order of baptism or the eucharist, nor a permanent union

⁹⁵ WA, supra note 78, 28:10.

⁹⁶ LW, supra note 84, 45:47.

⁹⁷ WA, supra note 78, Tidschreden, No. 3609B.

dissolvable only upon death of one of the parties. To be sure, Protestants, like Catholics, believed that marriages should be stable and presumptively indissoluble. But this presumption could be overcome if one of the other marital goods were frustrated. If there was a breach of marital love by one of the parties -- by reason of adultery, desertion, or cruelty -- the marriage was broken. The innocent spouse who could not forgive this breach could sue for divorce and remarry. If there was a failure of procreation -- by reason of sterility, incapacity, or disease discovered shortly after the wedding -- the marriage was also broken. Those spouses who could not reconcile themselves to this condition could seek an annulment and at least the healthy spouse could marry another. And if there was a failure of protection from sin -- by reason of frigidity, separation, or cruelty -- the marriage was again broken. If the parties could not be reconciled to regular cohabitation and consortium, they could divorce and seek another marriage.

Most early Protestants, especially Lutherans and Calvinists, thus tended to view the goods of marriage in more teleological terms than their Catholic brethren. Marriage was a means to love, to children, and to protection. Where such goods failed, the marriage failed, and such goods should be sought in a second marriage. Martin Bucer, the strong Strasbourg reformer who influenced Lutherans, Calvinists, and Anglicans alike, put the matter more flatly than most of his co-religionists: "A proper and useful" marriage, Bucer wrote, has "four necessary properties": "1. That the [couple] should live together.... 2. That they should love one another in the height of dearness.... 3. That the husband bear himself as the head and preserver of the wife instructing her to all godliness and integrity of life; that the wife also be to her husband a help, according to her place, especially furthering him in the true worship of God, and next in all the occasions of civil life. And 4. That they not defraud each other of conjugal benevolence." Marriages that exhibit these four properties must be maintained and celebrated. But even "where only one [property] be wanting in both or either party ... it cannot then be said that the covenant of matrimony holds good between such." To perpetuate the formal structure of marriage after a necessary property is lost, Bucer argued, is not only a destructive custom, but an unbiblical practice. "[T]he Lord did not only permit, but also expressly and earnestly commanded his people, by whom he would that all holiness and faith of the marriage covenant be observed, that he could not induce his mind to love his wife with a true conjugal love, might dismiss her that she might marry to another" who is more meet and good.⁹⁸

⁹⁸ BUCER, supra note 86, bk. 2, chs. 26, 38, 39.

This more teleological view of marriage is also reflected in the tendency of early Protestants to introduce alternative formulations of the goods of marriage than those inherited from the tradition. Aquinas and other medieval writers had considered, but then rejected, the notion that marriage might have additional or alternative goods beyond the Augustinian goods of faith, children, and sacramentality. The Protestant reformers showed no such reticence. They held out all manner of personal, social, and political goods that marriage could offer -- in part, on the basis of a fresh reading of biblical and classical sources, in part in support of their relentless arguments against celibacy and monasticism.

One common Protestant formulation was that marriage had civil and spiritual "uses" in this life -- a variant on the Protestant theory of the "uses of the moral law."⁹⁹ Both Luther and Calvin sometimes spoke in these terms. On the one hand, they argued, marriage has general civil uses for all persons, regardless of their faith. Marriage deters vice by furnishing preferred options to prostitution, promiscuity, pornography, and other forms of sexual pathos. Marriage cultivates virtue by offering love, care, and nurture to its members, and holding out a model of charity, education, and sacrifice to the broader community. Marriage enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare. Marriage enhances the life of the child, by providing it with a chrysalis of nurture and love, with a highly individualized form of socialization and education. On the other hand, marriage has specific spiritual uses for believers -- ways of sustaining and strengthening them in the Christian faith. The love of wife and husband is among the strongest symbols Christians can experience of Yahweh's love for the elect, of Christ's love for the Church. The sacrifices one makes for spouse and child can be among the best expressions of Christian charity and agape. For Christian believers, Calvin wrote, marriage can thus be "a sacred bond," "a holy fellowship," a "divine partnership," "a heavenly calling," "the fountainhead of life," "the holiest kind of company in all the world," "the principal and most sacred ... of all the offices pertaining to human society." "God reigns in a little household, even one in dire poverty, when the husband and the wife dedicate themselves to their duties to each other. Here there is a holiness greater and nearer the kingdom of God than there is even in a cloister."¹⁰⁰

⁹⁹ See sources and discussion in John Witte, Jr., *The Three Uses of Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433-65 (1994).

¹⁰⁰ See sources in FSC, *supra* note 6, at 109-110.

Other Protestants emphasized not only the civil and spiritual uses of marriage, but also its social and political goods. Building especially on Aristotelian and Roman law antecedents, Lutheran, Calvinist, and Anglican writers alike treated marriage as the created, natural foundation of civil society and political authority.

Philip Melanchthon, for example, Luther's eminent co-worker in Wittenberg, opened a long discussion of political authority thus:

The earthly life has orders (Stände) and works (Werke) which serve to keep the human race, and are ordained by God with certain limits and means. By this order we should know that this human nature is not created without the distinct counsel of God, and that God in this way lets his goodness shine on us to sustain and provide for us.

Matrimony is first, for God does not want human nature simply to run its course as cattle do. Therefore God ordained marriage (Gen. 2; Matt. 19; I Cor. 7) as an eternal, inseparable fellowship of one husband and one wife.... [M]atrimony is a very lovely, beautiful fellowship and church of God, if two people in true faith and obedience toward God cheerfully live together, together invoke God, and rear children in the knowledge of God and virtue.¹⁰¹

Marriage is the "mother of all earthly laws," Luther concurred, and the source from which the church, the state, and other earthly institutions flowed. "God has most richly blessed this estate above all others, and in addition, has bestowed on it and wrapped up in it everything in the world, to the end that this estate might be well and richly provided for. Married life therefore is no jest or presumption; it is an excellent thing and a matter of divine seriousness."¹⁰²

Elsewhere, Melanchthon and Luther emphasized that marriage was one of the three great estates (drei Stände), along with the church and the state, that God had appointed for the governance of the earthly kingdom. Hausvater, Gottesvater, and Landesvater; paterfamilias, patertheologicus, and paterpoliticus -- these were the three natural estates through which God revealed himself and

¹⁰¹ PHILIP MELANCHTHON, *LOCI COMMUNES RERUM THEOLOGICARUM* (1555), chap. 36, translated in *MELANCHTHON ON CHRISTIAN DOCTRINE* 323 (Clyde Manschreck trans., 1965).

¹⁰² MARTIN LUTHER, *THE LARGE CATECHISM* (1529), reprinted in *TRIGLOT CONCORDIA: THE SYMBOLIC BOOKS OF THE EV. LUTHERAN CHURCH* 565-773, at 639-641 (1921); WA, supra note 78, WA 30/1:152.

reflected his authority and law in the world. The estate of marriage was to teach all persons, particularly children, Christian values, morals, and mores. It was to exemplify for a sinful society a community of love and cooperation, meditation and discussion, song and prayer. It was to hold out for the church and the state an example of firm but benign parental discipline, rule, and authority. It was to take in and care for wayfarers, widows, and destitute persons -- a responsibility previously assumed largely by monasteries and cloisters. Marriage was thus as indispensable an agent in God's redemption plan as the church. It was as indispensable an agent of social order and communal cohesion as the state.¹⁰³

The best example of such an idealized marital household was the local parsonage, the home of the married Protestant minister. The Protestant reformers had already argued that ministers, like everyone else, should be married -- lest they be tempted by sexual sin, deprived of the joys of marital love, and precluded from the great act of divine and human creativity in having children. Such arguments, coupled with a theology of the priesthood of all believers and the equality of clergy and laity, proved strong enough for the early reformers to institute and encourage clerical marriage, even in the face of a millennium of canon law to the contrary. Here was an even stronger argument for clerical marriage. The clergy were to be exemplars of marriage. The clerical household was to be a source and model for the right order and government of the local church, state, and broader community.

Johannes Althusius (1557-1638), a distinguished Calvinist jurist and political theorist, drew on sundry Christian and classical sources to construct a comprehensive covenantal theory of the state and society -- again with marriage at its foundation.¹⁰⁴ "Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them," Althusius wrote, citing Aristotle. "The goal of political man is a holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful."¹⁰⁵ All such political associations are formed by "individual men covenanting among themselves to communicate whatever is necessary and useful for organizing and living in private life."¹⁰⁶ At the base of every such association is marriage, which is a "natural,

¹⁰³ See sources in FSC, SUPRA NOTE 6, ch. 2. See Luther's and Melancthon's exposition of the "three estates" theory in WITTE, supra note 88, chaps. 3-4.

¹⁰⁴ JOHANNES ALTHUSIUS, POLITICA: METHODICE DIGESTA ATQUE EXEMPLIS SACRIS ET PROFANIS ILLUSTRATA (Carl J. Friedrich ed., Harvard University Press, 3d. rev. ed., repr. ed., 1932, with partial translation by Frederick S. Carney, Liberty Fund, 1995) (1614).

¹⁰⁵ *Id.* at I.1-3.

¹⁰⁶ *Id.* at II.2

necessary, economic, and domestic society that is contracted permanently.... Therefore it is rightly called the most intense society, friendship, relationship, and union, the seedbed of every other symbiotic association."¹⁰⁷

Althusius went on to elaborate the relations and functions of husband and wife, adducing scores of classical, biblical, and early Christian sources to support the early modern ideal of an hierarchical household under the authority of the paterfamilias:

Husband and wife, who are bound to each other, communicate the advantages and responsibilities of married life. The director and governor of the common affairs of the marital association is the husband. The wife and family are obedient, and do what he commands. The advantages and responsibilities are either proper to one of the spouses, or common to both. Proper advantages and duties are either those the husband communicates to his wife, or those the wife communicates to her husband. The husband communicates to his wife his name, family, reputation, station in life, and economic condition. He also provides her with guidance, legal protection, and defense against violence and injury [and] supplies her with all other necessities, such as management, sollicitude, food, and clothing.... The wife extends to her husband obedience, subjection, trust, compliance, services, aid, honor, reverence, modesty, and respect. She brings forth children for him, and nurses and trains them. She joins and consoles him in misery and calamity. She accommodates herself to his customs, and without his counsel and consent she does nothing. And thus she renders to her husband and agreeable and peaceful life. There are common advantage and responsibilities that are provided and communicated by both spouses, such as kindness, use of the body for avoiding harlotry and for procreating children, mutual habitation except when absence may be necessary, intimate and familiar companionship, mutual love, fidelity, patience, mutual service, communication of all goods and right ... management of the family, administration of household duties, education of children in the true religion, protection against and liberation from perils, and mourning of the dead.¹⁰⁸

¹⁰⁷ *Id.* at II.14-15 (citations omitted).

¹⁰⁸ *Id.* at II.38-49 (citations omitted).

Anglican and Anglo-Puritan writers argued even more expansively than Continental Protestants that marriage at once served and symbolized the commonwealth (literally the "common good"), of the couple, the children, the church, and the state. William Perkins put it thus in 1590: "[M]arriage was made and appointed by God himself to be the foundation and seminary of all sorts and kinds of life in the commonwealth and the church.... [T]hose families wherein the service of God is performed are, as it were, little churches; yea, even a kind of paradise on earth."¹⁰⁹ Robert Cleaver opened his famous 1598 tract, A Godly Form of Householde Gouernment with an oft-repeated maxim: "A household is as it were a little commonwealth, by the good government whereof, God's glory may be advanced, the commonwealth which stands of several families, benefited, and all that live in that family, may receive much comfort and commodity."¹¹⁰ William Gouge premised his massive 800 page Domestic Duties (1622) on the same belief that "the family is a seminary of the Church and the Commonwealth," and is indeed in its own right, "a little church, and a little commonwealth, whereby a trial may be made of such as are fit for any place of authority, or subjection in Church or commonwealth."¹¹¹

Like the political and ecclesiastical commonwealths, Anglican divines argued, the domestic commonwealth was created as an hierarchical structure. God had created Eve as "a help meet" for Adam. He had called Adam and Eve to mutual society among themselves and mutual procreation of children (Gen 1:28, 2:18). After the Fall, He had commanded that Adam "shall rule over" Eve (Gen. 3:16). As heir of Adam, the modern husband was thus the head of his wife. As heir of Eve, the modern wife was his subject, his "help meet." Together husband and wife were the heads of their children and the rest of the household. Each of these offices in the family hierarchy was bound by a series of duties, rooted in the Bible and natural law, which dozens of thick household manuals and catechisms of the day elaborated.¹¹²

Faithful maintenance of domestic duties and offices, Anglican divines believed, was the best guarantee of individual flourishing and social order within the broader commonwealths of church and state. Robert Cleaver put it thus: "[I]f masters of families do not practice catechizing and discipline in their houses and thereby join their helping hands to Magistrates, and Ministers,

¹⁰⁹ WILLIAM PERKINS, *Christian Oeconomy or a Short Survey of the Right Manner of Erecting and Ordering a Family According to the Scriptures*, in *THE WORK OF WILLIAM PERKINS* 3:418-419 (Ian Breward ed., 1970). I have modernized the spelling and punctuation in this and the next five quotations from Anglican writers.

¹¹⁰ ROBERT CLEAVER, *A GODLY FORME OF HOUSEHOLDE GOVERNMENT* 1 (London: Thomas Creed, 1598).

¹¹¹ WILLIAM GOUGE, *OF DOMESTICALL DUTIES: EIGHT TREATISES* 27 (London: J. Haviland, 1622).

¹¹² See sources in FSC, *supra* note 6, ch. 4.

social order and stability will soon give way to chaos and anarchy."¹¹³ "A conscionable performance of household duties ... may be accounted a public work," William Gouge echoed. For "good members of a family are likely to make good members of church and commonwealth."¹¹⁴ Daniel Rogers concurred, arguing that a stable marriage and household served as "the right hand of providence, supporter of laws, states, orders, offices, gifts, and services, the glory of peace, ... the foundation of Countries, Cities, Universities, ... Crowns and Kingdoms."¹¹⁵ Dozens of Anglican and Anglo-Puritan writers, from 1600 onward, expounded this "commonwealth model" of marriage.¹¹⁶

Early American Formulations

These classical and Christian formulations of the goods and goals of marriage did not remain confined to Western Europe. They were also transmitted across the Atlantic to America during the great waves of colonization in the seventeenth and eighteenth centuries, and the great waves of immigration in the nineteenth and early twentieth. Even a brief sampling of the vast American literature allows us to see how commonplace these traditional Western sentiments became in American theology and law.

Roman Catholic formulations of marriage and its goods, while not so prominent in early America, were present from the colonial beginnings, not only in Lord Baltimore's Maryland founded in 1649, but also in the colonial south and southwest.¹¹⁷ Before the United States acquired the territories of Louisiana (1803), the Floridas (1819), Texas (1836), New Mexico (1848), and California (1848), these colonies were under the formal authority of Spain, and under the formal jurisdiction of Catholic bishops in San Domingo, Havana, and Mexico. The clergy and missionaries taught the sacramental theology of marriage, particularly as set out in the Roman Catechism of 1566. Both church and state authorities sought

¹¹³ CLEAVER, *supra* note 110, A4.

¹¹⁴ GOUGE, *supra* note 111, at 17, 27.

¹¹⁵ DANIEL ROGERS, *MATRIMONIAL HONOUR* 17 (London: Philip Nevil, 1642).

¹¹⁶ See, e.g., G.J. SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH CENTURY ENGLAND* (1975); Mary Shanley, *Marriage Contract and Social Contract in Seventeenth-Century English Political Thought*, 32 *WESTERN POLITICAL QUARTERLY* 79 (1979); BEATRICE GOTTLIEB, *THE FAMILY IN THE WESTERN WORLD FROM THE BLACK DEATH TO THE INDUSTRIAL AGE* (1993).

¹¹⁷ See esp. Hans W. Baade, *The Form of Marriage in Spanish North America*, 61 *CORNELL LAW REVIEW* 1, 1-89 (1975).

to enforce the Church's canon laws of marriage, particularly the decree Tametsi of 1563.¹¹⁸

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

With the formal acquisition of these Spanish territories by the United States in the nineteenth century, jurisdiction over marriage shifted to the American Congress and, after statehood, to local state governments. These new civil governments at first rejected portions of the inherited Catholic tradition of marriage -- sometimes ruefully, introducing a persistent anti-Catholic bias in mainline American law and theology of marriage for more than a century.¹¹⁹ Particularly the notion of ecclesiastical jurisdiction over marriage and the canonical prohibitions on religious intermarriage and on divorce and remarriage were written out of

¹¹⁸ This was not true of American Catholic communities, outside of Spanish territory, that came within the ecclesiastical provinces of Baltimore, Philadelphia, New York, and Boston, and, later, ecclesiastical provinces in the West. The original settlers in these non-Spanish communities were mostly from Britain, Scotland, or other parts of northern Europe where the Decree *Tametsi* was not in effect. They thus continued to recognize the pre-Tridentine Catholic canon law that a secret marriage formed by mutual consent was valid, even without priestly consecration. This disparity continued among some American Catholics until the Tridentine legislation was written into the 1918 Code of Canon Law. NOONAN, POWER TO DISSOLVE, supra note 3, 255-56; Baade, supra note 117, at 19-24, 36-38.

¹¹⁹ See, e.g., 1 JAMES SCHOULER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS 19 (6th ed. 1921); 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 101 (1851).

the new state laws almost immediately.¹²⁰ But the Catholic clergy in these vast former Spanish territories were generally left free to teach the doctrines and retain the canons of marriage for their own parishioners. Marriage contracted and consecrated before Catholic priests were eventually recognized at common law in all former Spanish territories in America. The Catholic hierarchy was generally left free to pass and enforce new rules for sex, marriage, and family life to guide their own faithful, and to advocate state adoption of these rules. Many basic Christian marital norms thereby found their way into American common law, particularly with the exponential growth of American Catholicism through immigration in the later nineteenth century.¹²¹

In the nineteenth and early twentieth centuries, American Catholic bishops issued hundreds of sermons and pastoral letters that reflected traditional Catholic formulations on the goods of marriage. They repeated and glossed endlessly the traditional formula of proles, fides, et sacramentum -- emphasizing, like their fellow European bishops, the goods of procreation and education, the ills of contraception and prostitution, and the mortal perils of intermarriage and divorce.¹²²

More than a few American Catholic bishops, however, also emphasized the unique psychological, social and political goods of marriage -- anticipating by a century and more the formulations of Vatican II. An 1863 Lenten pastoral of Bishop Augustin Verot of Savannah, Georgia, provides a good example. Lamenting the breakdown of the family born of the budding urbanization, industrialization, and modernization of his day, newly exacerbated by the Civil War, Verot declared that the intact marital household "is at the bottom of all the good that can be done among men."

The Family is a society instituted and appointed by God himself, for nature is but a borrowed name to express the Maker and Author of this universe, and of all the laws which govern it. It is God who instituted and

¹²⁰ This introduced an escalating divorce rate in a number of new states that were former Spanish colonies. See, e.g., ROBERT L. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890* (1982) (documenting the "divorce crisis" of later nineteenth century California); Lawrence M. Friedman and Robert V. Percival, *Who Sues for Divorce: From Fault Through Fiction to Freedom* 5 J. OF LEG. STUD. 61 (1975). See also 2 GEORGE ELIOT HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 408-497 (1904) and 3 *id.* 31-160 (for details on nineteenth-century laws of marriage and divorce).

¹²¹ See sources and discussion in NOONAN, *supra* note 88, at 302-40; BRUNDAGE, *supra* note 2, at 608-17.

¹²² See, e.g., the collection in *PASTORAL LETTERS OF THE AMERICAN HIERARCHY, 1792-1970* (Hugh J. Nolan ed., 1971). See discussion of shifting (American) Catholic views of marriage in Christine Firer Hinze, *Catholic: Family Unity and Diversity within the Body of Christ*, in *FAITH TRADITIONS AND THE FAMILY* 53-72 (Phyllis D. Airhart and Margaret Lambert Bendroth eds., 1996).

blessed marriage, and from the laws of marriage husband, wife, and children form a perfect and close society, sacred on account of its author, and indissoluble by the very nature of the ties which unite the members of it together. Hence the domestic society, because it is directly and immediately the work of God, is or ought to be a mirror, reflecting the supreme law of heaven, order, peace, and holiness, more exquisitely and perfectly than civil or political societies, which are more or less of human origin.¹²³

Verot then waxed at length about the social and political utility of the family -- sounding very much like the Protestant reformers before him and the Vatican II reformers after him: "The Family is the first school where we learn good or evil. It is the source and fountain head of morality or immorality, of a Christian or an infidel life, of virtue or vice, of good behavior or profligacy.... Oh! that this paramount importance of early impressions and of domestic training were well understood, felt, and acted upon. This would at once bring about the most salutary reformation in society, in church and state."¹²⁴ Properly viewed, Verot continued, marriage is "a domestic church ... a society bound by the ties of religion, faith, and virtue, yet more than by the bonds of a common origin and identity of blood." The Christian family is "the first step in virtue, the foundation of solid merit, a school of morality and piety, a centre [sic] of union, love, and peace, an unfailing element of future usefulness and greatness, a terrestrial paradise, an image of the blessed City of God, where order and happiness prevail undisturbed and unalterable."¹²⁵

Protestant formulations of marriage and its goods were more prominent in early American writings, and more influential at early American law. By the turn of the nineteenth century, the Atlantic seaboard was a veritable checkerboard of Protestant pluralism -- Anglican, Lutheran, Puritan, Presbyterian, Reformed,

¹²³ LENTEN PASTORAL OF RIGHT REV. A. VEROT, BISHOP OF SAVANNAH AND ADMINISTRATOR APOSTOLIC OF FLORIDA FOR 1863, at 4 (Savannah, 1863).

¹²⁴ *Id.*, 4-5.

¹²⁵ *Id.*, 9 (emphasis added). See comparable views in Third Plenary Council of Baltimore, *Pastoral Letter* (1884), in PASTORAL LETTERS OF THE AMERICAN HIERARCHY, *supra* note 90, at 175-76; PASTORAL LETTER OF THE RIGHT REV. MICHAEL JOSEPH O. FARRELL, BISHOP OF TRENTON ON CHRISTIAN MARRIAGE esp. 4-7 (New York: Benzinger Bros., 1883); *Pastoral Letter Issued by the Roman Catholic Hierarchy of the United States* (1919), in PASTORAL LETTERS OF THE AMERICAN HIERARCHY, *supra*, at 309-311. These views were elaborated in various Catholic household manuals and catechetical texts. See, e.g., BERNARD O'REILLY, THE MIRROR OF TRUE WOMANHOOD (1878), a 466 page spiritual "Dr. Spock" for women premised on the assumption that the household is "a little Eden". *Ibid.*, 7.

Huguenot, Baptist, Methodist, Quaker, Moravian, and more. This Protestant pluralism only increased with the Second Great Awakening of ca. 1800-1860.¹²⁶

These plural Protestant polities, though hardly uniform in their marital norms and habits, were largely united in their adherence to basic Protestant teachings about marriage inherited from Western Europe.¹²⁷ While adhering to many of the same basic Christian norms of sex, marriage, and domestic life taught by Catholics, they rejected sacramental views of marriage and ecclesiastical jurisdiction over marital formation, maintenance, and dissolution. They encouraged ministers to be married. They permitted religious intermarriage. They truncated the law of impediments. They allowed for divorce on proof of fault. They encouraged remarriage of those divorced or widowed.

Protestant theologians, of various denominations, repeated the familiar Protestant trilogy of marital goods. Many Anglican and Methodist writers -- following the Anglican Book of Common Prayer of 1662 and its Episcopalian revision of 1789 -- rendered this trilogy as "procreation, love, and protection," and expressed ample reticence about the propriety of divorce and remarriage.¹²⁸ Most other Protestant writers -- following Lutheran and Calvinist confessions and conventions -- rendered this as "love, protection, and procreation," and countenanced divorce and remarriage if one or more of these goods of marriage was irreconcilably compromised by the fault of one of the parties.¹²⁹

These variations on traditional formulations of marital goods did not prevent American Protestant theologians from underscoring the health benefits of marriage to the couple -- particularly to the husband. John Bayley, for example, an influential Methodist

¹²⁶ For a detailed demographic study, see EDWIN S. GAUSTAD, HISTORICAL ATLAS OF RELIGION IN AMERICA (New York/San Francisco, rev. ed. 1976).

¹²⁷ The most important difference among these colonies and early American states, was over whether marriages could be contracted before a civil official only, as New England Puritans allowed, or required church consecration, as Anglican communities required. Among numerous recent studies, see sources and discussion in PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); RICHARD CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW (1994); STEPHEN M. FRANK, LIFE WITH FATHER: PARENTHOOD AND MASCULINITY IN THE NINETEENTH-CENTURY AMERICAN NORTH (1998); JAN LEWIS, THE PURSUIT OF HAPPINESS: FAMILY AND VALUES IN JEFFERSON'S VIRGINIA (1983); STEPHANIE McMURRAY, MASTERS OF SMALL WORLDS (1995); DANIEL BLAKE SMITH, INSIDE THE GREAT HOUSE: PLANTER FAMILY LIFE IN EIGHTEENTH-CENTURY CHESAPEAKE SOCIETY (1980); MERIL D. SMITH, BREAKING THE BONDS: MARITAL DISCORD IN PENNSYLVANIA, 1730-1830 (1991).

¹²⁸ See, e.g., GEORGE BOURNE, MARRIAGE INDISSOLUBLE AND DIVORCE UNSCRIPTURAL 9-14, 23-35 (Harrisonburg: Davidson & Bourne, 1813); BUFFORD W. COE, JOHN WESLEY AND MARRIAGE esp. 52ff (1996).

¹²⁹ See, e.g., HOWARD MALCOM, THE CHRISTIAN'S RULE OF MARRIAGE (Boston: James Loring, 1834).

preacher, wrote a lengthy volume in 1857 expounding the ideal nature, structure, and purpose of marriage. His central thesis was that "prudent marriages are favorable to health, long life, and prosperity."¹³⁰ He defended this proposition with twenty odd pages of quotations from classical and Christian authors. Among his favorites was the Anglican divine Jeremy Taylor who had rhapsodized: "If you are for pleasure, marry; if you prize rosy health, marry. A good wife is heaven's last best gift to man—his angel and minister of graces innumerable—his gem of many virtues—his casket of jewels...."¹³¹ Bayley then defended at length the conventional legal requirements of marital formation -- formal betrothals, public banns, parental consent, two witnesses, civil registration, and church consecration -- and set out the respective "duties of love" between husband and wife, parent and child.

George Bourne of Virginia, in his oft-reprinted tome, voiced comparable sentiments about the emotional and moral benefits of married life. God has created marriage to be "sacred and honorable, of high Distinction, and nearly combined with the dignity and fruition of human nature," Bourne wrote. When marriage is properly entered into, it provides "every blessing which man can enjoy during his abode in this pilgrimage state; it diminishes his pain, excites his sympathies, purifies his desires, invigorates his exertions, unfolds his usefulness, duplicates his enjoyments, counteracts his vicious propensities, exalts his character, animates his devotional principles for present rectitude and future bliss everlasting...."¹³² Scores of other theological tracts and sermons on marriage are at hand to document this common "Protestant temperament" about the individual goods and benefits of marriage.¹³³

Ironically, it was the American jurists, more than the American Protestant theologians, that expounded the social and political goods of marriage and family -- adducing Anglican moralists, Roman jurists, and Greek philosophers alike to drive home the legal priorities of marriage. For example, Chancellor James Kent, one of the great early systematizers of American law, wrote about the spiritual and social utility of marriage:

¹³⁰ JOHN BAYLEY, *MARRIAGE AS IT IS, AND AS IT SHOULD BE* 13 (New York: M.W. Dodd, 1857). See *id.* at 9-29.

¹³¹ Quoted in *id.* at 26.

¹³² BOURNE, *supra* note 123, at 9, 12, 113. See also *id.*, at 18 ("Early marriages combine advantages so numerous, personal sanctity, relative comfort, social utility, and national stability").

¹³³ The phrase is from the landmark work PHILIP GREVEN, *THE PROTESTANT TEMPERAMENT: PATTERNS OF CHILD-REARING, RELIGIOUS EXPERIENCE, AND THE SELF IN EARLY AMERICA* (1977).

The primary and most important of the domestic relations is that of husband and wife. It has its foundations in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and cultivation of the liberal arts.¹³⁴

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

In a sense it is a consummation of the Divine to "multiply and replenish the earth." It is the state of existence ordained by the Creator, who has fashioned man and woman expressly for the society and enjoyment incident to mutual companionship. This Divine plan is supported and promoted by natural instinct, as it were, on the part of both for the society of each other. It is the highest state of existence,... the only stable substructure of our social, civil, and religious institutions. Religion, government, morals, progress, enlightened learning, and domestic happiness must all fall into most certain and inevitable decay when the married state ceases to be recognized or respected. Accordingly, we have in this state of man and woman the most essential foundation of religion, social purity, and domestic happiness.¹³⁵

Other standard legal texts spoke of marriage as "the highest state of existence," "a public institution of universal concern," "the very basis of the whole fabric of civilized society," "a spiritual association ... transcendent in its importance both to individuals and to society."¹³⁶

Likewise, the United States Supreme Court spoke repeatedly of marriage as "more than a mere contract," "a Godly ordinance, "a

¹³⁴ JAMES KENT, COMMENTARIES ON AMERICAN LAW 2:76 (O.W. Holmes, Jr. ed., Boston: Little Brown, 12th ed. 1896).

¹³⁵ W.C. ROGERS, A TREATISE ON THE LAW OF DOMESTIC RELATIONS sec.2, p.2 (1891).

¹³⁶ SCHOULER, supra note 119, 1:17-19; JOEL BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION 1:4-15; 2:217 (1891); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS sec. 109 (1834); 1 CHESTER VERNIER, AMERICAN FAMILY LAWS 45 (1931-1938).

sacred obligation."¹³⁷ In Murphy v. Ramsey (1885), one of a series of Supreme Court cases upholding the constitutionality of anti-polygamy laws, Justice Field declared for the Court:

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth ... than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement.¹³⁸

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

[W]hilst marriage is often termed ... a civil contract -- generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization -- it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. it is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.¹³⁹

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

¹³⁷ Maynard v. Hill, 125 U.S. 190, 210-11 (1888); Reynolds v. United States, 98 U.S. 145, 165 (1879); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Davis v. Beason, 133 U.S. 333, 341-42 (1890).

¹³⁸ 114 U.S. at 45.

¹³⁹ 125 U.S. at 210-11.

Summary and Conclusions

The health paradigm of marriage is both very new and very old. What is new is the wealth of recent statistical evidence demonstrating that, for most adult parties most of the time, married life is better than single life, marital cohabitation is better than non-marital cohabitation, married parents do better than single parents in raising their children. According to several recent studies, married folks on average live longer, happier, and safer lives. They are more satisfied, prosperous, and efficient. They receive better hygiene, health care, and co-insurance. Their children develop better emotional, social, and moral skills.

The health paradigm of marriage is also very old. It repeats and refines a number of ancient and enduring Western ideas about the goods and goals of marriage. Already in the centuries before Christ and before the Christianization of the West, classical Greek and Roman writers taught that marriage is a natural institution to which most men and women are naturally inclined; that marriage is a useful, pleasant, moral, and even sacred institution; that it provides an efficient pooling of property and division of labor and resources within the household; that it provides mutual care, protection, and compensation to couples; that it serves both for the fulfillment, companionship, and happiness of spouses and for the procreation, nurture, and education of children.

The Roman Catholic tradition, building on Augustine and Aquinas, wove these classical insights into the famous theory that marriage has three inherent goods: (1) fides -- a faithfulness and friendship between husband and wife that goes beyond that demanded of any other temporal relationship; (2) proles -- children, who are to be nurtured and educated to perpetuate the human species and to transmit and live out the proper norms and habits of spiritual and temporal life; and (3) sacramentum -- an enduring expression of Christ's love for his Church, an indissoluble channel of God's grace to sanctify the couple, their children, and the broader community. Particularly, since the Second Vatican Council (1962-1965), the Catholic Church has emphasized the need to keep these three marital goods in balance, and has held out the covenant of marital love as the new organizing idiom of the goods of marriage. The Church has also recently emphasized that marriage serves for the physical, emotional, moral, and spiritual "perfection" of a man and woman, and that the household is a "domestic church" and a model of love, charity, stewardship,

authority, dignity, faithfulness, discipline, and care for each new generation of children to learn.

The Protestant tradition, from its sixteenth-century beginnings, placed emphasis not only on the intrinsic goods but also on the instrumental goals of the covenant or estate of marriage. Marriage was created by God to foster love, to deter sin, and to produce children. If one or more of these created marital goals was permanently frustrated, those parties who could not reconcile themselves to this condition could seek divorce and remarry. Particularly Luther and Calvin emphasized further that marriage has "uses" in the life. Marriage deters vice by furnishing preferred options to prostitution, promiscuity, pornography, and other forms of sexual pathos. It cultivates virtue by offering love, care, and nurture to its members, and by holding out a model of charity, education, and sacrifice to the broader community. It enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare. It enhances the life of the child, by providing it with a chrysalis of nurture and love, with a highly individualized form of socialization and education. Such views echoed loudly in the theological and legal literature of the American colonies and early American republic.

For all of its theological and philosophical diversity, therefore, the West has had a long and thick overlapping consensus that marriage is good, does good, and has goods both for the couple and for the children. Classical, Patristic, Catholic and Protestant writers alike have all recognized the natural teleology and utility of marriage: (1) the natural drive on the part of most adults toward the institution of marriage because of the inherent goods of individual survival, flourishing, happiness, and even perfectibility that it provides; and (2) the natural capacity on the part of most adults to engage in the expected performance of marriage -- the unique combination of sexual, physical, economical, emotional, charitable, moral, and spiritual performances that become marriage. Obviously, there are ample exceptions to this natural norm of marriage that the tradition has long recognized. Some are called to celibacy or to the single or widowed life. Some lack the physical capacity or emotional temperament to engage in marriage. Some who get married should not be, and need to be removed from the institution through annulment or divorce. But the general inclination and instruction of nature, of the human body, of the human psyche, of the human heart, is for marriage, the Western tradition teaches.

The new social science data can thus be viewed as the start to a new chapter in a long and familiar Western story about the goods and goals of marriage. This new social science chapter

supplements and supports somewhat the many, more theologically explicit and expansive chapters that have been written and continue to be written. The new social science data present older prudential insights about marriage with more statistical precision. They present ancient avuncular observations about marital benefits with more inductive generalization. They reduce common Western observations about marital health into more precise and measurable categories. These new social science data thus offer something of a neutral apologetic for marriage. They provide a start to a useful bilingual vocabulary that allows us to move more easily between traditional and contemporary, theological and natural, spiritual and civil, confessional and professional terms and concepts of marriage.

What is still largely missing from this new social science chapter of marriage is a careful demonstration and documentation of the second core insight of the Western tradition -- that marriage is good not only for the couple and their children, but also for the broader civic communities of which they are a part. The ancient Greek philosophers and Roman Stoics called marriage "the foundation of the republic," "the private font of public virtue." The Church Fathers called marital and familial love "the seedbed of the city," "the force that welds society together." Catholics called the family "a domestic church," "a kind of school of deeper humanity." Protestants called the household a "little church," a "little state," a "little seminary," a "little commonwealth." American jurists and theologians taught that marriage is both private and public, individual and social, temporal and transcendent in quality -- a natural if not a spiritual estate, a useful if not an essential association, a pillar if not the foundation of civil society.

At the core of all these metaphors is a perennial Western ideal that stable marriages and families are essential to the survival, flourishing, and happiness of the greater commonwealths of church, state, and civil society. And a breakdown of marriage and the family will eventually have devastating consequences on these larger social institutions. To date, we have ample anecdotal evidence of the social pathos that sometimes follows the breakdown of the family, and ample political manipulation of the same, particularly in election years. But a careful measuring and mapping of the health benefits of marriage and the family for church, state, and civil society alike would be an apt conclusion to this latest chapter in the long Western story of the goods and goals of marriage.