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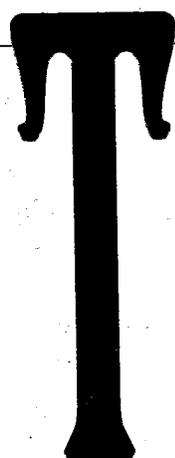
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# FROM SACRAMENT TO CONTRACT

## THE LEGAL TRANSFORMATIONS OF THE WESTERN FAMILY

John Witte, Jr.



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The Western Christian Church has, from its apostolic beginnings, offered four perspectives on marriage and the family. An *ecclesiastical* perspective regards the family as a religious or sacramental association, subject to the creed, code, cult, and canon law of the church community. A *social* perspective treats the family as a social estate, subject to the expectations and exactions of the local community and to special state laws of contract, property, and inheritance. A *contractual* perspective describes the family as a voluntary association, subject to the wills and preferences of the couple, their children, and their household. Hovering in the background is a *naturalist* perspective that treats the family as a created or natural institution, subject to the divine and natural laws of reason, conscience, and the Bible. In Voltaire's cynical phrase: "Among Christians, the family is either a little church, a little state, or a little club" blessed by God and nature.

Among many Christian writers, these four perspectives are seen as complementary, for they each emphasize one aspect of marriage and the family—its religious sanction, social legitimation, voluntary formation, and natural origin, respectively. These four perspectives, however, have also come to stand in considerable tension, for they are linked to competing claims of ultimate authority over the form and function of the family—claims by the church,

by the state, by family members, and by God and nature. Some of the deepest fault lines in the historical formation and the current transformations of the Western family ultimately break out from this central tension of perspective. Which perspective of the family dominates a culture, or at least prevails in an instance of dispute—the ecclesiastical, the social, the contractual, or the natural? Which authority wields preeminent, or at least preeminent, power over marriage and family questions—the church, the state, family members themselves, or God operating through one of these parties?

Catholics, Protestants, and Enlightenment philosophers alike have constructed elaborate models to address these cardinal questions. Each group recognizes all four perspectives but emphasizes one of them. Catholics emphasize the religious (or sacramental) perspective of the family. Protestants emphasize the social (or covenantal) perspective. Enlightenment exponents emphasize the contractual (or privatist) perspective. In broad outline, the Catholic model dominated Western family law till the sixteenth century. From the mid-sixteenth to the mid-nineteenth century, Catholic and Protestant models, in distinct and hybrid forms, dominated Western family law. In the past century, the Enlightenment model has emerged, often eclipsing Catholic and Protestant traditions of marriage and the family. The following sections



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take up these theological transformations of Western family law—from sacrament to social estate to contract.

#### FROM SACRAMENT TO SOCIAL ESTATE

**T**o introduce the shift from the Catholic sacramental model to the Protestant social model, we can begin with a 1523 case in Germany. The case involves one Johann Apel of Nürnberg. Apel was trained in Nürnberg, Wittenberg, and Leipzig and took his doctorate in canon law and civil law in 1519. After an apprenticeship, he took his holy orders in 1522, and swore an oath of clerical celibacy as was required by the Church's canon law. Conrad, the Bishop of Würzburg and Duke of Francken, appointed him as a cathedral priest and canon lawyer later that year.

Shortly after his clerical appointment, Apel became enamored of a local nun. The couple saw each other secretly for several months. The nun forsook the cloister and her vows and came to live with Johann. This move caused little consternation, for clerical cohabitation with concubines was not uncommon in that day. Shortly thereafter, however, Johann and the young woman were secretly married. This was an outrage. Clerical concubinage, although prohibited, was tolerated. Clerical marriage was anathema, and had been for centuries. Bishop Conrad, therefore, privately annulled Apel's marriage and admonished him to confess his sin, return his putative wife to the cloister, and resume his clerical duties. Apel refused, insisting that his marriage, though secretly contracted, was valid. The Bishop indicted Apel and temporarily suspended him from office. Apel offered a spirited defense of his conduct in a frank, open letter to the Bishop.

Bishop Conrad, in response, had Apel indicted in a church court for breach of holy orders and the oath of celibacy, and for defiance of his episcopal dispensation and injunction. Apel adduced conscience and Scripture in his defense—much like Luther had done two years before at the Diet of Worms. "I have sought only to fol-

low the dictates of conscience...and the Gospel," Apel insisted, not to defy episcopal authority and canon law. Scripture and conscience condone marriage for fit adults as "a dispensation against lust and fornication." Apel and his wife had availed themselves of this dispensation, and entered and consummated their marriage "in chasteness and love." Contrary to Scripture, canon law commands celibacy for clerics and monastics, and thereby introduces all manner of impurity among them. "Who does not see the fornication and concubinage? Who does not see the defilement and the adultery?" My alleged sin of breaking "this little man-made rule of celibacy," Apel insisted, "is very slight when compared to these sins of fornication and breaking the law of the Lord." "The Word of the Lord is what will judge between you and me," Apel declared to the Bishop, and such Word commands my acquittal.

Bishop Conrad took the case under advisement. Apel took his cause to the young evangelical community. He sought support for his claims from Martin Luther and Philip Melancthon, who had already written against clerical celibacy. He published his remarks at trial in a hot-selling pamphlet, adorned with a robust preface by Luther. Two weeks after publication of the tract, Conrad had Apel imprisoned, pending further proceedings. Apel, his family, and local magistrates pleaded for his release. Jurists and councilmen wrote open letters that denounced the Bishop's actions and that defended Apel's conduct as consistent with "the equitable commands of divine, natural, and human laws" and the "dictates and liberties of conscience." Even the emperor weighed in, urging the Bishop to try Apel quickly and release him if found innocent. Apel was tried three months later, found guilty of several canon law violations and of heretically participating in "Luther's damned teachings." He was defrocked and excommunicated, his robes torn from him in open court. Thereafter, Apel made his way to Wittenberg where he was appointed to the law faculty of his alma mater.

For all of his bitter experience Apel did not urge the abolition of the canon law of marriage and family life. Despite Luther's heated protestations, Apel insisted that



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the Wittenberg law faculty continue to offer canon law instruction. Apel himself lectured on the canon law from his first year of appointment. After 1528, he developed a special course on the canon law of marriage, which was the first such course in a Protestant university. Many such courses were to follow in Protestant universities throughout Reformation Europe.

Apel's case is a miniature portrait of both the prevailing sacramental model and the budding social model of marriage and the family in the sixteenth century. It illustrates the most pressing issues that divided exponents of these models in the sixteenth century—celibacy, concubinage, clerical marriage, secret marriage, easy dispensations and annulments—issues that pressed with equal force in Calvin's Geneva, Zwingli's Zürich, and Henry VIII's England. Apel's case also illustrates the organic connections that remained between these two models. While Luther was burning the canon law books, Apel, though badly burned by the canon law, insisted that this source remain at the core of the new Protestant theory and law of the family.

Bishop Conrad's position was in full compliance with the prevailing Catholic theology and canon law of marriage and family life, which for centuries had governed the West, albeit unevenly. Prevailing Catholic theology treated marriage and the family in a threefold manner—as a natural, sacramental, and contractual unit, with the sacramental quality as the most critical. First, said the Church, marriage was instituted at creation to permit persons to beget and raise children and to direct their natural passion to the service of the community and the Church. Since humanity's fall into sin, it had also become a remedy for lust. Yet marriage was subordinated to celibacy. Propagation was considered less virtuous than contemplation. Clerics, monastics, and other spiritual servants were to forgo marriage as a condition for ecclesiastical service. Those who could not, were not worthy of the clerical office. Celibacy was something of a litmus test of spiritual discipline. Second, the Church raised marriage to the dignity of a sacrament. Marriage

symbolized the indissoluble union between Christ and His Church and thereby conferred sanctifying grace upon the couple and the community. Couples could perform the sacrament in private, provided they were capable of marriage and complied with rules for marriage formation, communicated through the sermon, the catechism, and the confessional. Third, marriage was a contractual unit that prescribed a relation of love, service, and devotion and proscribed unwarranted breach or relaxation of one's connubial duties. The marital contract, like many contracts of the day, protected the superior status of the male, of the first born, of the *paterfamilias*.

The Catholic Church built a comprehensive and sophisticated body of marriage and family law upon this tripartite conceptual foundation. Because marriage was a holy sacrament, the Church claimed exclusive jurisdiction over it. The Church's canon law punished contraception, abortion, and child abuse as violations of the created marital functions of propagation and childrearing. It proscribed unnatural relations, such as homosexuality, incest, and polygamy. It protected the sanctity and sanctifying purpose of the marriage sacrament by declaring valid marital bonds to be indissoluble, and by dissolving invalid unions between Christians and non-Christians or between parties related by various legal, spiritual, blood, or familial ties. It supported celibacy by dissolving unconsummated vows to marriage if one party made a vow to chastity and by punishing clerics or monastics (and their spouses) who contracted marriage. It ensured free consensual unions by dissolving marriages contracted by mistake or under duress, fraud, or coercion.

While Bishop Conrad's position was firmly rooted in the prevailing Roman Catholic tradition, Johann Apel's position anticipated much of the new Protestant doctrine. The Protestant reformers, like the Roman Catholics, taught that marriage is a natural, created institution, but (with Apel), they rejected the subordination of marriage to celibacy. The person was too tempted by sinful passion to forgo marriage. The family was too vital a social institution in God's redemption plan to be hindered. The



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celibate life had no superior virtue and no inherent attractiveness vis-à-vis marriage and was no prerequisite for ecclesiastical service. Indeed, a common symbolic act of the Reformation in its early years was for monks and nuns publicly to renounce their vows, to marry, and to join the Protestant leadership.

The Protestant reformers replaced the sacramental model of marriage and the family with a social model. The family, though divinely ordained, was now viewed as one of the three earthly estates, alongside the visible church and the state. Participation in it required no prerequisite faith or purity, and conferred no sanctifying grace, as did true sacraments. Any fit man and woman, of proper age, were free to enter such a union. Marriage and the family were subject to civil law, not canon law. To be sure, church officials should continue to communicate divine and moral principles respecting sexuality and marriage, and even serve as state agents to register and consecrate the marriage. All church members, as priests, should counsel those who seek marriage and divorce. But principal legal authority over marriage and the family lies with the state, not the church.

Despite the bitter invectives against the canon law by early Protestant theologians, Protestant magistrates appropriated a good deal of the traditional canon law of marriage and the family. Such appropriation could only be expected. After all, the canon law was a sophisticated system of rules and procedures, still taught in the universities and found in the legal handbooks, and well known to the jurists and theologians who joined the reformed cause. Theologically offensive provisions, such as those rooted in papal supremacy or spurned doctrines, were naturally discarded. But what remained could be readily used. Thus, traditional canon law prohibitions against unnatural relations and against infringement of marital functions remained in effect. Canon law procedures treating wife and child abuse, paternal delinquency, child custody, and the like continued uninterrupted. Canon law impediments that protected free consent, that implemented Biblical prohibitions against marriage of relatives,

and that governed the relations of husband and wife, parent and child were largely retained.

But the new Protestant theology of marriage and the family also yielded critical legal changes. Because the reformers rejected the subordination of marriage to celibacy, they rejected laws that forbade clerical and monastic marriage and that permitted vows of chastity to annul vows of marriage. Because they rejected the sacramental concept of marriage as an eternal enduring bond, the reformers introduced divorce in the modern sense, on grounds of adultery, desertion, cruelty, or frigidity, with a subsequent right to remarry at least for the innocent party. Because persons by their lustful nature were in need of God's soothing remedy of marriage, the reformers rejected numerous canon law impediments to marriage not countenanced by Scripture. Because of their emphasis on the pedagogical role of the church and the family, and the priestly calling of all believers, the reformers insisted that both marriage and divorce be public, communal acts in order to be legitimate. Promises of marriage required parental consent, two witnesses, church consecration and registration, priestly instruction, and open disclosure in the community. Actions for divorce had to be announced publicly in the church and community and adjudicated in painfully open and full hearings.

After the Protestant Reformation, two theological models of marriage and the family lay at the heart of Western family law. A Catholic model, confirmed and systematized by the Council of Trent in 1563, flourished in southern Europe, Iberia, and France, and their colonial extensions to Latin America, Quebec, Louisiana, and other outposts. A Protestant social model rooted in the Lutheran "two kingdoms theory" dominated portions of Germany, Austria, Switzerland, and Scandinavia. A Protestant social model rooted in a parallel Calvinist covenant theology came to strong expression in Calvinist Geneva, and in portions of Huguenot France, the Pietist Netherlands, Presbyterian Scotland, and Puritan England, and was eventually transmitted via colonization to Puritan New England and portions of the middle American



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colonies. Something of a hybrid between these two models prevailed in Anglican England.

Despite the agitation during Henry VIII's reign to secularize family life and law, the pendulum swung back a good deal to traditional forms under Queen Elizabeth. By the turn of the seventeenth century, marriage was not a sacrament, nor celibacy a prerequisite for ecclesiastical service. But the Church, now as agent of the state, retained considerable jurisdiction over the institution until well into the nineteenth century. Secret marriages (called common law marriages) continued to be common, especially in the poorer and rural sections of Britain and its American colonies. Only in an act of 1753 did English law, finally, formally adopt the familiar Protestant and Tridentine requirements of parental consent, two witnesses, and church consecration of marriage, and only then did it introduce divorce into the common law on the ground of adultery alone. But to be effectuated, divorce required passage of a special bill in Parliament, thereby reserving the institution to a select few. This Anglican legal tradition of the family was exported *en masse* to the middle Atlantic and southern American colonies; colonial charters and statutes simply incorporated English law on the subject. Until the American Revolution, this law was enforced in Virginia, the Carolinas, Georgia, Maryland, and Delaware.

#### THE ENLIGHTENMENT TRANSFORMATION

For all their intellectual diversity, exponents of the European and American Enlightenments were united both in their aversion to this Western tradition of the family and in their agitation for a private, contractual model of marriage and the family. To introduce the rise of the Enlightenment model, and its rivalry with traditional Catholic and Protestant forms, permit me to summarize a rich and vigorous literary debate in mid-nineteenth-century England. The antagonists in the debate were James Fitzjames Stephen, a prominent Anglican jurist and moralist, and John Stuart Mill, a leading libertarian

and utilitarian of ample Enlightenment learning. Both were prominent men of letters and occasional legislators. Both spoke for broad constituencies—Stephen for the old order, Mill for a new order.

The setting for much of their debate was the ferment in Parliament and the public square for the reform of the traditional English learning and law of marriage and the family—ferment that erupted in equal force in American legislatures at the same time. The Stephen-Mill debate was focussed by several Parliamentary bills that sought to liberalize marriage and divorce requirements, to liberate children from abusive fathers, and to provide wives with rights over marital property, minor children, and minimal maintenance. The heart of this debate, in Stephen's words, "comes to this: is the family a divine, indissoluble union governed by the *paterfamilias*, or is it a simple contractual unit, governed and dissolved by the wills of the parties?"

Stephen, speaking for the old Anglican order, defended the first position. "The terms of marriage and family...settled by the law and religion of Europe" accord well with Scripture, reason, and nature, wrote Stephen. These sources teach that man is created with superior power, ability, and opportunity in life, which he must discharge with due restraint and accountability to God, and God's representatives in state and church. These sources also teach that women have a special calling to be wives and mothers, teachers and nurturers of children, which calling they must discharge in the home. Our law and religion reflect these divine and natural sentiments, said Stephen "by prescribing monogamy, indissoluble marriage on the footing of the obedience of the wife to the husband, and a division of labour among men and women with corresponding differences in the matters of conduct, manners, and dress."

Nature is defied if marriage is treated as a simple contract, said Stephen. This notion assumes falsely that men and women are equal. To allow marriage to become "a simple bargained-for contract," without oversight by parents and peers and by church and state, "will inevitably



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expose women to great abuse." They will have no protection in forming the bargain with naturally superior men, nor protection from men who dismiss them when barren, old, unattractive, troubled, or destitute. "The truth is," Stephen thundered "that the change of marriage...from status to contract," from divine sacrament to simple partnership "is not favorable to equality" or justice. "Men [and women] are fundamentally unequal, and this inequality will show itself, arrange society [and its law] as you like." "If marriage is to be permanent, the government of the family must be put by law and by morals in the hands of the husband."

Nature is also defied if the family is treated as an open society, subject to claims of right by wives, children, and servants. The family, once formed, is an autonomous unit, just like the church and the state. The husband and father is the head of the family, just as the monarch is the head of the church and commonwealth. He must rule the household as God's vice-regent with all benevolence, grace, and Christian devotion. A wife is the husband's co-helper in the family, who must submit to his reasoned judgment in the event of conflict. A child is the father's ward and agent, who must obey his every reasonable command.

Stephen was well aware of the potential abuses in this system. "No one," he writes, "contends that a man ought to have power to order his wife and children about like slaves and beat them if they disobey him." Such conduct must be punished severely, on a case-by-case basis. But these exceptions cannot unmake the general rules of marriage and family life forged by learned theologians and jurists over the centuries. John Stuart Mill attacked Stephen's sentiments with arguments well known in English liberal circles, especially those influenced by Mary Wollstonecraft's writings of the 1790s. In part, Mill's attack was directed against the abuses of the traditional family system. Though sometimes the family is marked by "sympathy and tenderness," said Mill, "it is still often...a school of willfulness, overbearingness, unbounded self-indulgence, and a double-dyed and idealized selfishness" of the husband and father, with "the individual

happiness of the wife and children...being immolated in every shape to his smallest preferences." No system of family law that allows such systemic abuse can be justified. Mill himself formally protested and renounced that law when he and Harriet Taylor were married in 1851, after a 21-year platonic friendship during which she was married to another.

Mill's deeper attack on Stephen, however, was theoretical—"laying bare the real root of much that is bowed down to as the intention of Nature and the ordinance of God," as he put it. The prevailing theology and law of marriage and the family supports a "three-fold patriarchy," Mill charged. The church dictates to the state its peculiar understanding of nature. The state dictates to the couple the terms of their marital relation, and abandons them once the terms are accepted. The man lords over his wife and children, divesting them of all liberty and license in their person and property, thought and belief. "The aim of the law," Mill charged, "is to tie up the soul, the mind, the sense, the body, and its material extensions."

Nature does not teach bondage and subjection of women, said Mill, but liberty and equality of all men and women. "[T]he legal subordination of one sex to the other is wrong and ought to be replaced by a principle of perfect equality with no favour or privilege on the one side nor disability on the other." "What is now called the [inferior] nature of women" and the superior nature of man "is an eminently artificial thing," born of social circumstances, not natural conditions. "If marriage were an equal contract...and if [a woman] would find all honourable employments as freely open to her as to men," marriages could be true institutions of liberty and affection, shaped by the preferences of wife and husband, not the prescriptions of church and state.

Nature also does not teach parental tyranny and "commodification" of children, but counsels parental nurture and education of children. If the family were an open unit, where children could seek redress from abuse and arbitrary rule, a real family could be realized and true happiness could be attained. If the *paterfamilias* does not



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“fulfill his obligation to feed, nurture, and educate his child with love and patience,” said Mill, the *paterpoliticus*, the state as the child’s protector under the social contract, “ought to see it fulfilled, at the charge, as far as possible, of the parent.”

Mill sought to infuse these Enlightenment contractarian principles of marriage and the family into the common law and public opinion of Victorian England and beyond. In his career as Parliamentarian and man of letters, Mill advocated the abolition of much that was considered sound and sacred in the Western legal tradition of the family. He urged the abolition of the requirements of parental consent, church consecration, and formal witnesses for marriage. Mill questioned the exalted status of heterosexual monogamy and supported peaceable polygamy and hinted strongly at his support for other putatively unnatural unions. He called for the absolute equality of husband and wife to receive, hold, and alienate property, to enter into contracts and commerce, to participate on equal terms in the workplace. He castigated the state for leaving annulment practice to the church, and urged that the laws of annulment and divorce be both merged and expanded under exclusive state jurisdiction. He urged that paternal abuse of children be severely punished, and that the state intervene where necessary to ensure the proper physical and moral nurture and education of children. Mill’s contractarian gospel for the salvation of Western family law was too radical to transform the law of his own day. But Mill’s gospel anticipated much of the agenda for the transformation of Anglo-American family law along Enlightenment libertarian lines. This transformation began slowly at the turn of this century, gained momentum with the New Deal, and broke into full form during the 1960s and thereafter.

Traditional marriage and family law, under both Catholic and Protestant models, had focussed on the contracting and dissolving of marriages. The governance of marriages and families once formed and once dissolved was left largely to the discretion of the husband and

father, operating with the counsel of the church and the Christian community. In the early part of this century, this pattern shifted dramatically. Sweeping new laws were passed to govern marriage formalities, divorce, alimony, pre-nuptial contracts, marital property, wife abuse, child custody, adoption, child support, child abuse, juvenile delinquency, education of minors, among other subjects. The state, Benjamin Cardozo quipped in 1933, has become “at once a third party to every marriage and the third parent to every child.”

Such sweeping legal changes had several intended consequences, which first came to social prominence in the 1960s. Marriages became easier to contract and easier to dissolve. Wives received greater protections in their persons and in their properties from their husbands, and greater independence in their relationships outside the family. Children received greater protection from the abuses and neglect of their parents, and greater access to benefit rights. The state came to replace the church as the principal external authority governing marriage and family life. The Catholic sacramental concept of the family, governed principally by the church, and the Protestant social concept of the family, governed by the broader Christian community, gave way to a new privatist concept of the family, whereby the wills of the parties, separately or together, would be enforced by the courts. Neither the church, nor the local community, nor the *paterfamilias* could override the reasonable (and legally circumscribed) expressions of will of the marital parties themselves. Couples could now make their own marital beds, and lie in them or leave them as they saw fit.

In the past two decades, this privatization of marriage and the family has taken even sharper focus. Pre-nuptial contracts, determining in advance the respective rights and duties of the parties during and after marriage, have gained prominence. No-fault divorce statutes are in place in every state. Legal requirements of parental consent and witnesses to marriage have become largely dead letters. The functional distinction between the rights of the married and the unmarried has been narrowed by a growing



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constitutional law of privacy. Homosexual, bisexual, and other intimate associations have gained increasing acceptance at large, and at law.

While *consensual* intimate relationships between adults have become increasingly impervious to state scrutiny, however, *nonconsensual* conduct has become increasingly subject to state sanction. Many state courts have opened their dockets to civil and criminal cases of physical abuse, rape, embezzlement, conversion, and fraud by one spouse or lover against the other. The ancient "marital exemption" in the law of rape, that often protected abusive husbands from criminal prosecution, is falling into desuetude. Fading too is the ancient spousal exemption in evidence law that discouraged spouses from testifying against each other.

Although the state has largely withdrawn from the intimate relationship between consenting adults, it has increased dramatically its protection of children. Sweeping changes have been introduced in the laws governing adoption, child custody, child support, child abuse and neglect, juvenile delinquency, education of minors, and similar subjects. Abused minor children are plucked from their natural homes with increasing ease. Adolescent children are suing delinquent parents, guardians, and other authorities with increasing alacrity, and success. As traditional marital forms and functions have eroded, the state's parental role over children has dramatically increased.

#### THE RESPONSE OF THE CHURCH

**H**ow does the Christian Church, in all of its denominational diversity, respond to this—pastorally and prophetically? How does the Church remain faithful to its traditional teachings on marriage, family, and sexuality, yet respond constructively to a transforming culture and law of the family. How does the Church respond to the new discourse about the traditional family, its values, and its alternatives, the new perspectives on sexuality, kinship, and procreation born of globalization and the

technological revolution. The Church has always had the spiritual and intellectual resources to come to terms with massive changes in the culture of the family and to accommodate, if not direct, great shifts in Western family law. The Church has always been able to strike new balances between order and liberty, orthodoxy and innovation, dogma and adiaphora, with respect to marriage, family, and sexuality. How should the Church respond today?

A mere law professor, I don't dare suggest an answer to that question. I will suggest, however, that as the Church formulates its response it would do well to remember two famous legal maxims: "We must always walk into the future with an eye on the past." "All the great questions of theology, philosophy, and society must ultimately come to the law for their resolution." Too much of the contemporary Church seems to have lost sight both of its rich theological tradition on marriage and the family, and of the ability of our forebearers to translate their enduring and evolving perspectives on marriage and family life into legal forms, both canonical and civil. There is a great deal more in those dusty old tomes and canons than idle antiquaria. These ancient sources ultimately hold the theological genetic code that has defined the contemporary family for what it is, and what it can be. There is a great deal more in law and legal discourse than the Hollywood productions of "The Firm" and "The O.J. Simpson Trial" would have us believe. Law is not only the rules and tricks of evidence, procedure, and the many other legal subjects that we cultivate. Law is also a living system of values and beliefs that depends, in substantial part, upon the voice of the Church and its theologians for its contents and its efficacy.

St. James said that faith without works is dead. The same thing might be said about the theology and law of the family. Without theology, legal governance of the family is in danger of empty formalism and ultimate listlessness. Without law, theological discourse on the family is in danger of shallow spiritualism and ultimate indifference. □