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ARTICLE

MARRIAGE IN ITS PROCREATIVE
DIMENSION: THE MEANING OF THE
INSTITUTION OF MARRIAGE THROUGHOUT
THE AGES*

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The word “institution” is one of those open-ended words that could mean many things to many different audiences. I intend to use the word in much the same manner as it has been employed by Douglass North in his studies of Western economic history. Institutions, North has written, define “the rules of the game; . . . they structure incentives in exchange, whether political, social, or economic.”¹ Institutions, in other words, embrace rules of law and other norms governing human interaction. They help us to channel human behavior in certain ways and not in others. Necessarily, they also embrace the belief systems that stand behind and animate the rules. They help to define social expectations and to set standards.

I shall take the position that the institutional weight of marriage, for most of the last two thousand years, has been in favor of seeing marriage as the appropriate vehicle in which to give birth to and raise children. The procreative dimension of marriage has been the central core organizing principle of the institutional—that is, the legal—understanding of marriage from the time of pre-Christian Roman law to the present, although it is currently endangered by various shifts in legal norms and public philosophies. But, for most of its history, it can fairly be said that the legal order of the West has dedicated itself, through a variety of rules and understandings, incentives and disincentives, to preserving marriage as a principal means of bringing into being the next generation. To have made this sort of claim even as recently as two or three decades ago might have appeared as stating

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1. Douglass C. North, *Institutions, Ideology, and Economic Performance*, in *THE REVOLUTION IN DEVELOPMENT ECONOMICS* 95 (James A. Dorn, Steve H. Hanke & Alan A. Walters eds., 1989).

the obvious. But in light of recent arguments about the nature and function of marriage—recently accepted by courts in the United States and Canada—reviewing the history of the procreative dimension of marriage seems like a worthwhile undertaking.

In this paper, I shall consider four societies that have existed over the course of western history. These include pre-Christian classical Rome, the early medieval West of the sixth through eleventh centuries, the High Middle Ages of the twelfth through fifteenth centuries, and the Anglican high church and theological culture of the early modern period. There is, in each of these societies, a great emphasis placed on marriage as the legitimate means of bringing into being the next generation. Indeed, the procreative dimension of marriage was, in each of these societies, the central organizing principle of legal analysis and social life.

I. PRE-CHRISTIAN ROMAN LAW

Let us begin with pre-Christian Roman law. The popular opinion, shaped probably by pulp novels and television and film representation, would have one believe that the Romans did not hold marriage in high regard. The morals of Petronius and Nero are likely what most people would think of should they be asked to focus on pre-Christian Roman sexual behaviors and expectations. The law, however, did not reflect or condone this code of conduct. There were steady efforts by lawmakers to provide institutional support for marriage and to recognize marriage as the means by which the next generation should come into being and be trained to accept its responsibilities.

We might consider the Augustan marriage reforms. Emperor Octavian, who took the name “Augustus”—“the Great” or “the Exalted One”—sought to restore order to a Roman Empire that had experienced decades of turmoil.² He understood marriage to be under grave threat in his day (he reigned from 31 BC to AD 14), and was especially concerned with the failure of the Roman elites to have children and thus to produce the next generation of leading citizens. Rome, in the century before Augustus ascended to the imperial throne, had undergone wrenching social and economic change. Over the course of one hundred years, Rome expanded its imperial reach over large parts of the Mediterranean basin and also over areas of the far North—northern Gaul and even Britain. Rome had also undergone a series of bloody civil wars. The old republican forms of government lost their real significance and were replaced by the principate—government by an emperor who preserved, on behalf of the elites, the old republican titles but who ruled on his own accord. In the course of these

2. One of Augustus’s most recent English-language biographers begins by describing him, then Octavian, as “[t]he man who can justifiably be called the founder of the Roman Empire.” PAT SOUTHERN, *AUGUSTUS* 1 (1998).

upheavals, the elites stopped having children. Indeed, one sees the emergence in the course of the first century BC of a kind of contraceptive mentality that favored present-centered hedonism over the foresight and sacrifice that fecund married life necessarily entailed.³

Augustus sought to counter these trends and to encourage the growth and fostering of families through a series of inducements and penalties.⁴ At least two laws were promulgated, one in 17 BC known as the *Lex Iulia de Maritandis Ordinibus* and the other in AD 9 known as the *Lex Iulia et Papia Poppaea*. Taken as a whole, this legislation is commonly known today as the *Lex Papia Poppaea* after the names of the men who were counsels at the time of the latter law's promulgation. The texts survive only in partial and derivative form, culled from a variety of ancient sources.⁵

The Hungarian scholar Pál Csillag has painstakingly identified the basic categories of thought behind this legislation. Csillag notes that the law divided all men between roughly the ages of twenty-five and sixty and all women between roughly the ages of twenty and fifty into two basic types—the married and the celibate (*caelibes*).⁶ The law expected all those who fell between the specified age limitations to marry or to face certain penalties, chief among them being the loss of the capacity to inherit.⁷ By marrying within one hundred days of receiving notice of a bequest, however, a celibate man or woman might remove the incapacity imposed by the statute.⁸ Failure to comply caused the gift to lapse and to become the property of the state.⁹ *Orbi*—childless couples¹⁰—were permitted to take one-half of the

3. The ancient writer Aulus Gellius recorded a speech delivered by a public censor, Metellus Numidicus, around the year 102 BC on the necessity of marriage. Metellus warned his audience that “it was impossible for the City to survive without frequent marriage” (“*civitatem salvam esse sine matrimoniorum frequentia non posse*”). AULUS GELLIUS, *NOCTES ATTICAE*, bk. I, VI.6. Suetonius records that Augustus used this speech, or one like it, in his own arguments before the Senate when seeking approval for his marriage legislation; the title of the speech was “*De Prole Augenda*” (“On the Increase of Children”). C. SUETONI TRANQUILLI, *DIVUS AUGUSTUS* 89.2 (1979).

4. The idea of legislative reform of morals and marriage was something that was current in late Republican thought. Thus, Karl Galinsky calls attention to Cicero's efforts to encourage Julius Caesar to embark upon a similar program. See Karl Galinsky, *Augustus' Legislation on Morals and Marriage*, 125 *PHILOLOGUS* 126, 132 (1981). There is also indirect evidence that Augustus may have commenced his legislative activity almost as soon as he became princeps, prior to the year 27 BC. See PETER BRUNT, *ITALIAN MANPOWER* 225 B.C.–A.D. 14, at 558 (1971).

5. The best source for these documents remains SALVATORE RICCOBONO, JR., 1 *ACTA DIVI AUGUSTI* 166–97 (1945).

6. PÁL CSILLAG, *THE AUGUSTAN LAWS ON FAMILY RELATIONS* 81–82 (1976).

7. Gaius's *Institutes* obliquely preserves the legislation on the incapacity of *caelibes* to take under a will when it acknowledges an exception for soldiers' wills: “Celibates . . . are forbidden to take an inheritance and legacies by the *lex Iulia*” (“*Caelibes . . . lege Iulia hereditates legataque capere vetantur . . .*”). GAIUS, *INSTITUTES*, bk. II, 111.

8. CSILLAG, *supra* note 6, at 86.

9. *Id.*

10. *Orbi* (masculine singular *orbis*) is a richly nuanced word that carries with it the sense of both deprivation and barrenness. It may mean a parent who has lost a child, a child who has lost

estates bequeathed to them.¹¹ Those who failed to marry or to reproduce might incur still other civil penalties, including the loss of political office.¹² In practice, the harshness of the law was mitigated by juristic commentary which taught that “inheritance from ascendants or descendants within three degrees was excepted.”¹³

The ancient historians noted that Augustus’s legislation enjoyed at best a mixed reception. Suetonius recorded that Augustus’s marriage legislation was met with a “tumult of refusal” (*tumultu recusantium*) at the time of its promulgation and was accordingly “softened” (*lenita*).¹⁴ Tacitus indicated that Augustus intended to rely on a general public duty to report those who might have received suspicious inheritances. As a practical matter, this enforcement mechanism evolved into a system of informers-for-profit that grew to be intensely disliked by the general population because, if the commentators are to be believed, it was a thoroughly corrupt process.¹⁵

While Augustus’s approach emphasized penalties, subsequent emperors stressed inducements. Again, the law of succession proved the vehicle by which childbirth was encouraged. By a decree of the second-century emperor Hadrian, freeborn mothers of three children and freedwomen mothers of four children received the preferential right to inherit from children who predeceased them even where the children were in the power of a relative—including the father.¹⁶ This rule represented a notable exception to the legally dominant position the father occupied in the Roman household.¹⁷ Further, the Emperor Septimius Severus, around the year 203, decreed “that one may be excused from the onerous duty of being a guardian or curator by having a certain number of children: three in Rome, four in the rest of Italy, five in the provinces.”¹⁸

Philosophers lent much-needed intellectual support to the proclaimed policy objectives of the Roman law. One might consider the teaching of Musonius Rufus, a Stoic philosopher who wrote in the latter half of the first century AD. Musonius understood marriage to serve two fundamental

his or her parents, those unable to reproduce, or those left alone and desolate in the world. See OXFORD LATIN DICTIONARY 1264–65 (1982).

11. CSILLAG, *supra* note 6, at 85.

12. JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 21 (1965).

13. *Id.*; see also Andrew Wallace-Hadrill, *Family and Inheritance in the Augustan Marriage Laws*, PROC. OF THE CAMBRIDGE PHILOLOGICAL SOC’Y 58 (1981) (exploring the implications of the Augustan legislation for families and estate planning).

14. C. SUTONI TRANQUILLI, *supra* note 3, at 34.

15. TACITUS, ANNALES 3.28; see also CSILLAG, *supra* note 6, at 163–64 (reviewing Tacitus and other sources).

16. GAIUS, *supra* note 7, at 3.3.2.

17. See CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW 69–72 (2004) (describing the scope and nature of the Roman legal doctrine of paternal power).

18. NOONAN, *supra* note 12, at 23 (summarizing CODEX 5.66.1).

goals—the procreation of children and the formation of a union that reflected the most intimate sorts of friendship and love. In this context, Musonius asserted, marriage was a coming together by husband and wife for the purposes of rearing the next generation. Such a goal, he asserted, was best achieved in a family filled with mutual love:

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 this desire as well as for having children that both entered upon marriage.¹⁹

The procreative and companionate ideals embodied in these legislative enactments and reflected in the writings of philosophers like Musonius Rufus, although resisted by some among the elites, must have had an effect. A review of recent scholarship, not on Roman marriage but on Roman concubinage, reveals that Roman social practice recognized that marriage, where it was available, should serve as the legitimate means of procreation.

In Roman practice, concubinage often involved a relationship of unequals; it might thus involve men too young for marriage but who lived for a while with a partner of lesser social status, as St. Augustine recorded he personally did in his *Confessions*.²⁰ It might also involve older men, whose wives had died and whose children were grown, living with women of unequal status. Finally, it might involve relationships where one party was forbidden by law to marry—for instance, where one party was a slave or of servile birth.²¹ What is significant, according to scholars who have studied the evidence of inscriptions, is how rarely children are acknowledged as being produced from such unions. Susan Treggiari, in her study of concubinage, could find evidence among the inscriptions she studied that only three

19. CORA LUTZ, *MUSONIUS RUFUS: THE ROMAN SOCRATES* 89 (1947); Some Stoics also advocated the development of a strong bond between parents and offspring. Thus, one often finds Stoic writers arguing on behalf of maternal breast-feeding of children, against the Roman custom of sending children out to wet-nurses. See GRETCHEN REYDAMS-SCHILS, *THE ROMAN STOICS: SELF, RESPONSIBILITY, AND AFFECTION* 126–28 (2005).

20. Thomas A.J. McGinn, *Concubinage and the Lex Iulia on Adultery*, 121 *TRANSACTIONS OF THE AM. PHILOLOGICAL ASS'N* 335, 338 (1991).

21. Beryl Rawson, *Roman Concubinage and Other De Facto Marriages*, 104 *TRANSACTIONS OF THE AM. PHILOLOGICAL ASS'N* 279, 304 (1974).

couples had children.²² Marriage, it seems, was considered by all involved to be the proper venue for the raising of children.²³

Procreation, of course, was not an absolute ideal in pre-Christian Rome. Throughout the history of pre-Christian Rome, the *paterfamilias*—the head of the household—retained the power of life and death over infants born into his family. The odious practice of exposure thus remained a regular feature of pre-Christian life. One has a sense of how deeply entrenched this practice must have been when one reads a document like Seneca the Younger's *De Ira*. Well regarded by many modern readers for his humaneness, Seneca spoke warmly about the need to destroy "weak and deformed" (*debiles monstrosique*) children.²⁴ Addressing the general need to avoid anger, Seneca opined that we are sometimes called to perform violent acts, but we must nevertheless retain our composure even under these circumstances. We must beat rabid dogs to death.²⁵ We kill wild oxen and slay sickly sheep lest they infect the entire flock. Just so, we "extinguish" (*enxstinguimus*) unnatural offspring and drown sick children. We do these things, Seneca counseled his reader, not from a heart filled with rage, but moved by reason and the rightful desire to remove the "useless" (*inutilia*) from the healthy and the sound. Seneca's concern was not with the moral problems associated with the taking of human life, but rather with encouraging that such unpleasant tasks be carried out with equanimity and the assurance that they are in accord with reason.²⁶

If the procreative ideal did not trump the paternal power to expose unwanted young, neither could it serve to open up the institution of marriage to those who were legally excluded from it. As alluded to above, slaves were excluded from the possibility of marriage, although they were allowed to form stable if not entirely permanent relations under the rubric of *contubernia*.²⁷ Realizing the utility in promoting affectionate relations

22. Susan Treggiari, *Concubinae*, 49 PAPERS OF THE BRIT. SCH. AT ROME 59, 67 (1981).

23. "[M]arriage," Beryl Rawson concluded, "remained the norm." Rawson, *supra* note 21, at 304.

24. SENECA, DE IRA I.XV.2.

25. *Id.*

26. Exposure was used not only as a means of eliminating children deemed unfit to live on account of birth defects, but also as a means of limiting family size or of dealing with suspected cases of infidelity. Mireille Corbier, *Child Exposure and Abandonment*, in CHILDHOOD, CLASS AND KIN IN THE ROMAN WORLD 52, 72 (Suzanne Dixon ed., 2001).

27. Adolf Berger defines *contubernium* as "[a] permanent, marriage-like union between slaves. Masters favored the maintenance of slave families. Children of such unions were *liberi naturales*." See ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 415 (1953) (*liberi naturales* means "natural children" as opposed to the legitimate children of legally married couples.). In addition to the status of the children, Buckland notes other consequences of *contubernia*—because the parties were slaves and hence incapable of marriage, neither could commit adultery. Slaves were also incapable of inheriting from one another. See W.W. BUCKLAND, THE ROMAN LAW OF SLAVERY: THE CONDITION OF THE SLAVE IN PRIVATE LAW FROM AUGUSTUS TO JUSTINIAN 76–77 (2000).

among the persons they owned, slave owners often permitted if not encouraged marriage-like unions that frequently produced children.²⁸

Despite these qualifications, however, it is clear that the central organizing principle supporting the Roman conception of marriage was the idea of procreation. To say that Roman marriage was all about the conservation of property, inheritance strategies, or the transmissibility of estates, or to observe that it was formed by the free consent of the parties and dissoluble in the same manner it was formed is all beside the point. None of this is comprehensible without keeping in mind the procreative dimension of marriage. After all, arrangements regarding property and inheritance only make sense when there is a succeeding generation to benefit from such planning. This was emphasized by Emperor Augustus and reiterated by succeeding generations of emperors. It was justified by the Stoic philosophers and can also be found in Ulpian's explication of natural law, which teaches "the joining of male and female that we call marriage, and the procreation and education of children."²⁹

II. THE CHRISTIAN EXPERIENCE OF THE EARLY MIDDLE AGES

Christianity represented a reordering of the way in which marriage was conceived. Most fundamentally, marriage was no longer seen as the highest or best life for persons committed to following Christ. Pride of place belonged, rather, to those who, in accord with the "counsels of perfection," chose instead to follow a life of perfect continence.³⁰

Virginity had existed as a religiously motivated phenomenon in the ancient world prior to the rise of Christianity. For example, the ancient Rome of Emperor Augustus preserved and revered the cult of the Vestal Virgins who were women selected before attaining puberty from among the

28. [B]ecause slaves were technically not permitted to marry and could thus not produce legally recognisable families, the relationships which are attested in the sources must be considered concessions to the slaves from their owners: it cannot be imagined, in light of owners' omnipotence over their slaves, that servile marriages occurred and lasted, or that children were born to married slaves, without the connivance if not express permission of [their] masters.

K.R. BRADLEY, *SLAVES AND MASTERS IN THE ROMAN EMPIRE: A STUDY IN SOCIAL CONTROL* 50 (1984). Establishing the fullness of masters' control over slaves' reproductive capabilities, Bradley goes on to note that slave owners frequently sold mothers and children but almost never sold family groupings that included a husband, wife, and children. *Id.* at 52–55.

29. JUSTINIAN, *DIGEST* 1.1.1 § 3 ("hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio").

30. In speaking of the "counsels of perfection," I am borrowing the classical term for the three great vows those entering the religious life would customarily undertake—chastity, obedience, and poverty. The classical distinction drawn by generations of scholastic writers was between "counsels," which one is free to accept or reject, and "precepts," which one is obliged to follow. All Christians are obliged to follow the evangelical precepts—the positive commandments of the Scripture—but are free to accept or reject those admonitions—"counsels"—intended to help us achieve a high level of perfection. One can still consult productively classic works like BISHOP CHARLES GAY, *THE RELIGIOUS LIFE AND THE VOWS* 1–15 (1942) (exploring the differences between the evangelical precepts and the counsels of perfection).

Roman aristocracy and given the task of serving at the altar of Vesta, the goddess of the Roman hearth.³¹ Vestal Virgins played a crucially important political role in ensuring the health of the state.³² Their continued virginity symbolized Roman stability, but the loss of virginity consequent upon an individual's moral lapse was feared as a threat to the state's very survival.³³ (Vestal Virgins, it should be added, did not maintain a commitment to perpetual virginity but rather were allowed to marry and engage in sexual intercourse late in life, after the possibility of procreation had passed by.)

While the purity of Vestal Virgins was essential to political right order, their way of life was not intended to represent the Roman ideal. Procreation remained the fundamental value of family life,³⁴ and Roman religion did not hold out the Vestal Virgin as a model for emulation or exalt the virgin to a special place in the afterlife. Peter Brown has captured these ideas well: "[Vestal Virgins] fitted into a clearly demarcated space in civic society. Though eminent and admired, they were not thought to stand for human nature at its peak."³⁵

The Church Fathers who wrote in the fourth and fifth centuries changed the premises on which religiously inspired virginity was constructed. They were emphatic on the transcendent significance of the virginal life. Methodius, a Greek writer active around the year 300, argued that virginity mirrored the divine form of life. It was necessary, on this account, that Jesus Christ remain virginal and that his life should constitute a pattern for those who would be perfect: "What then did the Lord, the Truth and the Light, accomplish on coming down to the world? He preserved His flesh incorrupt in virginity with which he had adorned it. And so let us too, if we are to come to the likeness of God, endeavor to banish corruptibility."³⁶

St. Ambrose, bishop of Milan, doctor of the Church, and teacher of St. Augustine, stressed the close connection between virginity and the promise of immortal life. Jesus Christ, by rising from the dead, offered to all the promise of resurrection of the body and life everlasting in glorified form. Jesus had also stated that in heaven they neither marry nor are given in

31. On the selection, training, and expectations of Vestal Virgins, see Mary Beard, *The Sexual Status of Vestal Virgins*, 70 *J. ROMAN STUD.* 12, 12–27 (1980). Beard has more recently reconsidered and modified her larger anthropological claims about the sexually ambiguous nature of the Vestal Virgins. See Mary Beard, *Re-reading (Vestal) Virginity*, in *WOMEN IN ANTIQUITY: NEW ASSESSMENTS* 166–77 (Richard Hawley & Barbara Levick eds., 1995).

32. ARIADNE STAPLES, *FROM GOOD GODDESS TO VESTAL VIRGINS: SEX AND CATEGORY IN ROMAN RELIGION* 135 (1998).

33. *Id.* ("A single lapse by a single priestess threatened the very existence of the state.") The sanction for such a lapse was terrifying—burial alive with token amounts of food and drink.

34. *Id.* at 130.

35. PETER BROWN, *THE BODY AND SOCIETY: MEN, WOMEN, AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* 8 (1st ed. 1988).

36. ST. METHODIUS, *THE SYMPOSIUM: A TREATISE ON CHASTITY* 47 (Herbert Musurillo trans., Longmans, Green & Co. 1958).

marriage.³⁷ St. Ambrose construed these and other teachings to justify virginity in this life as a foretaste and intimation of the life of the world to come:

“When the dead rise again there is no marrying or giving in marriage; they are as the angels in heaven are.” He who condemns virginity condemns our desire for that resurrection. Resurrection can hardly be counted wrong if it is assigned as the final reward for mankind; and its likeness, virginity, can hardly be offensive if its model is approved both by present desire and by future enjoyment.³⁸

Virginity, St. Ambrose stressed repeatedly, imitates the life of the angels themselves. It is not a naturally occurring phenomenon, and the mind focused only on the things of this world will not appreciate its foundation in a transcendent order.³⁹ It is not a practice found among “the nations” (*gentilibus*) nor among the “barbarians” (*barbaris*).⁴⁰ Animals do not practice virginity.⁴¹ “Virginity,” St. Ambrose asserted, “quite rightly looks to heaven for its manner of life.”⁴² It is, indeed, a gift from heaven, but one which can be imitated on Earth by those gifted with grace and filled with a firm disposition to follow the highest counsels of Christ. St. Ambrose also contrasted virginity practiced by Christians with the pagan practices of classical Rome. Vestal Virgins do not take a vow of perpetual continence, but rather practice chastity only for a few years. They maintain a youthful integrity only to be corrupted in advanced age.⁴³ St. Ambrose was both perplexed and dismayed at such a strange practice.

St. Augustine offered a similar theological defense of virginity. There are many natural duties that arise from our human nature, St. Augustine wrote, chief among them the requirement that we bring about the next generation. Virginity, however, is something set apart: virginal integrity, practiced through devoted continence, and the consequent freedom from sexual relations that those under vows enjoy, does not belong to this world; rather, it is the “angelic portion” (*angelica portio*)—the form of life led by celestial beings.⁴⁴

St. Augustine went so far as to assert that a special place has been reserved in heaven for those who observe virginal continence. In making

37. *Matthew* 22:30.

38. ST. AMBROSE, *De virginitate*, in *GIVEN TO LOVE* para. 27, at 87 (James Shiel trans., Scepter Publishers 1963). St. Ambrose is quoting *Matthew* 22:30.

39. St. Ambrose, *De virginibus*, bk. I, 11, 16 *PATROLOGIA LATINA* 191 (Jacques-Paul Migne ed., 1844–55).

40. *Id.* bk. I, 14.

41. *Id.*

42. *Id.* bk. I, 14, in *GIVEN TO LOVE* 21–22 (James Shiel trans., Scepter Publishers 1963).

43. St. Ambrose, *De virginibus*, *supra* note 39, bk. I, 15.

44. ST. AUGUSTINE, *De sancta virginitate*, in *DE BONO CONIUGALI, DE SANCTA VIRGINITATE* 78, para. 12 (P.G. Walsh ed. & trans., 2001).

this point, he chose to reflect on the text in the Gospel of Matthew that compares our eternal reward to the householder who has hired some laborers: Some labor all day long, others for a few hours, and some only for one hour at the very end of the day. Yet the householder gave to each one a single denarius as their wage.⁴⁵

Fearing, perhaps, that this text stood against his contentions, St. Augustine responded:

[E]ternal life will itself be shared alike by all the saints, and so the denarius has been allotted equally to all. But because in that eternal life the lights of their merits will shine differently, “There are many dwelling places in the Father’s house.” Accordingly, since the value of the denarius remains the same, one of us will not live longer than another, but in those numerous dwelling-places one will obtain brighter glory than another.⁴⁶

Virginity thus led to munificent eternal rewards. Even in this life, however, virginity was not to be understood as barrenness. A central feature of the case made on behalf of virginity was its procreative capacity. This was not procreation in a terrestrial, physical sense. Virginity, rather, was rich with the possibility of reproduction in a deeply transcendent, spiritual sense. By its witness to the perfection of human life in God, it won souls for the Church.

St. Augustine stressed that there were two kinds of birth: physical birth and spiritual birth. The latter was the more important since what mattered in this life was our salvation—our acceptance into the kingdom of God at the end of our days. Virgins were the ones responsible for the spiritual birth of souls within the Church; through the perfect lives they led, they modeled for the rest of us the way to salvation. They are, St. Augustine writes, “both virgins and mothers of Christ in the faith” (*virgines matresque Christi sunt in fide*).⁴⁷ They may have renounced the possibility of bearing children physically, but their cooperation in the birth of Christians to eternal life was indispensable to the survival and success of the faith.⁴⁸ Virginity was a form of motherhood—indeed, the highest form of motherhood—by which all are brought home to God’s mansions.

St. Ambrose made similar claims for virginity. Jesus Christ was both born of a virgin and has taken as his bride the virgin Church.⁴⁹ Mary’s marriage with Joseph, though virginal, was uniquely fecund. Similarly, Christ’s marriage to the Church has produced nothing less than salvation for all humankind.⁵⁰ Those who take a vow of virginity under the Church’s

45. *Matthew* 20:1–16.

46. ST. AUGUSTINE, *De sancta virginitate*, *supra* note 44, at 101.

47. *See id.* at 78, para. 7. Translation is author’s own.

48. *Id.*

49. St. Ambrose, *De virginibus*, *supra* note 39, paras. 21–22.

50. *Id.*

supervising authority have themselves agreed to take Christ as their spouse and they share in Christ's fruitfulness.

In making these claims for virginity, the theologians of the fourth and fifth century exalted the ideal of fecundity to a spiritual plane. They did not reject marriage; indeed, as will become clear, they viewed marriage as a great good. Rather, they made use of the image of a sound and fruitful marriage to explain the religious significance of virginity: Mary and Joseph enjoyed a virginal but fruitful relationship. Indeed, the fruit of their marriage brought salvation to the world. Christ enjoys the same sort of relationship with the Church; indeed, Christ is considered the Church's bridegroom. Extending the analogy, virgins were understood to have entered into a relationship with Christ and the Church that will win converts for Christ and thereby give birth to the next generation of Christians. Virgins have thus married Christ in a special way and can expect their unions to be fruitful. In this way, not only virginity, but also marriage, acquired institutional strength.

Not surprisingly, the fourth- and fifth-century theologians also explained and explored carnal marriage in terms of its fecundity. One might consider in particular the writing of St. Augustine, whose theology of the "goods of marriage" deeply influenced not only the shape of Christian doctrine but the concept of marriage as it was understood by secular lawyers until very nearly our own day.⁵¹

These goods of marriage were threefold: procreation, fidelity, and sacramental unity.⁵² Connecting the three goods into a single unity was the role of friendship between the parties. All persons, male or female, St. Augustine wrote, are members of the same human race and are capable of friendship.⁵³ God created all persons from one archetype—Adam—so as to enhance our natural capacity for friendship.⁵⁴ And marriage, which represented the natural unity that should prevail between man and woman, joins the couple together in unity and friendship.⁵⁵ Indeed, this friendship is so tight and so all-encompassing that it has caused some scholars to argue that

51. See Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 *BYU J. PUB. L.* 449 (2003).

52. *Id.* at 455.

53. ST. AUGUSTINE, *De bono coniugali*, *supra* note 44, at 2–3, para. 1.1.

54. *Id.*

55. *Id.* It has been observed that friendship is a fundamental organizing principle of St. Augustine's thought regarding human relations. "[F]riendship, sustained over time, brings such a rich, deep intimacy and unity to the friends that the friends become one in spirit and soul." PAUL J. WADELL, *BECOMING FRIENDS: WORSHIP, JUSTICE, AND THE PRACTICE OF CHRISTIAN FRIENDSHIP* 86 (2002). St. Augustine was borrowing from classical models in his analysis of friendship, but applied these classical models in startlingly new ways to the relationship between the spouses that is marriage.

there is a structural unity to St. Augustine's goods of marriage that can be usefully compared to the Trinity.⁵⁶

We shall concentrate on one of these goods—the good of procreation. For St. Augustine, sexual passions were inherently unruly and needed firm guidance and control. Marriage provided both the sole and proper outlet for sexual urges and also channeled human sexuality toward the fulfillment of a great social need—the reproduction of the next generation.⁵⁷ Especially when we are young, he stressed, we “burn with the passion of the flesh” (*aestuat concupiscentia carnis*).⁵⁸ Childbirth, the requirement that we look after the welfare of our children, places a brake on our ardor. As St. Augustine put it, “parental affection tempers [concupiscence].”⁵⁹

Affirmatively, St. Augustine made the case that all marriages must be open to the possibility of children. This was so even among elderly couples who were not expected to have children and married principally to give each other companionship in old age.⁶⁰ St. Augustine added, however, that one did not need to marry out of an express desire to have children: a couple might therefore marry solely for the purpose of sexual satisfaction. So long as the two agreed to remain together until death and did not affirmatively take steps to frustrate procreation, their union can legitimately be called “marriage.”⁶¹ Their sexual intimacy might exceed proper limits, but, so long as they were married, they sinned only venially, and their offense was pardoned by reason of their marriage.⁶² In this way, St. Augustine drew an unbreakable connection between procreation and marriage. St. Augustine made this case both affirmatively, by insisting that openness to procreation be a feature of every marriage, and negatively, by stressing that couples may not exclude the possibility of children from their union. A couple, St. Augustine taught, must not actively avoid procreation, nor should they make use of “some evil means” (*opere aliquo malo*) to frustrate childbirth.⁶³ “I do not see how we can call such a thing a marriage,” St. Augustine wrote dismissively.⁶⁴

Like the pre-Christian Romans, St. Augustine did not view procreation as an absolute value. Permanence in marriage, like procreation, was one of the fundamental goods. St. Augustine stressed that one could not abandon a

56. See Perry J. Cahall, *The Trinitarian Structure of St. Augustine's Good of Marriage*, 34 AUGUSTINIAN STUD. 223 (2003).

57. ST. AUGUSTINE, *DE BONO CONIUGALI*, *supra* note 44, at 7–9, III.3.

58. *Id.* at 8.

59. *Id.*

60. *Id.* at 8, III.3.

61. *Id.* at 11, V.5.

62. ST. AUGUSTINE, *DE BONO CONIUGALI*, *supra* note 44, at 11, V.5.

63. *Id.* at 10–11.

64. See *id.* at 10 (“non invenio quemadmodum has nuptias appellare possimus”). The word *quemadmodum* carries intensifying force when used in the sort of question St. Augustine has posed. I have used the word “thing” to carry this force. One might also more colloquially translate the passage as: “I do not know how in the devil we can call this marriage.”

marriage that had failed to produce offspring in order to move to another one that held out the promise of procreation.⁶⁵ Similarly, St. Augustine counseled that even married couples should consider sexual abstinence, although he stressed that it was mandatory that such a decision be mutual.⁶⁶ He made it clear that he did not value a high birth rate for its own sake.⁶⁷ What mattered, rather, was the number of new inhabitants in the spiritual City of God.

Despite these qualifications to the good of procreation, it should be obvious that procreation was a fundamental organizing principle for Augustine's analysis of the marital relationship. It was this principle that allowed not only his marital theory but also his concept of sacred virginity to cohere logically. Fecundity in a real and physical sense was a principal justification for marriage, and fecundity in an extended, spiritual sense was a key justification for virginity.

St. Augustine's basic framework for analyzing marriage would prove to be enduring. A millennium and a half after St. Augustine wrote and flourished, one can still find early American lawyers analyzing marriage in terms of the Augustinian goods, even when Augustine's name is never invoked.⁶⁸ There were, of course, multiple lines of transmission between the fifth and nineteenth centuries. I would like to consider briefly one such line—the Irish penitential literature of the early Middle Ages (roughly the seventh through ninth centuries). This line of transmission represents perhaps the logic of the procreative ideal taken to its most extreme form in the history of the West.

The penitential literature of Ireland was a product of a Church whose view of the world was shaped by an Irish monastic culture that observed an extreme asceticism.⁶⁹ The goal was nothing less than triumphant spiritual warfare against the devil.⁷⁰ Seen in this light, it was natural for the Irish monastics to teach an austere and demanding sexual ethic. Taming the desires of the flesh was a means of combating Satan and a sign of his ultimate defeat. An austere sexual ethic, inculcated in the population at large, was thus nothing more than an extension of the spiritual warfare and self-denial of monastic existence.

65. *Id.* at 16–17, VII.7.

66. *Id.* at 14–15, VI.6–VII.6.

67. *Id.* at 21–23.

68. Reid, *supra* note 51, at 459–70.

69. Dáibhí Ó Crónín has written about St. Columbanus, one of the greatest of the Irish monks, and his Rule for the monastic settlement he established on the Continent at Luxeuil: “[It prescribed] a harsh and unremittingly severe existence for the monks with no concessions to the frailties of body and soul. ‘Let him come weary to his bed and sleep walking, and let him be forced to rise while his sleep is not yet finished.’” DÁIBHÍ Ó CRÓNÍN, *EARLY MEDIEVAL IRELAND, 400–1200*, at 197 (1995) (quoting the Rule of St. Columbanus).

70. “The founding fathers of Irish monasticism . . . appealed to the native bellicose instinct of the Irish and sought to transform it into the service of Christian ideals.” HUGH CONNOLLY, *THE IRISH PENITENTIALS AND THEIR SIGNIFICANCE FOR THE SACRAMENT OF Penance TODAY* 9 (1995).

The monastic authors of the penitentials had a keen sense of the many ways one might sin sexually. "Sexual offenses constituted the largest single category of behavior that the penitentials treated."⁷¹ This suspicion of human sexuality fueled the penitentials' effort to minimize the possibility of sexual intercourse even among laypersons. With a single-minded logic and intensity, the penitentials insisted that sexual relations between persons could take place only within marriage and then only for the sake of procreation.⁷²

One might briefly consider some leading penitential texts. The *Penitential of Finnian* declared as a general rule that "marriage is to be continent," although it permitted couples to have sexual relations, not to satisfy lustful desires, but for the sake of children.⁷³ Driving the point home, the *Penitential* added that where it was clear that a wife was sterile, the parties should practice continence "until God passes true and just judgment" upon them.⁷⁴ In more abbreviated form, this rule is repeated in the *Penitential of Cummean*.⁷⁵

The penitentials made the point that sexual intercourse was solely for procreation through other, less extreme, rules as well. Thus it was frequently legislated that married men and women should refrain from sexual intercourse after the woman learned that she was pregnant.⁷⁶ The penitentials also generally forbade sexual contact with a woman during her menstrual periods, but this prohibition seems to have been motivated largely out of concerns over ritual impurity.⁷⁷

As with the other sources that have been considered, procreation was not the ultimate value before which all other rules were subordinated. Like St. Augustine, the penitential writers stressed that one could not abandon one's spouse and move to another for the sake of procreation. Indeed, as noted above, the penitential writers insisted upon mutual continence in such circumstances.⁷⁸ And the penitential writers also prescribed long periods of time, corresponding to periods in the Church calendar, during which couples were expected to refrain from intercourse. These periods included Lent, Advent, and a period of time following the feast of Pentecost.⁷⁹ During these times, couples were expected to be preoccupied with the things of the next world, not the sordid affairs of our shattered and sinful universe.

71. JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 153 (1987).

72. PIERRE PAYER, *SEX AND THE PENITENTIALS: THE DEVELOPMENT OF A SEXUAL CODE*, 550-1150, at 115 (1984).

73. *THE IRISH PENITENTIALS* para. 46, at 90-92 (Ludwig Bieler ed. & trans., 1975).

74. *Id.* at paras. 41, 88.

75. *Id.* at paras. 28, 116.

76. See the references collected by BRUNDAGE, *supra* note 71, at 156.

77. *Id.* at 155-56.

78. *Supra* notes 71-73 and accompanying text.

79. BRUNDAGE, *supra* note 71, at 158.

But with these exceptions, it is clear that procreation was a central organizing principle of the penitential literature. This collection of norms and principles, teachings and expectations in turn “helped shape the mentality, the ethic, of western Europe.”⁸⁰

III. SACRED SEX, THE GOOD OF CHILDREN, AND MARITAL PERMANENCE: THEOLOGIAN AND CANONISTS IN THE HIGH MIDDLE AGES

The early Middle Ages were a time of chaos. Kingdoms and principalities rose and fell with dreary regularity. Even the papacy became the plaything of the competing dynastic interests of the leading families of central Italy. It is fair to describe the period of the fifth through eleventh centuries as a time of widespread institutional failure. Christian sensibilities gradually gained a foothold among the Germanic tribes that settled Western Europe following the fall of the Roman Empire, but the Christianization of Europe was a gradual process, accomplished in fits and starts amidst a great deal of political and social turmoil.

By the end of the eleventh century, however, a certain stability was achieved. The papacy, thanks to the great reform movement led by the likes of Nicholas II and Gregory VII, established itself as an independent, effective, and powerful player on the European stage.⁸¹ Indeed, the Church took on the trappings of a transnational state, with papal representatives (legates) and courts in every country. The nation-states of Europe also took their first fledgling steps toward consolidation, much of it accomplished through the adoption of systematized law codes. Universities, whose purposes were to inquire into fundamental issues of philosophy, theology, and law, arose throughout Europe.⁸²

A major line of inquiry among the scholastic writers who peopled the faculties of the new universities was the nature of the sacraments, including the sacrament of marriage. In a previous paper, I explored the question of the marital rights of non-Christians.⁸³ That paper considered the sacramental theology of early scholastic writers like Hugh of St. Victor and Anselm of Laon who asserted that it was possible that Christians and non-Christians alike enjoyed marital rights deserving of at least some respect at law. The next several paragraphs will build on these earlier findings to consider “sacred sex”: the sacral dimension of the sex act in symbolizing the sacramental nature of marriage.

80. NOONAN, *supra* note 12, at 153.

81. For a good review of these developments, see generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE MAKING OF THE WESTERN LEGAL TRADITION* (1983).

82. For a classic treatment of the rise of the universities, see generally HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* (F.M. Powicke & A.B. Emden eds., 1936).

83. Charles J. Reid, Jr., *Toward an Understanding of Medieval Universal Rights: The Marital Rights of Non-Christians in Early Scholastic and Canonistic Writings*, 3 *AVE MARIA L. REV.* 95 (2005).

In the twelfth century it became established among canon lawyers and theologians that consent made a marriage while consummation conferred on a Christian marriage a special firmness.⁸⁴ In essence, consummation created a bond that was so tight that no earthly power could dissolve it.⁸⁵ But what was it about consummation that gave it such power? That is the question that shall next be considered.

The term “sacrament” (*sacramentum*) carried a variety of nontheological meanings. It carried the sense of an oath taken in judicial proceedings, as well as the oath taken upon entry into the military.⁸⁶ By extension, it conveyed the sense of a solemn undertaking⁸⁷ or the rites of initiation into a secret society.⁸⁸ The term was eventually taken up by Christian writers who imparted to it a technical, theological meaning. In early theological writing, *sacramentum* could carry the meaning of a theological mystery, such as the Incarnation.⁸⁹ It could also convey the sense of an outward sign of some sacred thing.⁹⁰ Finally, it might simply mean some visible sign of God’s presence in the world.⁹¹

St. Augustine made extensive use of the term in this final sense. “Sacraments, to St. Augustine, were signs of God’s presence and promise in the world, of His gifts to His creation, and of salvation through His Word.”⁹² A wide variety of events, natural phenomena, and human actions could convey the divine presence—everything from gestures of reverence, the liturgical calendar, or prayers for mercy.⁹³

This broad Augustinian understanding of the word sacrament continued to influence writers in the twelfth century, although one sees in this latter period a sustained—and ultimately successful—effort to confine its technical meaning to efficacious signs that were understood to confer grace upon the believers who made use of them. During the twelfth century, the Latin word *sacramentum* was narrowed and given greater precision—it now signified not any sign of God’s presence but, as the formula put it, “a sign of some sacred thing.”⁹⁴ It also came to represent a channel by which believers might come to acquire the grace necessary for salvation.

84. James Brundage traces this idea to the work of the twelfth-century canonist Gratian. See BRUNDAGE, *supra* note 71, at 235–42.

85. JOHN T. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA 81–82 (1972).

86. OXFORD LATIN DICTIONARY, *supra* note 10, at 1674–75.

87. *Id.* at 1675.

88. *Id.*

89. CHARLES DU CANGE, GLOSSARIUM MEDIAE ET INFIMAE LATINITATIS 257 (Léopold Favre ed., 1886).

90. *Id.*

91. Reid, *supra* note 83, at 103.

92. *Id.*

93. *Id.*

94. SEAMUS P. HEANEY, THE DEVELOPMENT OF THE SACRAMENTALITY OF MARRIAGE FROM ANSELM OF LAON TO THOMAS AQUINAS 3 (1963).

We are concerned in particular with the symbolism that came to be associated with marriage. What was it about marriage that signaled and represented the divine? What was uniquely sacred to marriage that elevated it to the level of a sacrament, not in the old Augustinian sense, but in the newer, more restricted, scholastic understanding of a grace-conferring, efficacious symbol? To answer this question will require us to examine the symbolic significance of the sex act, and in particular, the act of consummating a union.

Let us consider some of the scholastic treatises of the early and middle twelfth century. This period includes the first formative writings of the scholastic theology that would become the foundation of the Catholic Church's understanding of God and the sacraments for centuries to come. At the very beginning of this period, the anonymous treatise *Deus de cuius principio et fine tacetur* sought to compare and contrast the marriages of Christians and non-Christians.⁹⁵ All marriages have this much in common, the author asserted: parties enter into them to avoid fornication.⁹⁶ But consummated Christian marriages add to this minimalist understanding a symbolic significance: they reveal a fundamental truth about the relationship of Christ and His Church. This truth is revealed by the joining of the parties: Christ has married His Church and has become one body with the Church in the same way that a man becomes one body with his wife.⁹⁷

Honorius of Autun, active in the first half of the twelfth century, wrote a large number of works including the *Elucidarium*, intended as a summary of Catholic theology put in dialogue format. In the course of his dialogue, his interlocutors ask why it is impossible for close relatives to marry one another.⁹⁸ The answer, Honorius suggested, lay in the sacramental nature of marriage: earthly marriage among Christians represents the transcendent union of Christ and the Church. Jesus Christ and the Church are of different natures—divine and human—but have come together to form a single unbreakable body. So also, male and female should be of different natures—they should come from different bloodlines (*parentelae*) in order to represent the union of the divine and the human, that is, the joining together of Christ and His Church.⁹⁹ As Seamus Heaney put it in his analysis of this

95. This text appears as *Le recueil des sentences 'Deus de cuius principio et fine tacetur' et son remaniement*, in 5 RECHERCHES DE THÉOLOGIE ANCIENNE ET MÉDIÉVALE 245–74 (H. Weisweiler ed., 1933).

96. *Id.* at 272–73.

97. *Id.* at 273 (“Nam nuptias Christi et ecclesie significat, quia Christus et ecclesia unum corpus sunt. Christus tamen preest et regit. Sic vir cum sit unum corpus cum uxore . . . tamen preest ei et regit . . . [T]alis coniunctio dicitur sanctitas sacramenti.”); cf. HEANEY, *supra* note 94, at 6.

98. 172 HONORIUS OF AUTUN, *ELUCIDIARIUM*, PATROLOGIA LATINA 1147 (n.d.).

99. *Id.*

text, "It is clearly not the state of marriage which is the sacrament, but the sexual union."¹⁰⁰

A twelfth-century Bible commentary went into even greater detail: "The copulation of male and female is said to be a great sacrament," containing in itself Christ and the Church.¹⁰¹ Marriage, the author repeated for emphasis, represents the joining of Christ and his Church. Paraphrasing Scripture, the author noted that just as a man leaves his mother and father to join himself to his wife, so Jesus left his mother and father to join his bride—the Church.¹⁰² When we marry, furthermore, we partake in the virtues that Christ displayed in his earthly ministry.¹⁰³ Marriage is thus a means of achieving personal sanctity as well as symbolizing Christ's salvific love for all humankind.

Rufinus, author of an important early commentary on Gratian's *Decretum*, the founding document of the systematic study of canon law, accepted the framework laid down by the theologians.¹⁰⁴ There were, Rufinus asserted, really two sacraments of marriage. The first, which represented the soul's union with God, consisted of the exchange of consent to marry—even before consummation.¹⁰⁵ But the relationship of the soul to God is inherently unstable—people fall into heresy or apostasy every day. Something more was needed, and that was consummation. Consummation, Rufinus asserted, has within itself the whole symbolism of Christ and his Church.¹⁰⁶ The Church and Christ enjoyed a relationship that was unbreakable, and consummation permitted human persons to represent that transcendent relationship in their own marital relations.

In this way, theologians and canonists developed the positive attributes of human sexuality within marriage. Sexual intercourse was no longer seen—as it had been understood in the Penitentials—as a narrow concession in a relationship that should normally be governed by continence. Indeed, in the writings of these twelfth-century thinkers, intercourse became a necessary feature of the symbolism of Christian marriage and was necessary to give marriage its sacramental stability and unity. Christ and the Church had forged an unbreakable bond of different but compatible natures; so also do man and woman at the time they consummate their union. Consummation, and the joining of bodies that thereby occurred, was a sign

100. HEANEY, *supra* note 94, at 9.

101. ARTUR LANDGRAF, COMMENTARIUS CANTABRIGIENSIS IN EPISTOLAS PAULI E SCHOLA PETRI ABELARDI: 2. IN EPISTOLAM AD CORINTHIOS IAM ET IIAM, AD GALATAS ET AD EPHESIOS 431 (Philip S. Moore ed., University of Notre Dame 1939). "'Sacramentum'. Hanc copulationem maris et femine dicit esse sacramentum magnum, in Christo videlicet et ecclesia." *Id.*

102. *Id.*

103. *Id.*

104. RUFINUS, SUMMA DECRETORUM 442–43 (Heinrich Singer ed., 1963).

105. *Id.*; cf. Reid, *supra* note 83, at 116–17.

106. "Quod habeat in se Christi et ecclesiae sacramentum." RUFINUS, *supra* note 104, at 443.

pointing to a sacred reality—the promise of salvation through the mystery of Christ’s union with His Church.

If sexual relations had in some sense been sanctified, the theologians of the twelfth and thirteenth centuries also had important and original things to say about other aspects of marriage. In the process, they made it clear that marriage served the fundamental good of procreation. They built up a set of rules and doctrines that ensured that, ordinarily, marriages should be directed toward this great social good. In particular, the scholastic writers came to articulate the Augustinian goods of marriage in terms that would support the proposition that marriage existed to serve procreative ends.

Peter Lombard (c. 1100–c. 1161) was the most influential of these early theological writers. A professor at the University of Paris, Peter’s work would prove to be of enduring significance to the intellectual life of the Church. His *Sentences* became the foundational text of subsequent scholastic writing through the remainder of the Middle Ages—all doctoral candidates in theology were expected to write a dissertation on the *Sentences*.¹⁰⁷ His understanding of the sacraments as seven outward manifestations of sacred things that not only symbolize divine reality but confer grace on those who partake in them would become generally accepted by the Church and canonized as ecclesiastical doctrine at the Council of Trent in the sixteenth century.¹⁰⁸

With this as background, one can consider Peter’s treatment of the Augustinian goods of marriage. Peter, like the other medieval writers who have been reviewed, made productive use of St. Augustine where he was able to do so. He commenced his analysis of marriage by noting that sexual relations were a duty incumbent on persons even before the Fall: while Adam and Eve were still in Paradise, God enjoined on them the duty “to increase and multiply.”¹⁰⁹ Citing St. Augustine as support, Peter continued: When Adam and Eve sinned, they brought sin into the world and marriage assumed a double aspect. It was both a duty upon those able to use it properly and a remedy for those who suffered from illness (*aegrotis*), by which Peter meant clearly disordered human sexual urges.¹¹⁰ By providing a proper outlet for these impulses, marriage furnished a means by which to

107. On the gradual acceptance of Peter Lombard’s text as foundational to medieval theology, see Nancy Spatz, *Approaches and Attitudes to a New Theology Textbook: The Sentences of Peter Lombard*, in *THE INTELLECTUAL CLIMATE OF THE EARLY UNIVERSITY: ESSAYS IN HONOR OF OTTO GRÜNDLER* 27, 27–52 (Nancy Van Deusen ed., 1997).

108. For further information on Peter Lombard and the sacrament of marriage, see 2 MARCIA COLISH, *PETER LOMBARD* 628–98 (1994), and compare Charles J. Reid, Jr., *Marriage in the Western Legal Tradition: A Product of Natural Law or a Creature of the State?*, in *FAMILY IN THE THIRD MILLENNIUM: SELECTED SCHOLARSHIP SUBMITTED TO THE DOHA CONFERENCE ON MARRIAGE AND THE FAMILY* (2007).

109. PETER LOMBARD, *SENTENTIARUM LIBRI QUATUOR* 656 (Paris 1892).

110. *Id.*

direct them to a good purpose.¹¹¹ Attacking those whom he labeled heretics, Peter defended marriage as something that had been blessed twice by God—at the creation of the world and again by Jesus at the marriage feast at Cana.¹¹² Marriage, he concluded, is therefore a sacrament, a sacred symbol, and a channel of divine grace.¹¹³

Following what was rapidly becoming the received scholastic tradition, Peter asserted that it was consummation that constituted the visible sacramental sign of marriage, signifying the union of Christ and the Church.¹¹⁴ The consent that persons exchange in order to bring about marriage, Peter asserted, signifies the spiritual union of Christ and the Church, while the physical coupling of bodies represented the joining of human and divine natures in the Church.¹¹⁵

Peter in particular developed the significance of the Augustinian goods. Where the “three goods” have not been made part of the marriage contract, there is no marriage.¹¹⁶ Regarding the good of children, Peter acknowledged that it was impossible to expect every married couple to have children. A couple might have chosen to renounce the conjugal debt, or they may be aged or infertile.¹¹⁷ But so long as they do not exclude the “hope of children” (*prolis spes*), they contract marriage validly.¹¹⁸ Peter condemned both the use of “poisons of sterility” (the standard medieval term for contraceptives) and recourse to abortion as destructive of the good of children.¹¹⁹

Finally, St. Bonaventure, the thirteenth-century Franciscan theologian,¹²⁰ drew connections between fidelity and sacramental stability, on the one hand, and the good of children, on the other. In a disputation meant to respond to those who defended the concubinage of the ancient world, St. Bonaventure declared that the good of children was thereby offended.¹²¹ “Right reason,” St. Bonaventure argued, taught that a married couple is made “one flesh.” Their coming together is a kind of exercise of “genera-

111. *Id.*

112. Colish tends to read Peter as presenting a more optimistic account of marital sexuality than St. Augustine, especially in discussing sexual relations undertaken to prevent fornication. Where St. Augustine saw such relations as at least venially sinful, Colish notes that Peter Lombard understood “this type of sex in marriage not as a means of preventing sin but as a means of strengthening the couple’s mutual commitment.” COLISH, *supra* note 108, at 661.

113. *Id.* at 657.

114. *Id.*

115. *Id.*

116. *Id.* at 673.

117. *Id.*

118. COLISH, *supra* note 108, at 657.

119. *Id.*

120. St. Bonaventure (1221–1274), along with St. Thomas Aquinas, was one of the giants of thirteenth-century theology. He was a colleague of Thomas Aquinas at the University of Paris and authored a large number of theological treatises.

121. St. Bonaventure, *Commentaria in Quatuor Libros Sententiarum*, in *OPERA OMNIA* 747 (1889).

tive power” (*vis generativa*).¹²² This much, however, St. Bonaventure conceded, was true of any sexual relationship, even of those engaged in concubinage. He made this last point not in order to denigrate marriage but in order to stress that marriage was the divinely appointed means of achieving the procreation and education of the next generation. Because of the importance of sexual relations to procreation, St. Bonaventure believed two conclusions followed from his argument—all extramarital sexual relations were illicit; and, within marriage, the goods of sacramental unity and permanence served to effectuate the good of procreation.

Thus if a man and wife have children, “both parents” (*parentes ambo*) are required to see to the education of their children.¹²³ When the parents age and can no longer care for themselves, children must see to their parents’ needs. Concubinage shatters these obligations and expectations. Parents, especially fathers, will not be attentive to their children, preferring instead the attention of their paramours; and children will neglect their parents’ needs. Indeed, parentage itself would be made uncertain. It is always possible that a man will have a child by his concubine. Mingling the sublime with the intensely practical, St. Bonaventure noted that such a possibility shattered the natural order of marriage by gravely disrupting its sacramental stability, and by overturning the father’s carefully contrived estate planning.¹²⁴

What is significant for our purposes in this argument is the way in which St. Bonaventure has connected procreation with the other Augustinian goods. He has effectively united them in the course of his argument and thereby made procreation the chief bulwark against claims that concubinage should be permitted. Procreation has become the great social end toward which marriage is directed. To be sure, sacramental unity served as a symbol of Christ’s unbreakable union, but it also ensured the proper rearing of children; the same might also be said for permanence. Thus, these other Augustinian goods are now seen not only as good in their own right but as a means of facilitating this larger end of procreation.

IV. ENGLISH THEOLOGY AND LAW: THE FRUITFUL MARRIAGE

The Act of Supremacy of 1534, by which Henry VIII declared himself head of both church and state in England and broke off ecclesiastical allegiance to Rome, was one of the great transformative events in the history of the European Church (not to mention the modern unitary state).¹²⁵ By the terms of the Act, King Henry VIII henceforth became entitled to “enjoy, annexed and united to the imperial crown of this realm . . . all honours,

122. *Id.*

123. *Id.*

124. *Id.*

125. MARK A. NOLL, *TURNING POINTS: DECISIVE MOMENTS IN THE HISTORY OF CHRISTIANITY* 177–79 (2d ed. 2000).

dignities, pre-eminences, jurisdictions, privileges, authorities, immunities, profits, and commodities” previously belonging to the Roman pontiff in England.¹²⁶

Significant for our purposes was the claim over the jurisdictions and authorities exercised by the Roman pontiff. Henceforward, there could be no appeal of marriage cases to Rome. Rather, the law of marriage and all that belonged to it—divorce, annulment, child support, sexual crimes—belonged to the English ecclesiastical courts whose supreme head was the English monarch. The ecclesiastical courts would retain their jurisdiction over matrimonial causes until the mid-nineteenth century.¹²⁷ However, in spite of new jurisdictional lines of authority, English canon law held tenaciously to the law of the medieval Catholic Church in many respects.¹²⁸

While English canon law maintained fidelity to its medieval roots, the Protestant Reformation led to the introduction of some fundamental changes in the theology of marriage. The idea that marriage was a sacrament, instituted by Christ during His earthly ministry and conferring grace upon His followers, was rejected in favor of conception of marriage as a sacramental—a holy estate implanted in nature by God to channel the human person’s reproductive urges and to assist all who partake in it.¹²⁹ Marriage was a great social good and it continued to retain a spiritual dimension, but it ceased to be described as a grace-conferring sign and symbol of Christ’s union with the Church. Thus, John Witte has argued persuasively that the English reformers of the sixteenth and seventeenth centuries successfully replaced the Catholic conception of marriage as a sacrament with a new conception of marriage as a “commonwealth,” an entity that served “the common good—of the couple, the children, the church, and the state.”¹³⁰ Finally, the connection between virginity and marriage—indeed, the whole theology of virginity that had grown up since

126. *Id.* at 178 (quoting the Act of Supremacy).

127. In 1857, Parliament enacted a law greatly simplifying the procedures to be used in obtaining a divorce and removing the ecclesiastical courts from the process. Prior to 1857, a petitioner had to obtain a divorce *a mensa et thoro* (from bed and board) from an ecclesiastical court and subsequently petition Parliament for approval to remarry. The 1857 Act moved to the secular courts the power to grant divorce with the right to remarry. See STEPHEN CRETNEY, *FAMILY LAW IN THE TWENTIETH CENTURY* 161–62 (2003); Sybil Wolfram, *Divorce in England, 1700–1857*, 5 OXFORD J. LEGAL STUD. 155, 155–86 (1985); Margaret K. Woodhouse, *The Marriage and Divorce Bill of 1857*, 3 AM. J. LEGAL HIST. 260, 260–75 (1959).

128. Richard Helmholz states that “[t]he law of marriage presents the paradoxical case in which the English Church clung to a part of the medieval Roman canon law which the Roman Catholic Church itself discarded.” RICHARD H. HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND* 69 (1990). Helmholz is specifically referring to the practice of clandestine marriage, which was practically abolished by the Council of Trent.

129. E. GARTH MOORE, *AN INTRODUCTION TO ENGLISH CANON LAW* 82 (1967).

130. JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 131 (1997).

patristic days—was rejected in favor of a strong Protestant commitment to marriage as the ideal form of Christian life.¹³¹

One area of remarkable continuity with the medieval tradition in both theology and canon law was the centrality of the procreative dimension of marriage. One might consider theological developments first. The *Encyclopedia of Christianity* has compared the English Book of Common Prayer to the Bible in stating that “[a]long with the Bible, it has something of a standard of faith among Anglicans.”¹³² It was first published in 1549 under the direction of King Edward VI and revised and republished periodically since that year.¹³³ In its various editions, it has helped to condition several hundred years of Anglican thought and devotion.

The Prayer Book of 1549 referred back to medieval Catholic theology in declaring that marriage “signif[ied] unto us the misticall union that is betwixte Christe and his Church.”¹³⁴ God, the Prayer Book stressed, had instituted marriage “in the time of mannes innocencie,” before the Fall from grace in the Garden of Eden.¹³⁵ Its importance to humankind was renewed by Jesus Christ at the wedding feast at Cana.¹³⁶ Its continued existence was intended to serve three great ends, the first of which was procreation. The Prayer Book stated, “Duely consideryng the cuases for the whiche matrimonie was ordeined. One cause was the procreation of children, to be brought up in the feare and nurture of the Lord, and the prayse of God.”¹³⁷

After pronouncing the couple man and wife, a blessing, adapted from Psalm 128, was then to be pronounced, stressing the importance of fruitfulness:

Thy wife shall bee as the fruitful vine, upon the walles of thy house.

Thy children like the olife braunches rounde about thy table.

Loe, thus shal the man be blessed, that feareth the Lord.

The Lord from out of Sion shall so blesse thee: that thou shalt see Hierusalem in prosperitie al thy life long.

131. JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* 17 (2002). Witte speaks for the entire Protestant Reformation, continental and English, when he states that “[a]ll adult persons, preachers and others alike, should pursue the calling of marriage, for all were in need of the comforts of marital love and the protection from sexual sin.” *Id.*

132. Thaddeus A. Schnitker, *Book of Common Prayer*, in 3 *ENCYCLOPEDIA OF CHRISTIANITY* 285 (Erwin Fahlbusch et al. eds., Geoffrey William Bromiley trans., 1999).

133. G.J. CUMING, *A HISTORY OF ANGLICAN LITURGY* 66–95 (1969) (reviewing the drafting and promulgation of the first English prayerbook of 1549).

134. CHURCH OF ENGLAND, *THE FIRST AND SECOND PRAYER BOOKS OF EDWARD THE SIXTH* 252 (1913) [hereinafter *THE FIRST AND SECOND PRAYER BOOKS*].

135. *Id.*

136. *Id.*

137. *Id.* The other two causes included: marriage as “a remedie agaynst sinne, and to avoide fornicacion” and marriage for the sake of “the mutuall societie, helpe, and coumfort, that the one oughte to have of thother, both in prosperitie and adversitie.” *Id.*

Yea, that thou shalt see thy childers children; and peace be upon Israel.¹³⁸

Thus, themes of fecundity, earthly prosperity, and ultimate transcendence through the survival of the next generation were blended together as a way of seeking divine favor upon the newly married couple.

The second Prayer Book of Edward VI, promulgated in 1552, proved to be excessively Protestant for the English public and met ultimate popular disapproval for this reason.¹³⁹ This short-lived Prayer Book nevertheless retained the language reviewed above. Marriage still served first the purpose of procreation,¹⁴⁰ and the same blessing was still pronounced.¹⁴¹ When Queen Elizabeth I revived the Book of Common Prayer following Queen Mary's short-lived attempt to return the English realm to Catholicism, she removed from the 1552 version its more extreme Protestant elements.¹⁴² Elizabeth, however, retained the teachings on marriage. The same purposes ascribed to marriage in the earlier prayer books, and the same Psalm pronounced over the married couple, continued to be prescribed by Elizabeth's new Prayer Book of 1559.¹⁴³

The seventeenth century was a time of revolutionary ferment. Puritans, advocates of an austere Christianity harshly critical of the adornments and trappings of Anglicanism, gained power in the mid-seventeenth century and embarked upon a campaign of religious reform intended to purge the vestiges of "popery" from English lands.¹⁴⁴ Oliver Cromwell, however, who had declared himself Lord Protector in the 1650s, governed with a harshness that caused people to yearn for the old royal house. Eventually, with the death of Cromwell, Charles II, the exiled son of the first King Charles, was invited back to England in a Restoration of Monarchy. This Restoration was accompanied by a renewal of Anglican sensibilities, now tempered but not obliterated by Puritan theology.¹⁴⁵

An important exposition of the theological foundations of marriage and its centrality in the procreation of the next generation was Thomas

138. *Id.* at 255.

139. The 1552 Prayer Book was quickly rescinded with the accession to the throne of Queen Mary. When Elizabeth I succeeded Mary, she did not turn to the 1552 Prayer Book but set to work on a new version. See Schnitker, *supra* note 132, at 285; see also WILLIAM SYDNOR, *THE STORY OF THE REAL PRAYER BOOK* 16–19 (1989).

140. *THE FIRST AND SECOND PRAYER BOOKS*, *supra* note 134, at 410.

141. *Id.* at 413.

142. SYDNOR, *supra* note 139, at 20–24.

143. CHURCH OF ENGLAND, *THE BOOK OF COMMON PRAYER, 1559: THE ELIZABETHAN PRAYER BOOK* 290–91 (John E. Booty ed., University Press of Virginia 1976) (setting forth the purposes of marriage); see also *id.* at 294 (reiterating the Psalm).

144. A good summary of these developments can be found in HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 216–22 (2003).

145. *Id.* at 222–24, 228–30.

Comber's *The Occasional Offices of Matrimony*.¹⁴⁶ Published at the height of the Restoration, this work set forth—in greater detail than any of the official documents—the theology behind marriage and childbirth. Rejecting the Catholic doctrine of the sacramentality of marriage, Comber nevertheless repeated much of the medieval theology used to justify the Catholic stance. Marriage was “instituted by God the Father, vindicated by God the son, and explicated by God the Holy Ghost, to signify the mysterious Love of Jesus to his Church; For our Lord forsook his Heavenly Father, and did cleave to our Nature, becoming one flesh with us.”¹⁴⁷

Marriage, Comber continued, was instituted first of all for procreation.¹⁴⁸ Comber turned to Jewish theology to stress the transcendent significance of childbirth: Jewish writers, Comber declared, consider the biblical injunction to be fruitful and multiply “an indispensable precept, affirming that those who do neglect it, are Murderers, and shall have no part in the world to come.”¹⁴⁹ Comber acknowledged that Christianity did not hold to the same position, but even Christians believe that “God designed Marriage to replenish the world; and therefore all who enter into that estate are bound to aim principally at the Procreation and Education of Children.”¹⁵⁰ In support of this proposition, Comber reviewed a veritable parade of classical Christian writers—St. Ignatius of Antioch, St. Augustine, and St. Isidore of Seville, among others.¹⁵¹ He concluded,

[T]hus matrimony becomes the preserver of the world, and the continuer of Mankind, being a never-failing Foundation which always sends forth new streams . . . And yet still Marriage hath a higher end than barely to produce Children, for it is designed also for the Education of Children in the fear and nurture of the Lord, and to his praise and glory.¹⁵²

Comber's commentary on a related Anglican rite, “The Churching of Women,” also bears analysis. A medieval rite,¹⁵³ retained by the successive

146. THOMAS COMBER, *THE OCCASIONAL OFFICES OF MATRIMONY, VISITATION OF THE SICK, BURIAL OF THE DEAD, CHURCHING OF WOMEN, AND COMMINATION* (1679).

147. *Id.* at 25–26.

148. *Id.* at 31–36.

149. *Id.* at 32.

150. *Id.* In support of this proposition, Comber looked not only to Christian sources but also to the Augustan marriage laws reviewed above. *Id.* at 32–33.

151. COMBER, *supra* note 146, at 33–34.

152. *Id.* at 34–35. Comber continues by writing that,

[t]he Parents work is not half done when they have brought Children into this world, they must feed them and attend them, cloath and instruct them, preserve them from dangers, warn them against all evil things, and labour to make them truly fear God. Parents therefore, must not only desire to have Children, but resolve to bring them up well and vertuously.

Id.

153. On medieval antecedents to the “churching of women” ritual, see JOANNE M. PIERCE, ‘GREEN WOMEN’ AND BLOOD POLLUTION: SOME MEDIEVAL RITUALS FOR THE CHURCHING OF WOMEN AFTER CHILDBIRTH 191–215 (1999).

versions of the English Book of Common Prayer,¹⁵⁴ this ritual called down God's blessings on women who have undergone childbirth. Comber offered an extended explication of the significance of this rite.¹⁵⁵ Concerning the purpose of the ceremony, Comber wrote,

The Birth of Man is so truly wonderful, that it seems to be designed for a constant demonstration of the Omnipotence of our Creator; and if the frequency did not abate of our admiration, it could be esteemed no less than a perpetual miracle. However it is not a meaner act of God's power and mercy in it self, because he often repeats it; and therefore that the number of these Providences may not diminish our sense of their true worth, Holy Church ordains a publick and solemn acknowledgement by the Party most concerned; that is, the Woman, who still feels the bruises of our first Parents most deplorable fall¹⁵⁶

Every childbirth, Comber thus asserted, is sacred; none shall be taken for granted. Every child is a small miracle revealing divine power and an event worthy of the most solemn thanksgiving.

As with his citation to Augustus's marriage legislation,¹⁵⁷ Comber chose to justify Christian celebration by considering pagan wisdom. Galen is thus quoted as seeing in the birth of a child "the power of its Maker."¹⁵⁸ Comber continued: "And shall not we Christians be as just to our Creator? Shall we not acknowledge every instance he gives us of this kind? especially since he not only makes us in our Mothers Womb, but brings us also wonderfully from thence."¹⁵⁹

Anglican theology thus made procreation and education the chief purpose and responsibility of marriage. It was declaimed in the marriage ceremony and celebrated in the recitation of the Psalms that followed. It was also celebrated in the ritual known as the Churching of Women which was justified as a thanksgiving for the daily miracle of childbirth. The procreative dimension of marriage was thus advanced in a comprehensive form by Anglican teaching.

Anglican canon law also stressed the procreative dimension of marriage. Henry Swinburne, the author of a sixteenth-century treatise on marriage contracts, explained that parties become free to consent to marriage at the age of puberty because that is the age at which God Himself equipped

154. The rite appeared in the 1549 Prayer Book as a rite of purification. It became a rite of Thanksgiving in the 1552 Prayer Book and remained so characterized through subsequent editions of the Book of Common Prayer. See DAVID CRESSY, PURIFICATION, THANKSGIVING AND THE CHURCHING OF WOMEN IN POST-REFORMATION ENGLAND 106, 118–19 (1993).

155. COMBER, *supra* note 146, at 505–38.

156. *Id.* at 505.

157. See discussion, *supra* note 150.

158. COMBER, *supra* note 146 at 512.

159. *Id.*

the human person to reproduce.¹⁶⁰ A man at the age of fourteen and a woman at the age of twelve “have Natural and Corporal Ability to perform the duty of Marriage.”¹⁶¹ They have achieved the age at which,

the Lord and Maker of all Creatures in the beginning of the World, hath by Divine Providence, for the propagation of his Church, proclaimed an universal Liberty, *Crescite et Multiplicamini* [Increase and Multiply]. And therefore this Liberty is to be denied to none, whom otherwise the Almighty hath naturally disposed and enabled to encreate and multiply.¹⁶²

Elsewhere in his work, Swinburne reiterated and dressed in legal garb the classic Augustinian argument that the affirmative exclusion of the good of children resulted in the invalidity of the marriage contract. Swinburne condemned as contrary to marriage itself the placement in the contract of certain “unhonest conditions.”¹⁶³ By this term, Swinburne meant to include conditions against “the Substance of Matrimony,” which included the three Augustinian goods: “*bonum prolis, bonum fidei, et vinculum individuum*—the good of Issue, the good of Faithfulness, and the Bond inseparable.”¹⁶⁴ Such conditions, Swinburne reiterated, were “opposed to those things without which true Matrimony cannot consist.”¹⁶⁵ A condition against the good of children, Swinburne asserted, was especially destructive of the matrimonial contract because the good of children was “the first and principal good of Matrimony.”¹⁶⁶ Echoing his medieval forebears, Swinburne rejected the claims of those who would point to the marriage of Mary and Joseph as not a true marriage. To be sure, they did not avail themselves of the marital rights, but they were open to the possibility of procreation, and the birth of the Lord Jesus fulfilled the procreative good of marriage.¹⁶⁷

Subsequent generations of English canonists expanded upon these claims. John Ayliffe (1676–1732) echoed the writings of the fourth- and fifth-century patristic authors in declaring that marriage came into being even before the Fall for the sake of “the Propagation of Mankind.”¹⁶⁸ Neither approving or disapproving of the categories, Ayliffe noted that “among the papists, there is a threefold matrimonial Good, *viz.*, what they in Latin call *Fides, Proles* and *Sacramentum*.”¹⁶⁹

160. HENRY SWINBURNE, *A TREATISE OF SPOUSALS, OR MATRIMONIAL CONTRACTS* 47 (London 2d ed. 1711).

161. *Id.*

162. *Id.*

163. *Id.* at 134.

164. *Id.*

165. *Id.* at 135.

166. SWINBURNE, *supra* note 160, at 135.

167. *Id.* at 135–36.

168. JOHN AYLIFFE, *PARERAGON JURIS CANONICI ANGLICANI* 359–60 (London 1726).

169. *Id.* at 360.

This manner of thinking and talking about marriage persisted into nineteenth-century English ecclesiastical law. One can consider the work of Thomas Poynter who published a treatise on marriage and divorce in 1824. He asked why impotence or frigidity invalidated marital consent. In the process of resolving this question, he reviewed what the legal tradition had to say on the subject.¹⁷⁰ The eighteenth-century Anglican canonist Thomas Oughton, Poynter noted, had asserted that impotence and frigidity were “natural impediments” to marriage because they prevented the parties from fulfilling the good of children.¹⁷¹ Poynter also looked to the eighteenth-century continental jurist Samuel Pufendorf for guidance on this subject. Pufendorf had asked how it was that men and women who were beyond their reproductive years might be allowed to marry. Pufendorf concluded that such couples might be considered “as honorary members of the matrimonial state, enjoying a title without an office.”¹⁷² Poynter was inclined to agree with these commentators that procreation must be the central organizing principle of marriage.¹⁷³

The English Protestant writers tended to emphasize the procreative dimension of marriage to an even greater extent than their medieval forebears. Medieval Catholic writers, of course, were always required to recognize virginity as the ideal form of life. They thus moved intellectually back and forth between the spiritual fecundity of the virgin’s vows to God and the spouses’ physical fecundity in the here and now. Protestant theology had largely discarded such a belief in the sanctifying power of virginity. Greater emphasis was placed on carnal marriage, and its procreative dimension was thereby expected to carry greater weight.

Thus, in the English ecclesiastical law which would come to form the backbone of the American law of marriage, procreation remained the central organizing principle. This was the case whether one regarded the principles laid down by generations of theological writers—whose works informed and guided the work of the English canonists—or whether one considered the writings of the canonists themselves. A marriage contract that excluded the good of children contained a dishonest condition that resulted in the contract’s invalidity. A true marriage contained within its terms the three-fold Augustinian goods of procreation, fidelity, and indissolubility. Natural impediments such as impotence or frigidity, which served to frustrate procreation, also frustrated the possibility of bringing a marriage into being. This was the tradition that would inform American

170. THOMAS POYNTER, *A CONCISE VIEW OF THE DOCTRINE AND PRACTICE OF THE ECCLESIASTICAL COURTS IN DOCTORS COMMONS ON VARIOUS POINTS RELATIVE TO THE SUBJECT OF MARRIAGE AND DIVORCE* 123–26 (London, J. & W.T. Clarke 1824).

171. *Id.* at 123.

172. *Id.* at 124.

173. *Id.* at 123–24.

judicial writing on marriage in the nineteenth century and, indeed, for much of the twentieth century.

V. CONCLUDING OBSERVATIONS

American marriage law continued to reflect these basic presuppositions until well into the twentieth century. *Skinner v. Oklahoma*, decided by the United States Supreme Court in 1942, six months after the United States entered World War II, involved a constitutional challenge to an Oklahoma law compelling the sterilization of those determined to be habitual criminals.¹⁷⁴ William Orville Douglas, writing for a unanimous court, opened his opinion by stressing that what was involved was the right to procreate: “This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”¹⁷⁵

In these opening lines, personal rights and public purposes were linked: procreation was a fundamental human right, but it was also necessary for group survival. Later in the opinion, Douglas drove home the point that it was within the institution of marriage that this right was to be exercised: “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”¹⁷⁶

In 1965, *Griswold v. Connecticut*, known widely as the case that struck down legislation outlawing the sale of contraceptives to married persons, did not repudiate this fundamental purpose to marriage.¹⁷⁷ Rather, the *Griswold* Court understood its decision as protecting and enhancing the marital relationship. Once again, Justice Douglas—who can hardly be said to have respected marriage in his private life¹⁷⁸—offered a defense of marriage as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”¹⁷⁹ Justice John Marshall Harlan, in his concurrence, developed the kind of respect the Court continued to harbor for the institution of marriage. Harlan declared that the Court did not mean by the decision to depreciate the State’s professed policy behind the statute—the prevention of “all forms of promiscuous or illicit sexual relation-

174. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Habitual criminal for the purposes of the statute was defined as a person who was convicted of two or more crimes “amounting to felonies involving moral turpitude.” *Id.* at 536.

175. *Id.*

176. *Id.* at 541.

177. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

178. Douglas was married and divorced several times. One might get a sense of how Douglas comported himself in his private life by reading chapter thirty-two of Bruce Murphy’s new biography of Douglas, entitled “A Tale of Two Women.” See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 392–401 (2003).

179. *Griswold*, 381 U.S. at 486.

ships.”¹⁸⁰ Harlan noted that the Court’s judgment extended only to the prohibition on the sale of contraceptives to married persons. There may be legitimate reasons, Harlan asserted, for marital use of contraceptives—whether out of a desire for family planning or out of a concern for the well-being and even the lives of those involved.¹⁸¹

Only in the mid-1980s, in the academic reception given to the case of *Turner v. Safley*,¹⁸² does one see the definitive severing of procreation from its place of pride as the central organizing principle of American marriage law.¹⁸³ *Turner v. Safley* involved a challenge to prison regulations that prevented inmates from marrying. The Court, in unanimously striking down the regulations, noted that marriage served not only the purposes of sexual intimacy and procreation but also acted as a means of providing emotional or spiritual support for those who might be separated by distance.¹⁸⁴ Marriages, the *Turner* Court added, could serve as outward evidence of ongoing personal commitment.¹⁸⁵ Marriages might even serve as “a pre-condition to the receipt of government benefits.”¹⁸⁶ All of these purposes—all of these marital goods, to borrow the language of the theologians—were legitimate.

The *Turner v. Safley* Court did not intend to distinguish among these various marital purposes, nor did it see these purposes as somehow competing for primacy. The *Turner* Court, finally, did not view these purposes as somehow divisible. Indeed, it recognized that in most prison marriages, the inmate spouse will eventually be released and the union will be “fully consummated.”¹⁸⁷ Scholars and courts, however, “have now removed this list of marital goods from the penological context and relied upon them to argue against the traditional linkage between marriage and heterosexual reproduction.”¹⁸⁸ In the process, marriage came to be understood and explicated as serving the purposes of emotional fulfillment, or even the economic pooling of resources.

180. *Id.* at 505 (Harlan, J., concurring).

181. *Id.* at 503. Justice Arthur Goldberg, concurring in the Court’s judgment, quoted a prior Harlan opinion in *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961), to emphasize the centrality of family life to the *Griswold* Court:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole ‘private realm of family life’ it is difficult to imagine what is more private or intimate than a husband and wife’s marital relations.

Griswold, 381 U.S. at 495 (Goldberg, J., concurring).

182. *Turner v. Safley*, 482 U.S. 78 (1987).

183. The academic reception given to *Turner v. Safley* has been traced in Charles J. Reid, Jr., *The Gingerbread Man Thirty Years On: The Parlous State of Marital Theory*, 1 U. ST. THOMAS L.J. 656, 677–86 (2003).

184. *Turner*, 482 U.S. at 95–96.

185. *Id.* at 95.

186. *Id.* at 96.

187. *Id.*

188. Reid, *supra* note 183, at 683.

The American same-sex marriage decisions were the beneficiaries of the nominalistic treatment accorded *Turner v. Safley*. The Hawaii Supreme Court's decision in favor of same-sex marriage, *Baehr v. Lewin*,¹⁸⁹ understood the goods of marriage as chiefly economic in nature. Community property, spousal support, and access to a variety of state welfare programs were the goods of marriage, according to *Baehr*.¹⁹⁰

The Vermont Supreme Court in *Baker v. Vermont*¹⁹¹ explicitly rejected the State's assertion that its interest in the procreative dimension of marriage precluded it from recognizing same-sex marriage.¹⁹² Such a claim, the court concluded, was both under- and over-inclusive. Many heterosexual couples marry with no intention of having children, while many homosexual couples would seek to procreate through various artificial means.¹⁹³ Having diminished the linkage between procreation and marriage, the *Baker* court engaged in the same sort of economic reductionism found in *Baehr*: inheritance rights, pension and insurance rights, the right to sue for loss of consortium, and rights of joint tenancy and survivorship. These were among the fundamental rights and privileges of the marital relationship, according to *Baker*.¹⁹⁴

The Massachusetts case of *Goodridge v. Department of Public Health* recognized that marriage served emotional and economic ends.¹⁹⁵ The right to choose whether or not to marry was fundamental because only through its exercise or nonexercise might one truly have access to "the full range of human experience and [the] full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"¹⁹⁶ But marriage did not exist solely to further human emotional needs, according to *Goodridge*. It also provided access to economic benefits, "touching nearly every aspect of life and death."¹⁹⁷ Marriage, on this analysis, primarily served these two ends—the emotional and the economic.

There is a certain radicalism to these decisions. They represent a drastic departure from a western legal tradition that can be traced back to pre-Christian sources, to the Rome of Emperor Augustus. On the analysis of *Baehr*, *Baker*, and *Goodridge*, procreation no longer serves as the central organizing principle of the law. In a sense, then, these cases have ceased to connect marriage to the natural processes of fecundity and reproduction.

189. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

190. *Id.* at 59.

191. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

192. *Id.* at 881.

193. *Id.*

194. *Id.* at 883–84.

195. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

196. *Id.* at 957 (quoting *Baker v. State*, 744 A.2d 864, 889 (1999)).

197. *Id.* at 955.

The central reference point by which not only marriage—but even virginity—was understood in western theology and law has been taken away. One is left to wonder what comes next.