

7-1-2003

The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage

Charles J. Reid Jr.

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

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).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol18/iss2/6>

This Symposium Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage

*Charles J. Reid, Jr.**

I. INTRODUCTION

This Article has several related concerns: it is, first of all, an historical investigation into one of the principal, if unacknowledged, sources of American juristic thought on marriage—the work of St. Augustine, the fifth-century North African bishop and doctor of the Church, who identified as the three essential elements of the marital relationship procreation, fidelity, and lifelong unity, or permanence.

These three basic elements of St. Augustine's thought on marriage were transmitted to the modern era through the work of the medieval Catholic canon lawyers and theologians and the Anglican canon lawyers of the sixteenth through eighteenth centuries. Even though the Anglicans eschewed categorizing marriage as a sacrament—it was the sacramental quality of marriage that, to St. Augustine, required lifelong unity—marriage remained a holy estate that demanded the lifetime loyalty of both parties, even in the face of marital failure. Only truly exceptional

This paper was presented at “The Future of Marriage and Claims for Same-Sex Unions Symposium” on August 29, 2003 at the J. Reuben Clark Law School, on the campus of Brigham Young University. The article is part of this special symposium issue and the views expressed herein are those of the author and do not represent the views of the Journal of Public Law, the J. Reuben Clark Law School, or Brigham Young University.

* Charles J. Reid, Jr. is Associate Professor of Law at the University of St. Thomas School of Law (MN). He holds a JD, a license in canon law from the Catholic University of America, and a PhD from Cornell University. The author would like to thank the Rev. Robert J. Araujo, S.J., and Teresa Stanton Collett for helpful comments on an earlier draft of this article. Of course, all errors in this article are the fault of the author.

circumstances permitted one to remarry during the lifetime of one's partner.

These ideas took root and flourished in nineteenth-century American thought on marriage, although they have been seriously challenged over the last several decades. After exploring the medieval synthesis of St. Augustine's thought and its further development by the Anglican canon lawyers, the final two sections of this paper address what is probably the most comprehensive challenge to the Augustinian goods—the idea of same-sex marriage.

As will be made clear below, the marital theory supporting the idea of same-sex marriage is the principle of affection. Affection is, of course, a good thing. One shudders to think of affectionless marriages. Such unions have rightly been the object of satire and scorn in popular literature and the media. They are hardly healthy or happy environments.

But affection, personal commitment, and love between persons seem to be insufficient, without more, to provide a coherent foundation for marriage. What does it mean to say that a marriage is grounded on "affection"? What if affection, or commitment, vanishes? What if affection cannot be confined to a single party? What if loyalty shifts? The Augustinian goods provided a framework for answering these and other such questions. It is unclear what framework could or should prevail if the traditional conception of marriage comes to be supplanted.

This Article is divided into four sections. Part II tells the story of the development of the Augustinian goods of marriage and their transmission to the modern era. Part III considers the crystallization of this set of ideas in the work of nineteenth-century American commentators and courts. By and large these scholars and judges never mentioned St. Augustine. But they nevertheless continued to operate in a mental universe shaped to a considerable extent by Augustinian ideals. Part IV then considers in some detail the implications of the same-sex marriage decisions of *Baehr v. Lewin*¹ and *Baker v. State*² for marital theory. Finally, Part V provides a brief conclusion.

1. 852 P.2d 44 (Haw. 1993).

2. 744 A.2d 864 (Vt. 1999).

II. THE AUGUSTINIAN GOODS OF MARRIAGE

A. *St. Augustine's Formulation*

In his treatise *De bono coniugali*³ (“On the Good of Marriage”), St. Augustine sought to answer, in a sense, critics of both the left and the right. On the one hand were the Manicheans, the immediate target of his treatise, who maintained that marriage was not a social good at all. The fourth-century Manichees, to whose number St. Augustine had himself belonged in his youth, viewed the souls of human beings as consisting of sparks of light imprisoned within the created material order.⁴ The goal of the enlightened, on this theory, was to free the light and allow it to travel heavenward by refusing to cooperate with the created order. This refusal took the form of abstention from reproductive intercourse.⁵ “It is good to hate one’s body,” was the lesson of the Manichees.⁶

If the Manicheans formed one wing of the debate, then the old pagan order of ancient Rome formed the other. Marriage, according to the ancient Roman legal sources, was chiefly an institution for protecting the assets and interests of the elites. It was the means by which men and women of proper social backgrounds might unite their interests, reproduce, and transmit their wealth to the next generation.⁷ Unlike Christians, pagan Romans did not view marriage as the exclusive outlet for sexuality. Concubinage, prostitution, and other types of sexual relationships were permitted under Roman law.⁸ Marriage, on this model, existed for the purposes of bringing into being households that served the economic, political, and dynastic interests of the elite. It did not exist for some larger, transcendent purpose. It was freely dissolvable through divorce if the proper formalities were observed.⁹

3. ST. AUGUSTINE, *DE BONO CONIUGALI, DE SANCTA VIRGINITATE* 2 (P.G. Walsh, ed., 2001).

4. See JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS* 107-112 (enl. ed., 1986).

5. *Id.* at 108-111.

6. *Id.* at 112.

7. The Roman term *familia* reflected this understanding of the marital relationship: “From late antiquity into the Middle Ages, the most common meaning of *familia* continued to be the property or the dependents (sometimes only the servants) of the household head.” See DAVID HERLIHY, *MEDIEVAL HOUSEHOLDS* 3 (1985).

8. James Brundage observes, after reviewing the evidence regarding the Roman practices of concubinage and prostitution: “Romans generally tolerated a wide variety of other sexual practices.” JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 27 (University of Chicago 1987). Among the practices Brundage identifies are masturbation and homosexual relations. *Id.*

9. See PERCY ELLWOOD CORBETT, *THE ROMAN LAW OF MARRIAGE* 218-249 (University Press, Oxford 1969) (1930).

St. Augustine developed his theory of the goods of marriage with both of these schools of thought in mind. He sought specifically to synthesize Christian revelation with elements of Stoic philosophy and grounded his analysis on his vision of the nature of the human person. “Every human person,” St. Augustine commenced his treatise, “is a part of the human race and, by virtue of human nature, has a kind of sociability.”¹⁰ Indeed, St. Augustine emphasized that God created all persons from a single human being so that everyone might be bound together by a kind of “bond of relationship” (*cognationis vinculo*).¹¹ Friendship was thus a natural state of affairs based on the relationships that bound all persons, and marriage was its highest expression.

St. Augustine moved at once from this foundation to explain that the first manifestation “of this natural human society” was the sexual joining of man and woman.¹² Referring once again to the divine act of creation, St. Augustine observed that God did not create man and woman as strange and separate creatures alien from each other.¹³ Rather, He created the woman from the side of the man, thus signaling the power of their enduring union.¹⁴ Side by side, man and woman are thus joined, and so they proceed on the same path, planning and cooperating together.¹⁵

Rejecting his Manichean past, St. Augustine affirmed that “the marriage of man and woman is something good.”¹⁶ Augustine dedicated the remainder of his inquiry to exploring why this should be so. It was not, he concluded, solely because of procreation. There was, he asserted, “a natural companionship between the sexes.”¹⁷ It would otherwise not be possible to speak of marriages among the elderly, where procreation was hardly possible.¹⁸ Among the elderly, Augustine acknowledged, it was a common and praiseworthy thing to find that they have renounced sexual relations yet retain an even purer, more powerful relationship for

10. See AUGUSTINE, *supra* note 3, § 1.1, at 2 (“Quoniam unusquisque homo humani generis pars est, et sociale quiddam est humana natura . . . habet . . .”).

11. *Id.* On the significance of *cognatio* at Roman law, see ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 393 (1953); and W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 370-371 3d ed. rev. by Peter Stein (1963).

12. See AUGUSTINE, *supra* note 3, § 1.1, at 2.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* § 3.3, at 6. (“[A]liquid boni esse coniugium masculi et feminae . . .”).

17. *Id.* (“Quod mihi non videtur propter solam filiorum procreationem, sed propter ipsam etiam naturalem in diverso sexu societatem.”) (“It does not seem to me [to be a good] solely because of the procreation of sons, but also because a natural companionship between the sexes”).

18. *Id.*

having done so.¹⁹ Thus it was not procreation alone that made marriage good.

St. Augustine therefore concluded that there must be a second good of marriage, which he identified as fidelity – the loyalty of one spouse toward the other. Augustine looked to St. Paul for guidance on this matter. In First Corinthians, Paul declared that “a woman does not have power over her body, but the man; similarly, the man does not have power over his body, but the woman.”²⁰ This power over the body of the other St. Augustine took as evidence of the extreme loyalty married persons are required to show toward one another. Fidelity to the person of the other spouse was understood by Augustine as so valuable that it should count more than the bodily health which sustained life itself.²¹ Betrayal of this loyalty was the practical disowning of one’s own body.

Marriage, Augustine continued, had yet a third good. Augustine developed the argument in favor of this good obliquely, using as his starting point the good of procreation. May someone put aside a barren spouse in order to marry one who was not barren?²² This, St. Augustine admonished, is forbidden by the divine law.²³ Even where the spouses are unable to procreate, even where one spouse has abandoned the other, Augustine asserted, they remain symbolically bound to one another.²⁴ This symbolic or sacramental bond is so enduring that divorce cannot break it. Even should a couple divorce, they would commit adultery if they attempted marriage with others.²⁵ The Roman pagans married and divorced without guilt, Augustine observed, and Moses, because of the “hardness” of the hearts of the Israelites, permitted a man to repudiate his wife.²⁶ But among Christians, “in our city of God,” a different rule applied.²⁷ Marriage in the Christian dispensation was a lifelong unity of persons not to be broken by the merely personal judgments of the parties.

B. The Synthesis of the High Middle Ages

These three basic goods, these three basic values, as it were, provided the philosophical foundation for the marriage law of the middle

19. *Id.*

20. *Id.* § 4.4, at 8. Cf. 1 Corinthians 7:4.

21. AUGUSTINE, *supra* note 3, § 4.4, at 8.

22. *Id.* § 7.7, at 16.

23. *Id.* The term St. Augustine uses for “divine law” is *divina regula*.

24. *Id.*

25. *Id.*

26. *Id.* § 8.7.

27. *Id.* § 7.7 (*in civitate dei nostri*).

ages. One might take as representative the work of the twelfth-century canonist Gratian.

Although knowledge of Gratian's accomplishments today is largely restricted to specialist audiences, his feat of legal organization, brought to fruition about the year 1140, was one of the most important contributions in the whole history of western law. Harold Berman has described Gratian's work as "the first comprehensive and systematic legal treatise in the history of the West, and perhaps in the history of mankind—if by 'comprehensive' is meant the attempt to embrace virtually the entire law of a given polity, and if by 'systematic' is meant the express effort to present that law as a single body, in which all the parts are viewed as interacting to form a whole."²⁸ Although little is known about Gratian the man,²⁹ his use of the scholastic method of dialectics—a question-and-answer format leading to synthesis of seeming opposites—remains a staple of legal reasoning even today.³⁰

Gratian premised his analysis of marriage, as did St. Augustine, on its procreative purpose. Those who couple together, not for procreative purposes, but merely for the satisfaction of lust are to be accounted not married persons but fornicators.³¹ Those who employ the "poisons of sterility" (*sterilitatis venena*) to frustrate the procreative purpose of marriage are also to be accounted as fornicators,³² while those who procure an abortion after the soul has infused into the unborn child's body are guilty of homicide.³³ Procreation was not an absolute requirement of married life: those unable to have or bear children might nevertheless validly marry.³⁴ But the possibility of procreation was not to be frustrated by the parties themselves.

Gratian, furthermore, interwove his theory of marital fidelity and indissolubility into his theory of marital consent. He began by considering whether it was consent to a common way of life that made a marriage, or rather the sexual relations between parties who have so

28. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 143 (1983).

29. The most important treatment of the available biographical data concerning Gratian is John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 *TRADITIO* 145 (1979). On the composition of Gratian's *DECRETUM* one must now consult the pathbreaking work of Anders Winroth. See ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* (2000). For this work, Winroth has been made the recipient of a MacArthur Foundation grant.

30. See Berman, *supra* note 28, at 151-164; see also JAMES A. BRUNDAGE, *MEDIAEVAL CANON LAW* 44-69 (1995) (summarizing Gratian's method and accomplishments).

31. See C. 32, q. 2, d.p.c. 1.

32. C. 32, q. 2, c. 7. The phrase *sterilitatis venena* occurs in the rubric.

33. C. 32, q. 2, c. 8.

34. C. 32, q. 2, d.p.c. 16.

consented.³⁵ He concluded, based on the weight of patristic authorities that it was indeed consent that made a marriage, not copulation.³⁶

He did not, however, leave the analysis there. Sexual relations between married persons imparted to the union a special firmness. A consummated, ratified union among Christians, Gratian taught, might only be dissolved where it could be shown that one or both of the parties were gravely impeded from consenting to the marriage or from fulfilling the terms of that consent.³⁷ Parties who separated from one another might be able to move to a new relationship only where a competent ecclesiastical tribunal recognized that the old marriage failed not because of any defect subsequent to the exchange of consent, but where the consent itself was ineffective.³⁸

This teaching became the common currency of the canonists and theologians of the middle ages.³⁹ The work of Peter Lombard and Thomas Aquinas might be taken as representative. The principal reason for marriage, Peter asserted, was the procreation of children.⁴⁰ It was to fulfill His command to “increase and multiply” that God first instituted marriage, Peter taught.⁴¹

The three goods of marriage, Peter continued, embraced procreation, fidelity, and sacramental unity.⁴² The good of fidelity, Peter asserted, was sufficient to stand against all acts of infidelity.⁴³ That one might not become sexually involved with another following marriage was the unbreakable rule.⁴⁴ And the good of sacramental unity, Peter concluded, prevented one from remarrying even after canonical separation, except in those cases where an annulment had been obtained because of a failure of consent.⁴⁵

Thomas Aquinas, for his part, recognized that marriage was founded on the natural law: true, he conceded, it was not natural in the sense that all God’s creatures, human and non-human alike, married in order to have children. But, Thomas made clear, marriage was a natural

35. See C. 27, q. 2, cc. 1-15.

36. C. 27, q. 2, d.p.c. 15.

37. See Brundage, *supra* note 8, at 242-245.

38. *Id.*

39. On the relationship of law and theology in the middle ages, see Alain Boureau, *Droit et théologie au XIII siècle*, 47 ANNALES ESC 1113 (1992); and John van Engen, *From Practical Theology to Divine Law: The Work and Mind of the Medieval Canonists*, PROC. NINTH INT’L CONGRESS MEDIEVAL CANON LAW 873 (1997).

40. See PETER LOMBARD, SENTENTIARUM LIBRI QUATTUOR, 671, Bk. IV, dist. 30 (Paris, 1892).

41. *Id.*

42. *Id.* dist. 31, at 672.

43. *Id.*

44. *Id.*

45. *Id.*

inclination of the human species and was intended for the procreation and education of children.⁴⁶ This education was to consist of training in the virtues and should include lessons from both mother and father.⁴⁷ This much was the endowment—"the treasure"—that parents left their children.⁴⁸ Similarly, Thomas argued, marriage also embraced the good of fidelity: through the marriage vow, man and woman placed themselves in the power of the other.⁴⁹ The keeping of the marital vow, Thomas asserted, was not only a matter of theological virtue but a positive demand of justice.⁵⁰ Finally, Thomas concluded, marriage was indissoluble.⁵¹ It was, after all, a sacrament and a sign of Jesus Christ's own union with the Church.⁵²

C. The Anglican Canon Lawyers of the Early Modern Period

The Protestant Reformation challenged some aspects of the Augustinian framework that the medieval canonists and theologians had constructed. John Witte has shown that in some respects the Lutheran and Calvinist reformers of the sixteenth century deepened the Augustinian goods by, for instance, connecting the faithfulness demanded in marriage with the protection marriage offered from sexual sins.⁵³ In other respects, however, these Protestant reformers moved away from the Augustinian goods, particularly on the subject of the indissolubility of the marital union. Marriage, although a sanctified form of life and a holy estate, was not to be counted among the sacraments.⁵⁴ Hence, divorce with the possibility of remarriage was permitted, at least by the innocent spouse in cases of "[a]dultery, desertion, or cruelty"⁵⁵

On the other hand, as perhaps befit a Church that claimed to represent a *via media* between Catholicism and Protestantism, the

46. See ST. AUGUSTINE, *SUMMA THEOLOGIAE, SUPPLEMENTUM*, Q. 41, art. 1, resp. ("Primo, quantum ad principalem ejus finem, qui est bonum prolis. Non enim intendit natura solum generationem prolis, sed etiam traductionem et promotionem usque ad perfectum statum hominis, in quantum homo est, qui est virtutis status") ("First, as to [marriage's] principal end, which is the good of children: nature intends not only the procreation of children, but also their upbringing and their training in the perfect state of man, which is the state of virtue").

47. *Id.* See also *id.* at art. II, resp. 1.

48. *Id.*

49. See *id.* at resp. 3.

50. *Id.* at resp. 2.

51. *Id.* at resp. 4.

52. *Id.*

53. See John Witte, *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1046 (2001).

54. *Id.* at 1052.

55. *Id.*

structure of Anglican canon law, as expounded by its principal teachers in the sixteenth through eighteenth centuries, reflected the three classical Augustinian goods even though the English canonists seldom credited St. Augustine as their source. Thus, Thomas Oughton, in an analysis of the marital impediments that drew deeply from medieval sources, noted that marriage was ordained both for the avoidance of fornication and for the procreation of children (d. 1740).⁵⁶

John Ayliffe (1676-1732) made specific mention of the “threefold matrimonial Good” in the course of his analysis of marriage.⁵⁷ Marriage, as Ayliffe defined it, “is a lawful coupling and joining together of Man and Woman in one individual State or Society of Life, during the Lifetime of one of the Parties.”⁵⁸ The “papists,” Ayliffe observed, retained the three-fold good of “*Fides* [fidelity], *Proles* [children], and *Sacramentum* [“sacramental unity”].”⁵⁹ Although distancing himself from this formulation by attributing it to the “papists,” the only criticism Ayliffe offered involved the Roman Church’s practice of not allowing the clergy to marry.⁶⁰ Ayliffe otherwise maintained silence on the continued vitality of the goods.

But even if Anglican theology no longer retained marriage as one of the sacraments,⁶¹ and even though a writer like Ayliffe put some distance between himself and the Augustinian goods, the structure of Anglican marriage law was fundamentally shaped by the Augustinian goods. Thus, for instance, adultery remained a crime punishable by the English courts of common law or, where members of the clergy were concerned, by the ecclesiastical courts.⁶²

The retention of the Augustinian goods of marriage as the basic framework for analyzing marriage issues was especially evident in the treatment the law accorded divorce.

The medieval canon law had recognized two types of divorce, *a vinculo* (which had the effect of dissolving the marital bond), and *a*

56. See THOMAS OUGHTON, *ORDO JUDICIARIUS* 286 (London, 1738), vol. I.

57. See JOHN AYLIFFE, *PARERGO JURIS CANONICI ANGLICANI* 360 (London, 1726).

58. *Id.* at 359.

59. *Id.* at 360.

60. *Id.* (“For to forbear Marriage is not a necessary Means to preserve Chastity, as we may learn from the lewd and scandalous Practices of the Romish Clergy, who commit such frequent Acts of Whoredom and Adultery . . .”).

61. See NORMAN DOE, *THE LEGAL FRAMEWORK OF THE CHURCH OF ENGLAND: A CRITICAL STUDY IN A COMPARATIVE CONTEXT* 368 (1996) (“Theologically, holy matrimony is treated in the Church of England not as a sacrament but as sacramental in nature.”); see also GARTH MOORE, *AN INTRODUCTION TO ENGLISH CANON LAW* 82 (1967).

62. See JOHN GODOLPHIN, *REPORTORIUM CANONICUM: OR AN ABRIDGEMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM CONSISTENT WITH THE TEMPROAL* 469 (1687). Godolphin notes that “By the Laws of William the Conqueror the Adulterer was to be put to death.” *Id.* at 470.

mensa et thoro (which removed the obligation of common life, but did not free the parties to remarry). Divorce *a vinculo* was a practical consequence of the Augustinian good of sacramental unity. Only a flaw in the act of consent—say, because one of the parties had been forced into marriage or was actually a different person than alleged to be—might result in the dissolution of the bond itself. But divorce *a mensa et thoro* on account of adultery, or because one of the parties had fallen into heresy, or was excessively cruel—the three classical grounds of separation—did not carry with it the right of remarriage.⁶³

The Anglican canon lawyers retained this basic distinction well into the eighteenth century. Thus, Richard Grey, writing in 1732, retained the original medieval language when he explained the divorce law then prevailing in England:

Q: How many Kinds are there of Divorce?

A: Two: Separation *a Thoro & Mensa* and Separation *a Vinculo*.

Q: What is Separation *a Thoro et Mensa*?

A: Separation from Bed and Board: And this is in cases of Adultery, Cruelty, etc., in which the Marriage, having been originally good, is not dissolved; . . .

Q: What is Separation *a Vinculo*?

A: That which annuls or dissolves the very Bond of Matrimony . . .

Q: What are the Effects of that original Voidance and Nullity?

A: The Wife is barred of Dower, and the Issue is illegitimate, and the Persons so divorced may marry any others; . . .⁶⁴

Richard Burn, in his comprehensive exposition of ecclesiastical law, engaged in much the same analysis, at points repeating Grey nearly word for word.⁶⁵ Edmund Gibson, (1669-1748), librarian of Lambeth Palace and, eventually, Anglican Bishop of London, included in his compilation of canon law secular legislation of King James I prohibiting remarriage following divorce and declaring violations of the statute to be capital felonies.⁶⁶

63. See CHARLES J. REID, JR., *POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW* 294-302 (typescript, 2003).

64. See RICHARD GREY, *A SYSTEM OF ENGLISH ECCLESIASTICAL LAW* 146 (2d ed., 1732).

65. See RICHARD BURN, II *ECCLESIASTICAL LAW* 428-430 (2d ed., 1757).

66. See EDMUND GIBSON, I *CODEX JURIS ECCLESIASTICI ANGLICANI* 508. As the statute as excerpted by Gibson put it: "That if any person or persons within his Majesties Dominions of England and Wales, being married, or which hereafter shall marry, do at any time . . . marry any other person or

John Godolphin sought to reconcile legislation of this sort with the standard Protestant teaching – common on the European Continent – that innocent parties to marriages broken apart by adultery were free to wed.⁶⁷ To be sure, St. Matthew’s Gospel seemed to allow this interpretation, Godolphin noted, but this must be balanced by reference to the texts of St. Luke and St. Mark and, most especially, St. Paul’s admonition in 1 *Corinthians* that “a wife is bound to her husband as long as he lives. But if her husband dies, she is free to be married to whomever she wishes, provided that it be in the Lord.”⁶⁸ Even though Godolphin conceded that Protestant jurists of the Continent, like Hugo Grotius, took a different view and endorsed the right of remarriage, at least for innocent parties, “the ancient Canons of the Church, and the Constitutions of our English Reformation, have not thought fit to permit such liberty”⁶⁹

III. THE AUGUSTINIAN GOODS IN AMERICAN CASE LAW

A. *Chancellor Kent and the Natural Law of Marriage*

Chancellor James Kent (1763-1847), among the early leaders of the New York bench and bar, was extraordinarily influential in the shaping of American law.⁷⁰ He was also a believing Christian who understood Christian principles as the bedrock upon which the law of the new American nation was founded. In a decision issued in 1811, Kent upheld a blasphemy conviction even in the absence of a New York statute, reasoning that the people of New York “profess the general doctrines of Christianity.”⁷¹ “Whatever strikes at the root of Christianity,” Kent asserted, “tends manifestly to the dissolution of civil government.”⁷²

persons, the former husband or wife being alive, that then every such offence shall be felony, and the person and persons so offending shall suffer death as in cases of felony” *Id.*

67. See GODOLPHIN, *supra* note 62, at 493-499.

68. *Id.* at 498. *Cf.* 1 *Corinthians* 7:39.

69. GREY, *supra* note 64. Grey noted that in exceptional cases Parliament might by special act grant divorce with the right to remarry:

Q: May not the innocent Party, in case of Adultery, marry again?

A: No: by the Doctrine of the Canon Law, and the antient Constitutions of the English Church, grounded upon two remarkable Texts of Scripture, Mark X. 11, and 1 Cor. vii 11. But because our Saviour in another Place prohibiting Divorces and new Marriages thereon, specially excepts the Case of Fornication, it seems unreasonable that the Innocent should suffer for the Crime of another; and upon this Principle several Acts of Parliament, for the Divorce of particular Persons in the Case of Adultery, have expressly allowed a Liberty to the innocent Person of marrying again.

70. See CHARLES J. REID, JR., “JAMES KENT,” IN *AMERICAN CONSERVATISM: AN ENCYCLOPEDIA* (Bruce P. Frohnen, ed., forthcoming, 2003).

71. See *Wightman v. Wightman*, 4 Johns. Rep. 343 (1811).

72. *Id.*

An ardent defender of the natural law, Kent was known to approach legal issues with a keen appreciation of the unwritten natural law inscribed on the hearts of all persons.⁷³ In his *Commentaries*, written following his retirement from the bench, during his teaching days at Columbia University, Kent described the transcendent significance of the marital relationship:

The primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age, it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of marriage, a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.⁷⁴

In his capacity as Chancellor, Kent authored a significant opinion on the subject of the relationship of natural law and marriage. In *Wightman v. Wightman*, Kent was afforded the opportunity to apply the principles of the natural law to a question of marriage law because, as Kent observed, the New York law of his day, unlike probably any other jurisdiction “in the Christian world,”⁷⁵ “[had] no statute regulating marriage, or prescribing the solemnities of it, or defining the forbidden degrees.”⁷⁶

The issue in *Wightman* was whether the petitioner, who persuasively alleged that she was temporarily insane at the time of her marriage, was capable of exchanging valid consent.⁷⁷ Kent took notice of what he considered the peculiar situation of American jurisprudence: although there were no ecclesiastical courts in the new nation, American courts were nevertheless charged with enforcing the natural duties of the marital relationship. As Kent put it: “Are the principles of natural law, and of Christian duty, to be left unheeded, and inoperative, because we have no ecclesiastical Courts recognized by law, as specially charged with the cognizance of such matters?”⁷⁸

73. An example of Kent’s natural-law based reasoning is found in *Gardner v. Trustees of the Village of Newbergh* 2 Johns. Rep. 162 (1816), in which Kent awarded compensation for the taking of commercial property even in the absence of an eminent domain statute allowing for the payment of such an award.

74. See James Kent, 2 COMMENTARIES ON AMERICAN LAW 77-76 (3d ed., 1838).

75. See *Wightman*, 4 Johns. Rep. at 347 (1811).

76. *Id.*

77. *Id.* at 343-344.

78. *Id.* at 345.

Kent was not inclined to leave the natural law a dead letter, unenforceable by the courts. He proposed to define the natural law as it pertained to the case before him: “[B]y the law of nature I understand those fit and just rules of conduct which the Creator has prescribed to man, as from the deductions of right reason, though they may be more precisely known, and more explicitly declared by divine revelation.”⁷⁹

Kent imputed to Chancery Court the power to decide matters of matrimonial law, even in the absence of clear statutory authorization.⁸⁰ Kent was comfortable in relying upon the natural law because he did not see it as some arbitrary and subjective body of moral norms, but as a body of principles exemplified to a considerable degree in the canon and the common law and therefore generally knowable.⁸¹ “If it were otherwise, there would be a most deplorable and distressing imperfection in the administration of justice.”⁸²

Kent relied upon these principles in order to rule that capacity to contract was a requirement of valid marriage.⁸³ Kent took the opportunity to consider the broader application of the natural law to questions of matrimony. Stepping outside the scope of the question directly presented, Kent further considered and rejected the possibility that incestuous relationships might ever be recognized by New York: “Prohibitions of the natural law are of absolute, uniform, and universal obligation. They become rules of the common law, which is founded in the common

79. *Id.* at 348.

80. *Id.*

81. *Id.* at 347. This overt commitment to the principles of the canon law remained a feature of New York jurisprudence. In a case involving an allegation of female impotence, the Chancery Court of New York acknowledged the relationship of New York domestic relations law with English ecclesiastical law in order to require the provision of some evidence of impotence beyond the declarations of the parties. The Court explained the canonistic roots of this doctrine:

The Revised Statutes have authorized a proceeding of this kind at the suit of the injured party, against the party whose incapacity it alleged. But it is expressly declared that no sentence of nullity shall be pronounced solely on the confessions or declarations of the parties; and the court is in all cases to require other satisfactory evidence of the existence of the facts on which the allegation of nullity is founded. This last provision was absolutely necessary to guard against fraud and collusion in such cases, and is strictly in accordance with the requirements of the ecclesiastical or canon law.

Devanbogh v. Devanbogh, 5 Paige Ch. 554, 555 (1836).

The *Davenbogh* Court subsequently added: “When the legislature conferred this branch of its jurisdiction upon the Court of Chancery, it was not intended to adopt a different principle from that which had theretofore existed in England, and indeed in all Christian countries” *Id.* at 556.

The idea that canon law provided a framework for analyzing marriage cases remained alive even in the latter nineteenth century. The Nevada Supreme Court wrote in 1882: “The law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statutes.” *Wuest v. Wuest*, 17 Nev. 217, 30 P. 886, 887 (1882).

82. *See Kent*, *supra* note 74, at 347.

83. *Id.* at 344.

reason and acknowledged duty of mankind, sanctioned by immemorial usage, and, as such are clearly binding.”⁸⁴

Natural law was thus binding always and everywhere. Even in the absence of positive statutory enactment, marriage might thus be recognized and given force by the judiciary since its basic norms, its structure, and its fundamental goods and goals were inscribed on the hearts of all persons of good will and knowable through reason. The accumulated wisdom of the great writers on marriage, including the canonists of the middle ages and the Anglican canon lawyers of the English ecclesiastical courts might be consulted as a source of enlightenment and elucidation when doubtful questions arose. Kent, furthermore, was not alone in his endorsement of natural law as the foundation of American matrimonial law. It was the common understanding of the age.⁸⁵

B. The Procreative Purpose of Marriage

When it came to giving specific content to the natural law of marriage, nineteenth-century American commentators and courts tended to look to the Augustinian goods of marriage, which had become, through the medium of the English ecclesiastical writers, the common deposit of legal teaching. Echoing the Augustinian analysis, as mediated through the Anglican canon law, Joel Bishop, one of the most important treatise writers of the nineteenth century,⁸⁶ declared:

As the first cause and reason of matrimony,” says Ayliffe, “ought to be the design of having an offspring, so the second ought to be the avoiding of fornication.” These two, observes Dr. Lushington, the law recognizes as its “principal ends;” namely, “a lawful indulgence of the passions to prevent licentiousness and the procreation of children, according to the evident design of Divine Providence.”⁸⁷

84. *Id.* at 250. Chancellor Kent was far from alone in ascribing a natural-law origin and content to marriage. Thus the Vermont Supreme Court wrote in 1829: “To marry is one of the natural rights of human nature, instituted in a state of innocence for the protection thereof; and was ordained by the great Lawgiver of the universe, and not to be prohibited by man.” *See Overseers of the Poor for the Town of Newberry v. Overseers of the Poor for the Town of Brunswick*, 2 Vt. 151, 158 (1829).

85. Thus Bouvier wrote: “Marriage owes its institution to the law of nature, and its perfection to the municipal or civil law. . . . As an institution established by nature, it consists in the free and voluntary consent of both parties, in the reciprocal faith they pledge to each other.” JOHN BOUVIER, 1 INSTITUTES OF AMERICAN LAW 101 (1851).

86. On Bishop’s importance, see Stephen A. Siegel, Joel Bishop’s Orthodoxy, 13 LAW & HIST. REV 222 (1995).

87. *See* JOEL BISHOP, 1 NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION 326 (quoting John Ayliffe, PARERGON, 360; and Deane v. Aveling, 1 Rob. Ec. 279, 298) (1891).

The procreative purpose of marriage was also a steady feature of nineteenth-century case law. The Pennsylvania Supreme Court, in 1847, declared:

The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; but the procreation of a progeny having a legal title to maintenance by the father; . . . [T]he paramount purpose of the marriage [is] the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world.⁸⁸

One finds this principle being asserted again in 1862, by the Supreme Judicial Court of Massachusetts. That Court was confronted with a difficult problem of fraud: a husband learned following the marriage ceremony that his wife had become pregnant by another man shortly before the marriage.⁸⁹ The Court ruled the marriage invalid because the wife, at the time consent was exchanged, was unable to fulfill the most important purpose of the marital relationship:

[O]ne of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union. A husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. This is implied in the very nature of the contract of marriage.⁹⁰

The Missouri Supreme Court, confronting a complicated question of marriage and dower involving a white man who had married a Native American woman in his youth and subsequently married a white woman, reasoned:

[W]hen there is a cohabitation, by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in a state of nature, would be a marriage; and in the absence of all civil and religious institutions, may safely be presumed to be, as it is termed by some writers, “a marriage in the sight of God.”⁹¹

C. Marital Fidelity

Fidelity, St. Augustine’s second great good of marriage, was also recognized and given life by the American courts. The Vermont Supreme

88. *Matchin v. Matchin*, 6 Pa. 332, 337 (1847).

89. *Reynolds v. Reynolds*, 85 Mass. 605 (1862).

90. *Id.* at 610.

91. *Johnson v. Johnson’s Adm’r*, 30 Mo. 72, 85-86 (1860) (quoting Shelford on Marriage and Divorce).

Court, acknowledging the importance of fidelity, denounced as a violation of “the municipal law” and “the moral or divine law” the crime of adultery, whether committed by the married person himself or herself, or that party’s unmarried partner.⁹² Adultery, the Court observed, amounted to “filthiness and criminality” and should not be tolerated.⁹³ A concurring opinion in a Georgia Supreme Court case explained that statutes against adultery and seduction had as their purpose the protection of “the sacred promise of marriage—the promise to become *one*—the promise of taking the vow of love and fidelity and protection for life”⁹⁴

Courts also called attention to statutory enactments that required fidelity as an element of marriage. The California Supreme Court noted that the obligations of marriage, assumed by all who undertake that contract, included “mutual respect, fidelity, and support.”⁹⁵ Citing statutory authority, an Ohio Court declared: “Husband and wife contract towards each other obligations of mutual respect, fidelity, and support.”⁹⁶ The Louisiana Supreme Court repeated the argument of counsel in asserting that “The conclusion to be derived from consideration of the different articles of the code appears to be an unavoidable one. Mutual fidelity, support and assistance are enjoined . . . upon the husband and wife. Their relations, each to the other, presuppose as much.”⁹⁷

A pre-Civil War Ohio case stressed the relationship between fidelity and free consent: because marriage demanded fidelity, consent had to be the result of “the utmost freedom of choice, and between persons of matured judgment and discretion.”⁹⁸ An 1882 decision of the Wisconsin Supreme Court stressed that marriage required of the husband “his allegiance and fidelity to his wife [and] an obligation of support”⁹⁹

The right to marital faithfulness, the Massachusetts Supreme Judicial Court asserted, was a primary expectation of the parties. Speaking specifically of the wife, the Court held: “There is no more important right of the wife than that, which secures to her in the marriage relation

92. *See* Shattuck v. Hammond, 46 Vt. 466, 470 (1874).

93. *Id.*

94. Wood v. State of Georgia, 48 Ga. 192, 295 (1873) (Trippe, J., concurring).

95. Livingston v. Superior Court of Los Angeles County, 49 P. 836, 837 (Cal. 1897) (quoting California Civil Code sec. 155).

96. Miller v. Miller, 1 Ohio Dec. 264, 264 (Ct. Common Pleas, 1894).

97. Zerega v. Percival, 15 So. 476, 484 (La. 1894).

98. Shaffer v. State of Ohio, 20 Ohio 1, 6 (1851).

99. Cook v. Cook, 56 Wis. 195, 216 (1882). The Pennsylvania Supreme Court had said much the same: “A man owes to his wife affection, fidelity, and protection.” *See* Richards v. Richards, 1 Grant 389, 392 (Pa. 1856).

the companionship of her husband and the protection of his home.”¹⁰⁰ The Mississippi Supreme Court determined that a father whose adultery led to the breakup of his marriage could not thereafter obtain legal custody of his child.¹⁰¹ “[T]he father should not be permitted, when his own violation of duty had produced a dissolution of the marriage tie, to deprive the mother of her child to which she was entitled by fidelity to the marriage vow.”¹⁰²

The Kansas Supreme Court stressed the relationship of marital fidelity to marital stability and the larger social goods thereby served:

Every one is fully aware that the happiness of the domestic circle, the preservation of the concord and confidence that should exist between husband and wife, depends largely, if not absolutely, on the maintenance of mutual confidence of the parties in the chastity and fidelity of each other. . . . The moral progress of the race, the purity of society, depends absolutely on home influences and surroundings.¹⁰³

The Tennessee Supreme Court similarly spoke for the unconscious Augustinianism of the age when it wrote:

The marriage contract is peculiar, and in many respects different from all others. It is for life, and the parties have no power, by mutual consent, to dissolve it. The moment it is solemnized, society, for the wisest reasons, is interested in the fidelity with which it shall be observed; and it cannot be annulled, without the consent of the tribunals of the country, specially clothed with such power.¹⁰⁴

D. Marital Permanence

As the Tennessee Supreme Court intimated, the good of fidelity was closely connected with the idea of marital permanence. The American commentators and courts emphatically rejected the Augustinian ideal, crystallized and given juridic definition by the medieval canonists and theologians, that marriage was a sacrament—a sign and symbol of God’s enduring love. As the Pennsylvania Supreme Court put it, “The absurdity of the dogma, that marriage is a sacrament, and dissoluble only by the

100. *Magrath v. Magrath*, 103 Mass. 570, 579 (1870). *Magrath* was concerned, strictly speaking, not with infidelity, but with spousal abandonment.

101. *See Cocks v. Hannum*, 39 Miss. 423 (1860).

102. *Id.* at 439.

103. *Masterman v. Masterman*, 51 P. 277, 280 (Kan. 1897).

104. *Cameron v. Cameron*, 42 Tenn. 375, 376-377 (1865).

head of the church, instead of a *political status* subject to the power of the state, is manifest.”¹⁰⁵

But while marriage was not sacramental, in any juridic sense, nineteenth-century legal authorities nevertheless emphasized the importance of marital permanence. Chancellor Kent, in the course of reviewing the experiences of the ancient world and of modern Europe, asserted: “[T]he stronger authority, and the better policy, are in favour of the stability of the marriage union.”¹⁰⁶ The Roman practice of liberal divorce, Kent concluded, was “injurious and shameful.”¹⁰⁷ The Roman “facility of separation tended to destroy all mutual confidence and to inflame every trifling dispute.”¹⁰⁸ This divorce mentality prevailed “until it was finally subdued by the influence of Christianity.”¹⁰⁹

Kent favored the restrictive approach to divorce and was grateful that American states tended to share his reluctance. In several states, Kent observed, “no divorce is granted, but by a special act of the legislature, according to the English practice.”¹¹⁰ Kent especially singled out the state of South Carolina. At the time of his writing, Kent agreeably noted regarding South Carolina, “there is no instance . . . since the revolution, of a divorce of any kind, either by the sentence of a court of justice, or by act of the legislature.”¹¹¹ On the other hand, there were also states and territories that conferred jurisdiction over divorce to the courts, but even in these instances the grounds of absolute divorce, with right of remarriage, were generally limited to adultery.¹¹² And where one attempted to marry while bound to another he or she broke the law:

“No person can marry while the former husband or wife is living. Such second marriage is, by the common law, absolutely null and void,

105. Matchin, 6 Pa. 332, 337 (1847); *accord*, Town of Londonderry v. Town of Chester, 2 N.H. 268, 278 (1820) (“It is one of the corruptions of popery, that marriage itself is a ‘sacrament’”). The Alabama Supreme Court, on the other hand, declared:

Marriage is a divine institution, and, although in some respects it may partake of the nature and character of ordinary contracts, it has, with few exceptions, always considered as standing upon higher and holier grounds than any secular contracts. By a large portion of the Christian world it is believed, and held, to be a sacrament, and is revered and treated as such. Our Blessed Savior says, “a man shall leave his father and mother and cleave to his wife, and the twain shall be one flesh.”

Campbell’s Adm’r and Heirs v. Gullatt, 43 Ala. 57, 67 (1869).

It is, of course, the abandonment of this sense of transcendent importance to the marital relationship that is at the heart of the modern crisis.

106. Kent, *supra* note 74, at 101.

107. *Id.*

108. *Id.* at 102.

109. *Id.*

110. *Id.* at 104. On the English practice, see Grey’s discussion, *supra* note 64.

111. Kent, *supra* note 74, at 104.

112. *Id.* at 104-105.

and it is probably an indictable offence in most, if not all of the states in the union.”¹¹³

Writing near the close of the nineteenth century, Joel Bishop was more explicit in his reasons why parties to a marriage should be denied the freedom to dissolve their unions. Marriage, Bishop argued, served the greatest social goods: “Marriage, being the source of population, of education, of domestic felicity, – being the all in all without which the State could not exist, – it is the very highest public interest. Prima facie, therefore, each particular marriage is beneficial to the public; each divorce, prejudicial.”¹¹⁴

Bishop continued by connecting these great public goods to the religious foundations of society and to its deepest ideals:

Evils numberless, extending to the demoralization of society itself, would follow the abandonment of marriage as a permanent status, and permitting it to be the subject of experimental and temporary arrangements and fleeting partnerships. Wisely, therefore, the law holds it to be a union for life. It is so also in reason, in the common sentiments of mankind, and in the teachings of religion. No married partner should desert the other, commit adultery, beat or otherwise abuse the other, or forbear to do all that is possible for the sustenance and happiness of the other and of the entire family. Figuratively speaking, the two should walk hand in hand up the steeps of life and down its declivities and green slopes, then lay themselves together for the final sleep at the foot of the hill. Consequently there should be no divorces, no divorce courts, no books on the law of divorce. In Utopia, it will be so; it ought to be so in our own country.”¹¹⁵

“But,” Bishop went on, it is not always possible that married partners remain together all their days.¹¹⁶ He expressed concern that a too dogmatic and religious approach to divorce, forbidding divorce of every type in the name of the marital ideal, would end badly.¹¹⁷ He rejected explicitly the Catholic position that marriage was “indissoluble, or only to be dissolved by the Pope.”¹¹⁸ Bishop argued, in contrast, that the state should be empowered to grant decrees of divorce with the right of remarriage where one of the parties failed to perform the essential obligations of the marital contract.¹¹⁹ But even where divorce with the

113. *Id.* at 79.

114. BISHOP, *supra* note 87, at 16.

115. *Id.*

116. *Id.*

117. *Id.* at 17.

118. *Id.* at 18.

119. *Id.* at 19. Bishop wrote:

Matrimony is a natural right, to be forfeited, only by some wrongful act. Therefore the

right of remarriage was granted, Bishop concluded, it should not be exercised to the detriment of society. “These principles should not be carried to the extent of impairing the stability of the marriage relation.”¹²⁰ As support for this proposition, Bishop quoted Chancellor Kent.¹²¹

Nineteenth-century case law endorsed these views. The Kentucky Supreme Court declared in 1841:

Marriage, being more fundamental and important than any of the social relations, is controlled, as to its obligations, by a peculiar policy deemed essential to the permanent welfare of the whole social community. Being a contract for life, indissoluble by the consent of the parties merely, it should not be dissolved by the sovereign will for any other causes than such as are subversive of its essential ends or inconsistent with the general welfare. And it is certainly important to the general stability and harmony of that relation, that the parties should know, that, having taken each other with all their infirmities, and vowed reciprocal fidelity and forbearance for life, it is their interest, as well as their duty, to ‘bear and forbear’ as far as the resources of love, philosophy, and religion can enable them.”¹²²

Twenty-one years later, the Supreme Judicial Court of Massachusetts wrote: “The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring.”¹²³ The Wisconsin Supreme Court echoed these remarks in 1881,¹²⁴ as did the New York Superior Court in 1895.¹²⁵

In a bigamy prosecution in 1899, the Nebraska Supreme Court ruled against the defendant’s attempt to assert his good faith as a defense: “Public policy forbids that the permanence of the marriage relation should depend on anything so precarious and elusive as the mental state of one of the parties.”¹²⁶ The Supreme Court of Louisiana wrote in 1900:

government should permit every suitable person to be the husband and wife of another, who will substantially perform the duties of the marital relation; and when it is in good faith entered into, and one of the parties without the other’s fault, so far fails in those duties as practically to frustrate its ends, the government should provide some means whereby, the failure being established and shown to be permanent, the innocent party may be freed from the mere legal bond of what has in fact ceased to be marriage.

Id.

120. *Id.* at 20.

121. *Id.*

122. *Logan v. Logan*, 41 Ky. 142, 146 (1841).

123. *Reynolds v. Reynolds*, 85 Mass. (3 Allen) 605, 607 (1862).

124. *See Vamey v. Vamey*, 8 N.W. 739, 741 (Wis. 1881).

125. *See Fisk v. Fisk*, 34 N.Y.S. 33, 34 (N.Y. Sup. Ct. 1895).

126. *Reynolds v. State*, 78 N.W. 483, 484 (Neb. 1899).

“Legislation looks to the permanence of marriage. It is to the best interest of society that it should be made permanent as far as possible.”

In a debate that calls to mind, to a reader familiar with the medieval sources, old arguments over whether non-Christians might truly marry,¹²⁷ nineteenth-century courts debated whether the Native American peoples possessed valid marriage. This debate turned in substantial degree on the perceived permanence or impermanence of Indian marriage. In *Roche v. Washington*, the Indiana Supreme Court confronted the question whether marriage among the Miami tribe was valid where, the court stated, custom and practice allowed couples to separate “by consent.”¹²⁸

The Court felt compelled to consult the “*jus gentium*” – the “law of peoples” – to determine the meaning of marriage:

What, then, constitutes the thing called a marriage? What is it in the eye of the *jus gentium*? It is the union of one man and one woman, “so long as they both shall live,” to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own volition and act, dissolve, but which can be dissolved only by the authority of the State. Nothing short of this is a marriage.¹²⁹

Other courts were more willing to extend legal recognition to the matrimonial relations of Native American peoples. Thus, the ante-bellum Alabama Supreme Court upheld Choctaw marriage where the tribe was “governed by their own chiefs and laws,”¹³⁰ while the Tennessee Supreme Court reached a similar conclusion with respect to the Cherokee nation.¹³¹ These two decisions, relying on positivist, not natural-law analysis, premised their holdings on the law-making authority vested in tribal government. A quarter-century later, however, the North Carolina Supreme Court reached a different conclusion with respect to the Cherokee people: because “the tribe had professed Christianity [before the marriage in question],” and because “most of the marriages had been solemnized by a Justice of the Peace,” permanence was to be imputed as an element of Cherokee marriage.¹³²

Harsh in their application of “white man’s law” to Native peoples, echoing, all unconsciously, the commentaries of various twelfth- and thirteenth-century writers on the marital rights of unbelievers, these

127. Hugh of St. Victor, a prominent twelfth-century writer on marriage, proposed that non-Christians as well as Christians might truly marry provided they take one another for purposes of procreation, keep faith with one another, love each other as companions, and provide for their mutual needs. See Hugh of St. Victor, *De Sacramentis Fidei Christianae*, 176 PATROLOGIA LATINA 505.

128. See *Roche v. Washington*, 19 Ind. 53, 55 (1862).

129. *Id.* at 57.

130. *Wall v. Williamson*, 8 Ala. 48, 51 (1845).

131. See *Morgan v. M’Ghee*, 24 Tenn. (5 Hum.) 13 (1844).

132. *State v. Ta-Cha-Na-Tah*, 64 N.C. 614, 616 (1870).

decisions nevertheless serve as evidence of the commitment of American courts to permanence as an essential element of marriage. To be sure, some courts were more reluctant than others in endorsing a strict notion of marital permanence,¹³³ but ideas of no-fault or free divorce were very far from the nineteenth-century judicial mind. Permanence, like procreation, like fidelity, was to be ranked among the essential elements of matrimonial union.

The nineteenth-century lawyers and judges did not cite St. Augustine. They did not borrow directly from his treatise on the goods of marriage. Rather, it is clear, they operated within a mental universe defined by the parameters first laid down by St. Augustine and elaborated upon and systematized by generations of medieval and early modern ecclesiastical lawyers. Compelled by the absence of specialized ecclesiastical tribunals to entrust marriage to the protection of the state, these writers nevertheless saw marriage as something that was not merely state-created. Its essential elements – procreation, fidelity, and permanence – were part of a natural ordering of society. Too great departure from these norms, it was believed, could lead to calamitous social consequences.

IV. THE AUGUSTINIAN GOODS OF MARRIAGE AND THE SAME-SEX DECISIONS

In 1971, the Minnesota Supreme Court, in *Baker v. Nelson*, confronted the issue of same-sex marriage. Two “[p]etitioners, Richard John Baker and James Michael McConnell, both adult male persons, made application” for a marriage license from the duly constituted authorities and were denied “on the sole ground that petitioners were of the same sex.”¹³⁴ The petitioners sought to have the licensing statute declared unconstitutional as a violation of the equal protection and due process clauses.¹³⁵

The Court answered by looking to the Augustinian goods of marriage – specifically, the good of procreation, as recognized by the jurisprudence of the United States Supreme Court:

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as

133. See *Bauman v. Bauman*, 18 Ark. 320 (1857), which notes that the distinction between divorce *a mensa et thoro* and divorce *a vinculo* had largely lost significance in Arkansas, and which recommends that the right of remarriage be freely granted to innocent parties “in cases of adultery, malicious desertion, long absence, or capital enmities . . .” *Id.* at 325 (quoting a report of ecclesiastics made at the time of King Edward VI of England).

134. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

135. *Id.*, at 186.

old as the book of Genesis. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655, 1660 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and social interests for which petitioners contend.¹³⁶

Three years later, in 1974, the Washington Court of Appeals confronted the issue of same-sex marriage and responded, as had *Baker v. Nelson*, with an invocation of the good of procreation:

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.¹³⁷

But as we know, at the same time *Baker v. Nelson* and *Singer v. Hara* were decided the relationship of marriage to the traditional goods ascribed to it by St. Augustine, by the medieval Catholic and the early modern Anglican canon lawyers and by the American common lawyers of the nineteenth century was under serious assault. Procreation was in the process of being disconnected from marriage; laws against adultery were only rarely and haphazardly enforced,¹³⁸ divorce came to be much

136. *Id.*

137. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

138. In 1983, the Massachusetts adultery statute was found to be constitutional even though it was concededly only rarely enforced. *See Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983). The Court acknowledged that "the crime of adultery is rarely made the subject of criminal prosecution." *Id.* at 360. Even so, the Court declared: "The statute remains as a permissible expression of public policy." *Id.* at 361. What that policy was remained unarticulated by the Court. Rather, the Court suggested that it belonged to the legislature to change the policy, not the judiciary.

A similar constitutional challenge to the Utah adultery statute on privacy grounds was rejected by federal district court. *See Oliverson v. West Valley City*, 875 F. Supp. 1465 (D.Utah 1995). The Court admonished that privacy was a doctrine that required the imposition of carefully-drawn limitations: "To some extent balancing is essential. Modern life is urbanized and communal and requires restriction of some individual interests in order for all citizens to be able to enjoy a reasonable life. Harmony dictates some limitation on individual interests. An absolute right of privacy would be a form of anarchy." *Id.* at 1478. The Court concluded that rights of intimate association were not without limits. It looked to the language of *Griswold v. Connecticut*, 381 U.S. 479 (1965) for guidance on the proper boundaries of

more freely granted, especially on no-fault grounds. Marriage, it was observed, had gone from being the highest sort of contract, one in which the whole of society had an interest in maintaining, to being of lesser status than any other contract, since it was terminable at the will of either party.¹³⁹ Today, of course, who could even contemplate a return to prosecution for adultery, or to the restrictive divorce laws that prevailed at the time of Kent or Bishop? Indeed, a persuasive argument can be made that the relaxation of the laws, especially those concerning divorce, has had some beneficent social consequences, allowing parties to depart from abusive relationships that were destructive to the parties but that did not fit the standard grounds of divorce.

But our concern today is not with tracing these developments, which would be a long and arduous undertaking. It would also ultimately be a distraction from our central thesis. Rather, we are concerned with identifying the alternative marital theory proposed by the Hawaii and Vermont Supreme Courts.

A nineteenth-century writer like Chancellor Kent commenced his analysis of marriage with the structure and demands of the natural law firmly in mind. Neither legislators nor courts had the right or power to “make” the law of marriage. Rather, it was their solemn duty to recognize and give legal force to a pattern already laid down in the natural order.¹⁴⁰ This pattern, as outlined above, embraced the Augustinian goods of procreation, fidelity, and unity.

When one turns to the Hawaii Supreme Court’s decision in *Baehr v. Lewin*, on the other hand, one finds a court that has arrogated to the state the full authority over determining what constitutes a marriage.¹⁴¹ “The power to regulate marriage is a sovereign function reserved exclusively to the respective states,” the *Baehr* Court declared.¹⁴²

By its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and

privacy interests. “Nothing suggests the privacy interest recognized in *Griswold* could encompass a right to a sexual relationship outside of marriage or one contrary to marital integrity. No right to perform an act of marital infidelity was even alluded to in the majority opinion.” *Oliverson*, 875 F. Supp. at 1480.

The reluctance of the Massachusetts Court and the labors of the Utah Court, demonstrate that even though adultery statutes might survive constitutional scrutiny, their continued vitality remain subject to legal challenge.

139. See John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255, 265, 273-274 (1973).

140. See *supra* notes 73-85, and accompanying text.

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

142. *Id.* at 58.

obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution.¹⁴³

The *Baehr* Court acknowledged contrary authority to its totalistic claims on behalf of the state's control of the marital relationship. It quoted *Jones v. Hallahan*'s pronouncement that "Marriage was a custom long before the state commenced to issue licenses for that purpose. . . . [M]arriage has always been considered as a union of a man and a woman. . . ." ¹⁴⁴ *Baehr*, however, never addressed the implications of this insight, preferring rather to see in the *Jones* case a failure to address the equal protection issue supposedly inherent in this understanding of marriage.¹⁴⁵ It noted also the Washington Court of Appeals' denial of a marriage license to a same-sex couple in *Singer v. Hara*.¹⁴⁶ The *Singer* Court had written regarding the same-sex appellants that they "were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."¹⁴⁷

The *Baehr* Court's response to these invocations of a natural order to the marital relationship was to exalt the power of the state: "marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that relationship."¹⁴⁸ The Court left no room for Chancellor Kent or Joel Bishop in the face of this declaration of state power. The *Singer* Court's reasoning was specifically denounced as "tortured and conclusory sophistry."¹⁴⁹

Gone from this understanding of marriage is any notion of teleology. There is no sense that marriage exists to serve particular purposes or that it is intended to fulfill certain goods. This failure to appreciate that marriage might serve some positive social good emerges full-blown in the court's definition of marriage. The *Baehr* Court wrote: "This court construes marriage as 'a partnership to which both parties bring their financial resources as well as their individual energies and efforts.'" ¹⁵⁰

Absent from this definition is any notion of procreation, or the fidelity or loyalty owed by one partner to the other, or the partnership for life that the parties are expected to share. The definition the court proposes is virtually indistinguishable from the definition one might

143. *Id.*

144. *Id.* at 61 (quoting *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973)).

145. *Id.*

146. *Id.* at 63 (citing *Singer v. Hara*, 522 P. 2d 1187 (Wash. Ct. App. 1974), *cert. denied* 84 Wash. 2d 1008 (1974)).

147. *Id.* at 63 (quoting *Singer*, 522 P. 2d at 1196).

148. *Id.* at 58.

149. *Id.* at 63.

150. *Id.* at 58 (quoting *Gussin v. Gussin*, 73 Haw. 470, 483, 836 P.2d 484, 491 (1992)).

accord a business partnership between two persons. Eliminate the word “both” and it might include a committee charged with planning a Fourth of July celebration, or a school board setting its budget. Indeed, it could embrace nearly all forms of collaborative enterprise.

But this “state-conferred status,” this “partnership to which both parties bring their financial resources as well as their individual energies and efforts,” nevertheless was the vehicle through which the state conferred certain benefits. By privileging, as it were, heterosexual poolings of financial resources and individual energy, other forms of partnership were denied access to benefits. These include tax benefits, access to the courts for spousal support, or child custody, and rights to property division, among other benefits.¹⁵¹ If marriage has any purpose, on this analysis, it is to facilitate the distribution of state-controlled benefits. It has become, according to the Hawaii Supreme Court, one more social-welfare program.

Baker v. State, the Vermont decision of 1999, takes a much more sophisticated approach to the meaning of marriage.¹⁵² The litigants in *Baker*, same-sex couples seeking marriage licenses, conceded that marriage in Vermont traditionally encompassed heterosexual unions and served the purposes of procreation and child-rearing.¹⁵³ The plaintiffs, however, wished to shift the premises. Regarding procreation, plaintiffs contended that a prohibition on same-sex unions failed to serve the state’s interest, given “the large number of married couples without children, and the increasing incidence of same-sex couples with children”¹⁵⁴ Plaintiffs proposed an alternative understanding of the nature of the marital relationship: “They argue[d] . . . that the underlying purpose of marriage is to protect and encourage the union of committed couples and that, absent an explicit legislative prohibition, the statutes should be interpreted broadly to include committed same-sex couples.”¹⁵⁵

The Court, however, elected to ground its decision not on the statutory scheme authorizing and supporting the marital relationship, but on the Vermont Constitution’s “Common Benefits Clause.”¹⁵⁶ Like the Hawaii Court before it, the Vermont Supreme Court viewed marriage in terms of the benefits it conferred. And the Vermont Constitution prohibited discrimination in the conferral of benefits:

151. *Id.* at 59.

152. *See Baker v. State*, 744 A.2d 864 (Vt. 1999).

153. *Id.* at 869-70.

154. *Id.* at 870.

155. *Id.*

156. *Id.*

The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security, so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege.¹⁵⁷

If an equal distribution of benefits is the norm, the Court reasoned, and the status of marriage offered substantial benefits,¹⁵⁸ then “any statutory exclusion [of a group of persons] must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.”¹⁵⁹

The state of Vermont countered by asserting its interest in providing for the raising of the next generation:

The State has a strong interest, it argues, in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support. The State contends, further, that the Legislature could reasonably believe that sanctioning same-sex unions “would diminish society’s perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing.”¹⁶⁰

The Court responded by asserting, in effect, that the State’s purported justification was both under and over inclusive. On the one hand, the Court noted, there are “many *opposite-sex* couples [who] marry for reasons unrelated to procreation, [and] some of these couples never intend to have children, and . . . others are incapable of having children.”¹⁶¹ On the other hand, “there is no dispute that a significant number of children are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of techniques.”¹⁶² In a sense, the Court asserted, the state’s interest in procreation might even be served by permitting same-sex marriage.¹⁶³

157. *Id.* at 876-77.

158. *Id.* at 883-84. The Court provides a comprehensive list of marital benefits, including the spousal share of the estate, intestate provisions, the right to sue for wrongful death or loss of consortium, joint ownership of property, and a host of other benefits.

159. *Id.* at 884.

160. *Id.* at 881.

161. *Id.*

162. *Id.*

163. *Id.* at 882

Therefore, to the extent that the state’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-

Ultimately, however, the Vermont Court, like the Hawaii Court, did not define marriage as serving a procreative end. This was one of a number of possible purposes for marriage, and one that the parties themselves might freely accept or renounce. After all, the Court observed, there are many who marry who never intend to have children.¹⁶⁴ Although taking greater cognizance than *Baehr* of the state's interest in procreation, the Vermont Court, in the final analysis, viewed marriage as a kind of co-mingling of state-conferred benefits on the one hand and mutual affection between the parties, on the other:

While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case. The State's interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple's commitment provides

sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against.

Id.

The Catholic Church's teaching on artificial means of reproduction is to see it as morally unacceptable for several reasons, chief among them the severance of the procreative act from the natural sexual union of the parties to a marriage. According to the *Catholic Catechism*:

Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm, or ovum, surrogate uterus) are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by a marriage. They betray the spouse's "right to become a father and a mother only through each other." (Quoting DONUM VITAE, intro., 2).

Techniques involving only the married couple (homologous artificial insemination and fertilization) are perhaps less reprehensible, yet remain morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one that "entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children." (Quoting DONUM VITAE, II.5).

See CATECHISM OF THE CATHOLIC CHURCH, paras. 2376-2377, p. 571 (2d ed., 1997).

164. See *supra* note 152 and accompanying text. St. Augustine, for his part, found it impossible to characterize as marriage a relationship between those who have affirmatively taken steps to frustrate permanently the conception or birth of children. See DE BONO CONIUGALI, sec. 5.5, p. 1011 (Walsh edition). This teaching remains a foundation of the Catholic canon law of marriage. Canon 1055, sec. 1 of the Latin-rite Code of Canon Law (1983) provides that marriage serves the good of the spouses and the procreation and offspring of children. Exclusion of the good of children, or the goods of fidelity or indissolubility, will result in an invalid marriage. See C. 1101 (1983 Code of Canon Law). See also THE CODE OF CANON LAW: A TEXT AND COMMENTARY (James Coriden, et al., eds., 1985), at 784-787.

stability for the individuals, their family, and the broader community.¹⁶⁵

V. THE AUGUSTINIAN GOODS: DO THEY RETAIN VITALITY?

In *Standhardt v. Superior Court*, an action brought by two males seeking a marriage license so as to marry one another, a division of the Arizona Court of Appeals rejected plaintiffs' contention that the recent Supreme Court decision in *Lawrence v. Texas* required recognition of homosexual marriage.¹⁶⁶ The Court first determined that *Lawrence* did not mandate that homosexual unions must be accorded the status of marriage.¹⁶⁷ Indeed, the *Standhardt* Court observed that *Lawrence* had explicitly declared that "the case before it '[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'"¹⁶⁸

The Court then considered the legal contours of the marital relationship. The Court looked to *Maynard v. Hill* for guidance on the societal value marriage retained. Marriage, the *Standhardt* Court quoted, "creat[ed] the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution."¹⁶⁹

The Court then rejected plaintiffs' attempt to connect their claim with the fundamental-rights analysis of *Loving v. Virginia*.¹⁷⁰ "Implicit in *Loving* and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and one woman."¹⁷¹ The *Standhardt* Court continued:

Thus, while *Loving* expanded the traditional scope of the fundamental right to marry by granting interracial couples unrestricted access to the state-sanctioned marriage institution, that decision was anchored to the concept of marriage as a union involving persons of the opposite sex. In contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of "marriage."¹⁷²

The *Standhardt* Court did not explicitly endorse the procreative purposes of marriage. It did acknowledge that legislative protection of

165. *Baker*, 744 A.2d at 888-89.

166. See *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); cf. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

167. *Standhardt*, 77 P.3d at 458.

168. *Id.* at 456 (quoting *Lawrence*, 123 S. Ct. at 2484).

169. *Id.* at 458 (quoting *Maynard*, 125 U.S. at 205).

170. *Id.*; cf. *Loving v. Virginia*, 388 U.S. 1 (1967).

171. *Standhardt*, 77 P.3d at 458.

172. *Id.* at 458.

this policy was not outside the boundary of judicial protection. The Court stressed the importance of history to its analysis: “The history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.”¹⁷³

One is entitled to ask whether the Augustinian goods retain vitality. *Standhardt* suggests that they continue to exert some influence. But *Standhardt*, in the final analysis, does not mount a robust defense of the traditional marital goods. History, tradition, and judicial deference to legislative policy are the values that seem to dominate *Standhardt*’s analysis, not an express solicitude for the traditional goals of the marital relationship. One must ask the question, without here answering it, whether such values are sufficient judicial protection of the marital relationship.

173. *Id.* at 460.