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Three Degrees of Promising

*Eric G. Andersen**

I. INTRODUCTION

A young married man borrowed a substantial sum of money. He was already making mortgage payments on his house. After a time he found himself unable to make both the installment payments on the loan and the mortgage payments on the house. He concluded that he must either default on the loan and file for bankruptcy or sell his house and rent a small apartment. He sought advice.¹

One friend advised: “You have a legal obligation to repay the amount you borrowed, but your creditor, by agreeing to make you an unsecured loan, voluntarily accepted a risk that you might be unable to repay. That was a business decision your creditor made. The interest rate it charges for its loans assumes a certain rate of default among its debtors. You are legally entitled to the protection of the law of bankruptcy, which will allow you to keep your house. You should do so without any sense of shame.”²

Another friend advised: “Keep your agreement and repay the loan.”³

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1. Based on N. Eldon Tanner, Address at the 136th Semi-Annual General Conference of the Church of Jesus Christ of Latter-day Saints (Oct. 1, 1966), in OFFICIAL REPORT OF THE 136TH SEMI-ANNUAL GENERAL CONFERENCE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 97, 99 (1996); see also *Keep Your Covenants*, IMPROVEMENT ERA, Dec. 1996, at 1136–37.

2. See generally Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 778–80 (1987) (“A contract is not a legally enforceable obligation to do a promised thing. . . . A bankruptcy scholar would point out that . . . a contract requires [only that] a party . . . do the thing promised or . . . pay the money equivalent *or* . . . discharge the promise through the bankruptcy system. . . . Anyone who ever extends credit faces the possibility that repayment will not be forthcoming. Interest is structured, among other things, to pay the creditor for assuming the risk of nonpayment.”). For a discussion of bankruptcy in terms of the community’s moral obligation to provide insolvent debtors with a fresh start, see Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515 (1991).

3. See Tanner, *supra* note 1, at 99.

“Even if it costs me my home?” asked the young man.⁴ “I am not talking about your home,” the friend replied, “I am talking about your agreement, and I think your wife would rather have a husband who would keep his word, meet his obligations, keep his pledges or his covenants, and have to rent a home than have a home with a husband who will not keep his covenants and his pledges.”⁵

The two friends approached the meaning of the young man’s promise in very different ways. The first viewed it in legal and economic terms, casting it in terms of business risk and legal options. The second saw the promise in moral, even spiritual, terms, associating it with the young man’s integrity and, using the words “covenant” and “pledge,” linking the promise with the expectations the young man’s wife might have of his character.

The advice the young man received suggests that widely varying ideas about the meaning and importance of promises are current in our culture. This paper does not point to a simple or authoritative resolution of the young man’s dilemma, but I hope it might be useful to those facing such questions.

When lawyers think of promises, they usually think of contracts. Scholars debate the precise importance of promises to contracts, but promises are clearly at the heart of mainstream thinking about contracts. The modern law of contracts centers its attention on commercial transactions, although it is also prepared to deal with noncommercial relationships, such as charitable subscriptions and undertakings between family members. Such noncommercial transactions can influence the formation of contract law.⁶ But the content and structure of the law is devised primarily to govern dealings in the commercial world.

If promises are central to the world of commercial contracts, is it also fair to say that contracts are central to the world of promises? One might be tempted to think so. There are, however, settings in which people make promises that the law considers important but that *contract* law fails to address carefully or at all.

Consider making a promise under oath. When the President-elect stands before the Chief Justice of the United States on inauguration day or when an anonymous person from small-town America is sworn in as a witness in a trial, each makes a promise accompanied by some degree of

4. *Id.*

5. *Id.*

6. *See, e.g.*, E. ALLEN FARNSWORTH, *CONTRACTS* 92–93 (3d ed. 1999).

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ritual intended to impress upon all participants in the occasion that a serious obligation has been undertaken. Contracts casebooks and treatises do not address these promises, although books on government and the law of evidence may do so.

Consider marriage. When a bride and groom approach the altar in a traditional religious ceremony or stand before a justice of the peace in a purely secular proceeding at town hall, part of what they do is make promises to each other. Whatever else their promises might mean, they have an important legal effect. Those promises, however, are not the subject of contract law. Although formal contracts may be made in connection with the formation or dissolution of a marriage, the marriage vows themselves are more accurately described as creating an important legal status, a subject usually classified as part of family law.

The practice of promising, even if one focuses only on promises that have legal significance, touches us at many points in our lives. The formal law of contracts addresses only some of them, with other bodies of law pressed into service to deal with the rest. The result is that lawyers look at promise-making in a fragmented way.

As a practical matter, no harm exists in doing so. A single body of law need not deal adequately with both the sale of tractor parts and the creation of a family through the exchange of marriage vows. But the act of *promising* is central in both cases. Looking for relationships between the different kinds of promises we make in disparate settings is a worthwhile exercise. Specifically, in keeping with the theme of the symposium of which this essay is a part, I suggest that the variety of promises we make reflects the tension between the self-serving, “natural”⁷ side and the spiritual, “eternal” side of human nature as understood by members of the Church of Jesus Christ of Latter-day Saints (“Latter-day Saints” or the “LDS Church”).

I make that point by dividing promises into three loose categories or “degrees.” Latter-day Saints will recognize the allusion to the “three degrees of glory”⁸ which, in a very general sense, correspond to my three degrees of promising. I conceive of the degrees of promising as areas along a spectrum ranging from our natural to our eternal selves. Ordinary

7. A common Latter-day Saint term is “natural man.” See *Mosiah* 3:19 (Book of Mormon); *Alma* 41:11 (Book of Mormon); Neal A. Maxwell, *Put Off the Natural Man, and Come off Conqueror*, ENSIGN, Nov. 1990, at 14–16 (“the burdensome natural man . . . is naturally selfish”).

8. Latter-day Saints believe that a range of eternal circumstances, grouped under three main heads, awaits God’s children after mortality. See *Doctrine & Covenants* 76:50–113; 88:14–31; see also *1 Corinthians* 15:40–44 (King James); *2 Corinthians* 12:2 (King James).

commercial agreements reside at the natural end of the spectrum. They assume the contracting parties will seek their own economic self-interests, with relatively minimal oversight by the sovereign state. Towards the middle of the spectrum are promises illustrated by commitments made under oath and typical marriage vows. Such promises assume one acting not solely or even primarily in self-interest, but in the interests of others and the larger community, with the sovereign state playing a more active, if ceremonial, role when the promise is made. Promises of the third degree, illustrated by religious covenants, assume the promisor acts as a spiritual or eternal being, with sovereign God in a close and vital relationship as promisee and reciprocating promisor.

The “natural” and “eternal” sides of our natures influence the way we think about the promises we make. Although first- and third-degree promises reside close to their respective ends of the spectrum, each is nevertheless subject to the influence of the opposite pole. Second-degree promising is in approximate equipoise between the two. In this essay, I suggest that society’s view of promises in that middle region may reveal something important about how we collectively value the natural and eternal sides of our natures.

II. THE FIRST DEGREE OF PROMISING

The first degree of promising is represented by the traditional law of contracts, especially as applied to ordinary commercial contracts. In recent decades, contract law has seen substantial development in the courts and legislatures and has received extensive attention in the academic literature. Notwithstanding the complexity of that development and of the theories used to explain it, I maintain that the law of contracts, as reflected in our commercial and personal lives, assumes that promisors are principally motivated by self-interest, which interest is measured in material terms. The promisor is thus a “natural” or (to use a more modern phrase) economic being. First-degree promising also assumes that the governmental sovereign plays a largely passive role, at least at the level of individual bargains.

A. Contracts and the Economic Being

Recent generations of legal scholars have developed a number of impressive and complex theories to explain and prescribe the content of modern contract law. Some of them would no doubt take exception to

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my simple and categorical statement about an economic being as the assumed actor in the practice of making, performing, and enforcing contracts. I do not mean that contract law and theory can be accounted for *solely* in economic terms. I suggest, however, that contract law and theory cannot be explained *without* those terms. Conceiving of contracting parties as economic actors is an essential part of the conceptual infrastructure of contract law. Reference to a few current and important approaches to contract theory illustrates the point.

The most obvious example is the school of thought that views the law of contracts primarily as an engine for achieving economic efficiency, meaning an increase in total “utility” in society.⁹ Efficiency results when two individuals exchange assets because each values the other’s asset more highly than his or her own.¹⁰ The parties to such an exchange usually choose to plan their transactions in advance rather than engage in a sale on the spot, so they trade promises to perform in the future. Such bargained-for exchanges of promises are at the heart of modern contract practice. From the law and economics perspective, the purpose of the law of contracts is to foster the bargaining process between economically rational actors, thus moving goods and services to their most highly valued uses and increasing the sum of utility in society as a whole.

The economic analysis is highly sophisticated.¹¹ However sophisticated the analysis, though, economic efficiency is always at the bottom. As noted by Professor Alan Schwartz, the state should pursue efficiency in contract law because efficiency is the only implementable goal.¹² Clearly, an economic being—a self-interested individual whose interests are measured in economic terms—is at the heart of this approach to contract law.

9. See generally ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 3–7 (1979).

10. The classic example of an efficient transaction is the simple exchange of goods for money. I have a book and you have \$10.00. I would rather have \$10.00 than the book, and you would rather have the book than \$10.00. If we bargain for and carry out an exchange of our assets, each of us is better off, and the total quantum of utility in society has increased.

11. For example, it looks beyond simple assumptions about the circumstances that will exist if a promise is performed or enforced as made. As Richard Craswell has pointed out, theorists recognize that they must take account of the effects of enforceability on the economic incentives to make promises in the first place. See Richard Craswell, *Two Economic Theories of Enforcing Promises*, in *THE THEORY OF CONTRACT LAW* 26–34 (Peter Benson ed., 2001).

12. See Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 18 (Jody S. Krause & Steven D. Walt eds., 2000).

Not all theories of contract law center on giving effect to the utilitarian preferences revealed by the bargaining process. One important approach to contract theory, for example, focuses on the autonomy of the promisor.¹³ The underlying idea is that making a commitment in the form of a promise is an exercise of individual autonomy and the law respects that autonomy by holding the promisor to the self-imposed obligation. Since contracts, by definition, include the making of a promise, a “contract must be kept because a promise must be kept.”¹⁴

On its face, an autonomy theory of contract would appear to be grounded in a moral theory of respecting individual choice and commitment that is not necessarily connected with the economic sphere. A difficulty with this class of contract theory, however, as Professor Melvin A. Eisenberg has recently noted, is that if truly based solely on the value of respecting individual autonomy, the theory can neither account for the existing rules of contract law nor generate satisfactory rules.¹⁵

For example, the principle of mitigating damages, central to existing contract doctrine and policy, holds an injured promisee accountable to avoid unnecessary costs or consequences for the party committing a breach.¹⁶ One reason courts do not routinely order specific performance is that doing so would often be inconsistent with the mitigation principle.¹⁷ Requiring promisors to follow through with promises they have failed to perform would, if feasible at all, often impose serious costs on them with no corresponding benefit to promisees. So the law turns instead to money damages, which are adjusted according to the mitigation principle. If giving effect to the autonomy of the promisor were to trump all other values, however, then specific performance would become a routine remedy.

Similarly, revising contract doctrine to be consistent with a single-minded autonomy theory of contract would lead to undesirable results. As Professor Eisenberg notes, such a theory would require the legal

13. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

14. FRIED, *supra* note 13, at 17.

15. Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* (Peter Benson ed., 2001).

16. See Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073, 1092 (1988); Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 306 (1988).

17. See Eisenberg, *supra* note 15, at 228–29.

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enforcement of purely donative promises, such as promises between friends to make gifts.¹⁸ But doing so would thrust the personal relationships fostered by gift-giving into the world of lawyers and lawsuits. The parties to such promises do not intend to be *legally* bound (even if they consider themselves *morally* bound) because they know that their relationship, “driven by affective considerations like love, affection, friendship, gratitude, and comradeship” is inconsistent with that world.¹⁹

Professor Eisenberg’s own careful and nuanced approach to contract theory illustrates why the economic being always appears center stage: any workable body of contract law will be tethered to economic concepts, even when it accounts for “relevant moral, policy, and empirical propositions.”²⁰ For example, he identifies “social welfare” as an important moral or policy element relevant to whether a promise should be enforceable.²¹ He then describes social welfare in terms of “increase[d] wealth by trade and [the facilitation of] private economic planning [that allows] actors to allocate risks and to coordinate economic activity through the acquisition of control over inputs and outputs.”²² Moreover, protecting reasonable reliance on promises also advances social welfare “because the promise induced the promisee to incur costs he would not otherwise have incurred.”²³ Thus, social welfare is characterized in terms of economic costs and benefits.

The integral link between contract law and the economic realm is illustrated by the nature of contract remedies, broadly considered. Remedies are relevant because, as Professor Stephen A. Smith noted recently, “We should assume that an account of the interests protected by contractual remedies has something important to say about the interests protected by contract law generally.”²⁴ Whatever bases for enforcing promises may be advanced, the consequences of breach are not only measured, but conceived in economic terms.²⁵

18. *Id.* at 229–30.

19. *Id.* at 230.

20. *Id.* at 241.

21. *Id.* at 261.

22. *Id.*

23. *Id.*

24. Stephen A. Smith, *The Reliance Interest in Contract Damages and the Morality of Contract Law*, ISSUES IN LEGAL SCHOLARSHIP, June 2001, at 4.

25. Of course, the subject of remedies for breach of contract is highly complex with different basic measures of damages, which are calculated on a number of different bases, available in various situations. See RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979) [hereinafter RESTATEMENT SECOND].

B. The Role of the Sovereign

The sovereign state plays a complex role in first-degree promising. At one level the state is deeply enmeshed in every agreement. At another level the state is largely passive, leaving the parties to make their own bargains and intervening only in exceptional circumstances.

The state's deep involvement is found in the background of law and policy against which individual bargains are made. To the extent the state controls the distribution of wealth in society, it necessarily affects the economic bargaining power of those who make promises to exchange assets with one another. Whether by legislative action or common law, the state also puts in place a set of rules and practices—a legal infrastructure within which bargaining occurs. Some rules are mandatory, such as those regarding capacity to contract.²⁶ Others are “default rules” that the parties can change by agreement.²⁷

Much of the infrastructure set up by the state aims to protect against abuses of the bargaining process. Doctrines of fraud, duress, and unconscionability are examples of such safeguards. The infrastructure also reflects the distribution of political power in society, however, sometimes in ways that are so common they have become invisible.²⁸

When one leaves the level of infrastructure and deals with individual bargains, the sovereign's role becomes decidedly passive. Under both efficiency and autonomy theories, it is, by definition, up to the parties to make their own bargains. The sovereign acts essentially as a referee by authorizing contract formation and enforcing contracts as made. Except in extraordinary cases, such as large mergers that threaten the national economy, the state stays out of the process of individual contract formation, becoming involved only when the parties themselves reach an impasse and one of them seeks to enforce or avoid a contractual obligation.

“The world of contract is a market world, largely driven by relatively

26. *See id.* § 12.

27. *See, e.g.*, U.C.C. § 2-308 (2002) (specifying the place of delivery of good in a contract for sale in the absence of agreement to the contrary).

28. For example, if an agreement does not specify an order of performance, a promise that takes time to perform must be completed before one that can be performed instantaneously. *See* RESTATEMENT SECOND, *supra* note 25, § 234. Thus, as a practical matter, those who perform labor in exchange for money must work first and be paid later. It would be just as logical to require an employer to pay in advance. The default rule reflects the typical bargaining advantages that employers often enjoy over employees, although nothing prevents an agreement altering the rule.

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impersonal considerations, and focused on commodities and prices.”²⁹ Moral obligation may be a component of admirable and workable academic theories of contracts. Moreover, practical contract law, which often operates with cheerful oblivion to academic theories, contains many doctrines, such as illegality, the avoidance of forfeiture, refusal to enforce on grounds of public policy, unconscionability, and (in some conceptions) contractual good faith, that rest on more than economic grounds alone.³⁰ But neither the theories nor the law in practice can operate successfully in the real world if they do not measure the value of a promise and the costs of enforcement in terms of their economic value to the contracting parties. The economic being, under the not-so-watchful eye of the sovereign state, employs contracts to acquire and consume.

This observation is not intended as a critique of modern contract law and theory, which is another subject altogether. My point is simply that the legal system that governs promising in the daily world of commerce, work, and leisure, and the theories we employ to explain and shape that system, focus heavily, even primarily, on self interest, framed in terms of economic values. Those values represent, in large part, the common currency of our modern, secular society.

III. THE SECOND DEGREE OF PROMISING

Second-degree promising is common in American culture, although it is seldom the subject of articles and treatises on the law of contracts. Such promising occurs in contexts that have legal significance but are not understood as being primarily economic in nature. I offer two examples: promises made under oath and marriage vows. Each involves promises made on the basis of one’s membership in a community, whether it be a family or the larger society to which we belong. These promises implicitly assume that the promisor acts not as an economic being but as a moral being.³¹

29. Eisenberg, *supra* note 15, at 229–30.

30. See *infra* Part V.A (noting that the economic being is not fully dominant, even in first-degree promising).

31. These examples are certainly not exhaustive of second-degree promises. Undoubtedly many other promises, including purely donative promises, fall within this category. Nevertheless, something more than the fact of the promise is needed to signal a serious moral obligation of the kind discussed here. For example, a fundamental difference exists between a promise to get together for lunch sometime and a promise to care for a friend’s dying husband or wife. I focus here on two kinds of promises in which the presence of a serious moral obligation is universally recognized.

A. Promises Made Under Oath

In American culture, making oaths appears calculated to enhance the virtues important to a cohesive, civil society. The oath is usually made in a formal setting, often in circumstances designed to lend dignity to the occasion. A person making a promise under oath usually engages in some form of ritual, such as raising the right hand. The formality of the setting and the element of ritual impress on the minds of those present—both the oath taker and others—that something important is happening.³²

An oath and a promise are not the same thing. An oath is a solemn attestation of the truth of one's statement. Traditionally, an oath invokes Deity, appealing to God to witness the giving of the statement.³³ Sometimes the oath invites divine punishment if the statement is false. In modern times, an oath may not be consciously associated with divinity, but it emphasizes the earnestness and seriousness with which the statement is made.

The statement itself may be an assertion of a present fact, such as one's loyalty to country, or it may be a promise, a commitment to act (or not act) in a certain way in the future. Oaths often reinforce the making of a promise. Important examples include a promise to speak truthfully in judicial proceedings and a commitment to faithfully perform the duties of public office.

The state as sovereign takes a much more active role in promises of this sort than in first-degree promising. In some cases, the state actually imposes the duty to make the promise in the first place, as when one is summoned to court and instructed to promise under oath to judge honestly as a juror or to speak truthfully as a witness at a trial. The sovereign's participation in the making of the promise is generally required. For instance, a government official administers the oath of office to a public servant, and an officer of the court leads a witness through the oath to testify truthfully.

The notion of economic gain is not intrinsic to the making of promises under oaths. An oath may be part of a bargain,³⁴ of course, but the transaction is not typically commercial in character. Instead, the oath

32. See FED. R. EVID. 603 ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation *administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.*") (emphasis added).

33. See *infra* Part IV.B.1 (further discussing oaths).

34. A defendant in a criminal case, for example, may plead to a lesser offense in exchange for his or her promise to testify under oath against others.

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taker makes a commitment to benefit the broader community, as by promising to speak truthfully in a judicial proceeding, even at the cost of personal discomfort or even danger.

Failure to keep a promise made under oath brings consequences different from those of breaching a commercial, first-degree promise. As noted, the latter authorizes remedies measured in economic terms. By contrast, violation of a promise made under oath might lead to a criminal penalty, a judicial sanction, impeachment, or public opprobrium. Such penalties do not attempt to measure the economic value of keeping the promise or of the harm done by not keeping it but rather respond to the societal harm caused by the breach.

B. Marriage

Marriage vows, another kind of second-degree promising, are made in a very different setting from the typical public oath. But the commitments made at marriage have key elements in common with promises made under oath. They encompass an important promise made in an often elaborate ceremony.

The role of the sovereign state, again, is very much an evidentiary one. The law requires officiation by a third person authorized by the state.³⁵ In many instances, that person is also a religious authority whose presence suggests that another sovereign is represented.³⁶

The law says very little about the *form* of the marriage vow. It leaves the precise words spoken and ceremony followed to traditions of the parties' community or, increasingly, to their individual choice.³⁷ The *content* of the promises made at marriage, however, is indirectly prescribed and enforced by the law. The parties accept the bundle of rights and responsibilities that constitute the legal status of marriage. The law traditionally has had little to say about the details of those rights and obligations while the marriage lasts. Until fairly recently, it generally presumed that the husband spoke for the family, and the law refused to become involved in resolving disputes over family management issues.³⁸

Upon entering marriage the parties promise (or are assumed to

35. See, e.g., IOWA CODE ANN. § 595.10 (West 2001); CAL. FAM. CODE § 400 (West 1994 & Supp. 2002).

36. See *infra* Part IV (discussing religious third-degree promising).

37. See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.3 (2d ed. 1988).

38. See, e.g., Kilgrow v. Kilgrow, 107 So. 2d 885 (Ala. 1959); McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).

promise) to provide for one another's physical, economic, social, and spiritual needs during their marriage. But the law has left the definition of those needs, and the understanding of how they are to be met, to the parties themselves.³⁹ The law has traditionally marked the point at which a spouse's performance of marital obligations drops below a minimum by setting the requirements for divorce. The fault-based grounds that once governed marriage dissolution described the kinds of misconduct that warranted releasing a spouse from the promises made upon entering marriage.⁴⁰

The law changed substantially when no-fault divorce statutes supplemented or replaced fault-based divorce beginning in the late 1960s.⁴¹ As those statutes have been interpreted, a spouse has been effectively able to determine unilaterally that the marriage has failed and will end.⁴²

This paper is not an occasion to explore the current state of marriage and divorce law. The point is that marriage, like promises made under oath, represents a kind of promising quite different from the commercial transactions that typify first-degree promising. Although marriage and divorce have important economic implications, those institutions are generally, and correctly, understood to be about far more than economics. Most people assume that individuals enter a marriage expecting to be made better off by it, but the public understanding of marriage has been that it represents something greater than a self-serving bargain. Rather, it is a life-long commitment, in which love, selflessness, and sacrifice are expected for the good of others, including both immediate family and the larger community.

In our culture, neither marriage nor formal oaths can be properly understood without considering what I define as third-degree promising.

39. The law has occasionally intruded into the economic decision-making of a legally intact family via the necessities doctrine. *See, e.g.,* *Sharpe Furniture, Inc. v. Buckstaff*, 299 N.W.2d 219 (Wis. 1980). In recent years it has also become more attentive to domestic abuse, although that problem exists in nonmarital as well as marital relationships. *See, e.g.,* 1 FAMILY LAW AND PRACTICE § 6.02[1] (Arnold H. Rutkin ed., 2002).

40. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES ch. 12 (1968); 1 FAMILY LAW AND PRACTICE, *supra* note 39, § 4.03.

41. *See* CLARK, *supra* note 37, § 13.6.

42. *See id.* at 516 (“[I]f one of the spouses seriously and persistently asserts that the marriage is broken, it is broken, notwithstanding the disagreement of the other spouse and notwithstanding the other spouse’s insistence that the marriage could be saved.”); James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 905–06 (2000); *see also* Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722–23.

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I turn now to that idea.

IV. THE THIRD DEGREE OF PROMISING

Third-degree promising occurs when one makes religious covenants with God. A summary of my conclusions about first and second-degree promises illuminate the idea of third-degree promising.

First-degree promising assumes a self-interested promisor primarily seeking material advantage through bargaining with others. The sovereign plays a limited role, establishing the ground rules and enforcing the agreement through economically-conceived remedies. Otherwise the sovereign lets the chips fall where they may as to the outcome of the bargaining itself.

Second-degree promising assumes a promisor acting primarily as a person exercising moral choice. The rules and practices governing such promising are designed to impress upon the promisor and those witnessing the promise that it is not made solely for personal advantage, but for the benefit of the broader community. The sovereign plays an active role including officiating when the promise is made so as to emphasize the moral obligation it involves.

By contrast, third-degree promising treats a promisor primarily as a spiritual and (in LDS theology) an eternal being who stands in a relationship with God. Third-degree promises, like those of the second degree, are not made primarily in the pursuit of personal advantage, but for the benefit of others, whether a specific individual, a family, or even an entire religious community. The promise may be made either to God, to other persons, or both. Whether or not God is the promisee on behalf of a community, the promisor invokes the relationship with God, as sovereign, without whom the promise could not be efficacious. Divine law and justice provide the framework for the promise and define the consequences of breach.

A. Religious Covenants

The clearest illustrations of third-degree promises are those made by believers within their own religious communities. Consistent with the focus of this symposium—Latter-day Saint Perspectives on Law—I illustrate with examples from my own religion. Members of other religious communities will doubtless recognize parallels in their own beliefs.

Latter-day Saints usually refer to their third-degree promises as

“covenants,” a word reinforcing a sense of their solemnity and seriousness.⁴³ One making a covenant participates in a sacred ceremony, presided over by one with authority to act on behalf of God.⁴⁴

Baptism into the LDS church, for example, includes making a covenant with God that the new member “will serve him and keep his commandments.”⁴⁵ Baptism requires the performance of a sacred ceremony—immersion in water. One can renew the baptismal covenant by taking the sacrament—bread and water reminding the individual of the body and blood of Christ.⁴⁶

One of the most important religious experiences available to a Latter-day Saint is participation in the ordinances of the temple, an exceptionally sacred place considered to be the “House of the Lord.”⁴⁷ In the temple, worthy members of the LDS church make sacred covenants to draw closer to God. These covenants involve dignified ceremonies and are officiated over by church leaders with special authority. Gordon B. Hinckley, the current President of the LDS church, has referred to these covenants as “act[s] of solemn promising.”⁴⁸

One of the covenants an individual makes in the temple is the covenant of marriage, in which the spouses make promises not only to each other, but also to God.⁴⁹ If the husband and wife fulfill their part of the marriage covenant, their bond to each other and to their children remains effective beyond death and through eternity.

Even this very brief description makes clear that these covenants

43. The concept of the oath is sometimes used together with covenant. *Doctrine & Covenants* 84:39. For further reading on the Church’s beliefs regarding covenants, see Wouter Van Beek, *Covenants*, in 1 *ENCYCLOPEDIA OF MORMONISM* 331–33 (Daniel H. Ludlow et al. eds., 1992); George S. Tate, *Covenants in Biblical Times*, in 1 *ENCYCLOPEDIA OF MORMONISM*, 333–35; BRUCE R. MCCONKIE, *MORMON DOCTRINE* 166–68 (2d ed. 1966); James E. Faust, *Search Me, O God, and Know My Heart*, *ENSIGN*, May 1998, at 17–20; Richard K. Hart, *The Marriage Metaphor*, *ENSIGN*, Jan. 1995, at 22–27; Robert J. Matthews, *Our Covenants With the Lord*, *ENSIGN*, Dec. 1980, at 33–39; Lynn D. Wardle, *Seeing the Constitution as Covenant*, *ENSIGN*, Sept. 1989, at 7–9.

44. Dennis B. Neuenschwander, *Ordinances and Covenants*, *ENSIGN*, Aug. 2001, at 20.

45. *Mosiah* 18:10 (Book of Mormon).

46. Those partaking of the sacrament, speaking to God through one with the authority to administer the ordinance of the sacrament, “witness . . . that they are willing to take upon them the name of [the] Son, and always remember him and keep his commandments which he has given them.” *Doctrine & Covenants* 20:77. In return, God promises those who make that promise that “they may always have his Spirit to be with them.” *Id.*

47. See, e.g., Boyd K. Packer, *The Holy Temple*, *ENSIGN*, Feb. 1995, at 32; John A. Widtsoe, *Looking Toward the Temple*, *ENSIGN*, Jan. 1972, at 56.

48. *TEACHINGS OF GORDON B. HINCKLEY* 638 (1997).

49. See, e.g., Hart, *supra* note 43; Marion D. Hanks, *Eternal Marriage*, *ENSIGN*, Nov. 1984, at 35.

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represent commitments of a different order than first-degree promises in commercial contracts or second-degree promises illustrated by promises under oath and civil marriage vows. Third-degree promises, made by a person acting as a spiritual, eternal being, are distinct from the law of the land. Except for the covenant of marriage, which is legally as well as religiously binding (in the United States, but not in all other countries), the covenants I have described do not create legal rights and duties. They operate in a different sphere. Those who fulfill their part of the covenants can hope for the fulfillment of God's promises in this life and the next. This assurance of eternal efficacy is underscored by LDS scripture that states the principle in the negative:

All covenants, contracts, bonds, obligations, oaths, vows, performances, connections, associations, or expectations, that are not made and entered into and sealed by the Holy Spirit of promise, of him who is anointed, both as well for time and for all eternity, . . . are of no efficacy, virtue, or force in and after the resurrection from the dead; for all contracts that are not made unto this end have an end when men are dead. . . . And everything that is in the world, whether it be ordained of men, by thrones, or principalities, or powers, or things of name, whatsoever they may be, that are not by me or by my word, saith the Lord, shall be thrown down, and shall not remain after men are dead, neither in nor after the resurrection.⁵⁰

The clear implication is that third-degree “covenants, contracts, bonds, obligations, [and] oaths” will endure “in [and] after the resurrection.”

B. A Second Look at Promises under Oath and Marriage

Third-degree promising prospers most in a setting in which believers can freely and fully express and act on their religious convictions. But such promising may not be limited to religious covenants associated with specific religious communities. A look beneath the surface of the second-degree promising previously discussed—making promises under oath and exchanging marriage vows⁵¹—shows that in its purest or ideal sense such second-degree promising may be more closely related to third-degree promising than first appears.

My sketch of second-degree promising presented an overly tidy picture: Men and women undertake commitments to behave in a certain

50. *Doctrine & Covenants* 132:7, :13.

51. *See supra* Part III.

way, recognizing that society has a strong interest in their promises beyond whatever personal benefit or disadvantage may flow to them. They understand that they are making solemn, voluntary undertakings as free, moral agents. Although they may often fall short in honoring their commitments, in making and keeping promises of this sort they are expected to act, or to aspire to act, on moral principle.

Second-degree promising is not so simple, however. Both of the examples discussed in this paper are closely bound up with religion. Whether or not the promisor intends a religious element in the commitment, I suggest that a religious connection remains important to these institutions of second-degree promising. In a legal culture committed to the separation of church and state, and one increasingly uncomfortable with allowing religion a role in the public square, we have filtered out many of the explicit references to Deity in these promises.⁵² Instead, we tend to think of them primarily as, and in many respects they have become, exercises in moral agency. I suggest, however, that their religious character cannot be so easily excised. The practices of making oaths and entering marriage has traditionally directly implicated an individual's relationship to Deity. The promisor makes a solemn affirmation, not simply as a man or woman who wishes or needs to be taken seriously in a cause greater than self-interest, but as one who stands in a relationship to God.

1. The religious underpinnings of the modern oath

The history of the oath makes its religious underpinnings particularly clear. In various ancient cultures, the oath-taker invoked Deity and engaged in some form of imprecation—inviting liability to divine punishment or vengeance if the promise or assertion proves to be false.⁵³ The dramatic imprecation, a conditional self-curse, has captured the attention of some who study the oath and has been portrayed, sometimes critically, as its essential element, even in modern times.⁵⁴ I find it more reasonable to see the oath-taker's acknowledgment of God as the oath's

52. For example, the statutorily specified oath administered in California courts used to include the words "so help you God." The statute now provides a variety of forms of "oath, affirmation, or declaration" with several options eliminating that phrase. CAL. CIV. PROC. CODE § 2094 (West 1998 & Supp. 2002). Similarly, the oath administered to grand jurors has been revised to eliminate the words "so help me God." CAL. PENAL CODE § 911 (West 1985 & Supp. 2002).

53. See Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1339–43 (1959).

54. *Id.* at 1329 ("This presentation is an attempt at showing that the oath has remained an atavistic survival of an ancient ritual—a primitive self-curse.").

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essential element. However common the imprecatory element may have been in some settings, it would have no purpose if not grounded in a belief in the divine, or at least the supernatural, in the first place.

The nature of the oath taker's relationship to Deity necessarily has a great deal to do with the meaning of the oath itself. Invoking the attention of a god one believed to be capricious or cruel would be a different thing than an oath made before a god who is understood to be just and merciful. From his obviously Christian perspective, James Endell Tyler therefore described the essence of the oath as a "pledge[] that [one] is speaking under a solemn sense of the presence of Deity, the witness of our words and actions, the moral Governor of the world, the Judge of mankind, and the just avenger of falsehood and wrong."⁵⁵ That "solemn sense" gives peculiar power to a promise made under oath.⁵⁶

Modern oaths often omit explicitly religious elements, but the shadow of those elements remains. The evidence is conflicting about whether the framers intended constitutionally mandated oaths as religious versus solemn, though secular, promises—i.e., as second versus first-degree promises.⁵⁷

Those taking oaths of office have voluntarily added religious elements to their oaths. George Washington added the words "so help me God" to the oath he took as the nation's first President, an addition that has persisted as a custom even though that phrase is not included in the constitutional text.⁵⁸ Members of Congress also use the words "so help me God" in their oath of office.⁵⁹

55. JAMES ENDELL TYLER, *OATHS: THEIR ORIGIN, NATURE & HISTORY* 14 (2d ed. 1935). For a statement of the same point as a matter of nineteenth century English law, see 1 S. MARCH PHILLIPS & THOMAS JAMES ARNOLD, *LAW OF EVIDENCE* 13 (1852).

56. Cf. *Hebrews* 6:16 (King James) ("An oath for confirmation [between mortals] is to them an end of all strife."). Building on the power of the oath, God himself "confirmed" his counsel "unto the heirs of promise" of Abraham by an oath, "[t]hat by two immutable things [i.e., the promise and the oath], in which *it was impossible* for God to lie, we might have a strong consolation . . . to lay hold upon the hope set before us." *Id.* at 6:17–18.

57. See Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 *BAYLOR L. REV.* 927, 979–86 (1996).

58. See *id.* at 983–84; see also James E. Pfander, *So Help Me God: Religion and Presidential Oath-Taking*, 16 *CONST. COMMENT.* 549, 551 (1999); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 *COLUM. L. REV.* 2083, 2110–11 (1996).

59. The Constitution requires members of Congress to take an oath, U.S. CONST. art. VI, cl. 3, but the words to be used are not set out verbatim. The text of the oath to be used by members of Congress and other federal officials is supplied by statute:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly

The close connection between the oath and invocations of Deity has fueled a debate over the efficacy and propriety of mandatory oath-taking. That debate has often been framed in religious terms.⁶⁰

Critics such as Jeremy Bentham object that the oath implies that man is able to control the power of God by deciding when that power will be used.⁶¹ He also contended that if one expected divine retribution for swearing falsely, punishment for perjury was unnecessary. He suggested that the oath be abolished and that false statements “uttered upon a legal occasion, for a legal purpose” be punished “according to the nature of the mischief,”⁶² i.e., perjury should be punished as such, without the necessity of taking an oath.⁶³

swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. *So help me God.*

5 U.S.C. § 3331 (2000) (emphasis added); see also 28 U.S.C. § 453 (2000) (setting out the oath of office for federal judges):

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: “I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. *So help me God.*”

(emphasis added). The words of § 453 are often used, apparently as a matter of tradition, when witnesses promise under oath to testify truthfully before a congressional committee. In fact, a member of a Senate committee recently criticized the committee chair for omitting the words “So help me God.” *Senator Upset About So Help Me God Oath*, IOWA CITY PRESS CITIZEN, Aug. 3, 2001, at 5A.

60. The debate has, of course, been political as well, especially with respect to mandatory loyalty oaths. For discussions on the history of loyalty oaths in the United States, see HAROLD M. HYMAN, *TO TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY* (1959); Vic Snyder, *You’ve Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897 (2001).

61. See Jeremy Bentham, “*Swear Not At All*”: *Containing an Exposure of the Needlessness and Mischievousness, as Well as the Anti-Christianity, of the Ceremony of an Oath*, in 5 *THE WORKS OF JEREMY BENTHAM* 187 (John Bowring ed., Russell & Russell 1962) (1817).

62. JEREMY BENTHAM, 1 *RATIONALE OF JUDICIAL EVIDENCE* 366–367 (Rotham & Co., photo. reprint 1995) (1827).

63. John Stuart Mill, criticizing the rule requiring witnesses to take an oath, argued the following:

The assumption on which this is grounded is that the oath is worthless of a person who does not believe in a future state—a proposition which betokens much ignorance of history in those who assent to it (since it is historically true that a large proportion of infidels in all ages have been persons of distinguished integrity and honor), and would be maintained by no one who had the smallest conception how many of the persons in greatest repute with the world, both for virtues and attainments, are well known, at least

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Defenders argue that those taking an oath do not purport to control God but that they recognize God's hand in human affairs.⁶⁴ Both critics and defenders have noted that the oath in its traditional form has its greatest effect on those who believe in God. If one assumes that the oath-taker is likely to be a believer, the oath protects those who might rely on it. As Justice Story put it with regard to the presidential oath:

A President, who shall dare to violate the obligations of his solemn oath or affirmation of office, may escape human censure, nay may even receive applause from the giddy multitude. But he will be compelled to learn, that there is a watchful Providence, that cannot be deceived; and a righteous Being, the searcher of all hearts, who will render unto all men according to their deserts. Considerations of this sort will necessarily make a conscientious man more scrupulous in the discharge of his duty; and will even make a man of looser principles pause, when he is about to enter upon a deliberate violation of his official oath.⁶⁵

I sketch the debate over mandatory oath-taking simply to emphasize that, in its origin and (considering its ancient lineage) its fairly recent history, the oath is essentially religious. A genuinely religious person may be moved much less by the prospect of divine punishment for violating an oath than by the sense that an oath directly implicates the deepest elements of the self, which is understood only in the relationship of the self to God.

That understanding of the oath is perhaps best reflected in the life of one who refuses to take an oath, even at great personal cost. Playwright Robert Bolt's *Sir Thomas More* dramatically portrays such a person. The historical More in fact refused to take an oath in support of the Act of Succession because it entailed a repudiation of papal supremacy.⁶⁶ In *A Man for All Seasons*, Bolt's More, imprisoned for refusing to take the oath, is visited by his family. His daughter Margaret has herself already

to their intimates, to be unbelievers. The rule, besides, is suicidal and cuts away its own foundation. Under pretense that atheists must be liars, it admits the testimony of all atheists who are willing to lie, and rejects only those who brave the obloquy of publicly confessing a detested creed rather than affirm a falsehood.

JOHN STUART MILL, *ON LIBERTY* 29 (Elizabeth Rapaport ed., Hackett 1978) (1859).

64. In his treatise on evidence, Simon Greenleaf made the point this way: "The design of the oath is not to call the attention of God to man; but the attention of man to God;—not to call on Him to punish the wrong-doer, but on man to remember that He will." SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 364(a) (16th ed. 1899).

65. JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 170 (1840).

66. See ROBERT BOLT, *A MAN FOR ALL SEASONS* vii–x, 159 (1960).

taken an oath to attempt to persuade More to yield:

More: (*Coldly*) That was silly, Meg. How did you come to do that?

Margaret: I wanted to!

More: You want me to swear to the Act of Succession?

Margaret: “God more regards the thoughts of the heart than the words of the mouth.” Or so you’ve always told me.

More: Yes.

Margaret: Then say the words of the oath and in your heart think otherwise.

More: What is an oath but words we say to God?

Margaret: That’s very neat.

More: Do you mean it isn’t true?

Margaret: No, it’s true.

More: Then it’s a poor argument to call it “neat,” Meg. When a man takes an oath, Meg, he’s holding his own self in his own hands. Like water. (*He cups his hands*) And if he opens his fingers *then*—he needn’t hope to find himself again. Some men aren’t capable of this, but I’d be loathe to think your father one of them.⁶⁷

Sir Thomas More’s courage and integrity may impress us, and Justice Story’s comment may charm. But both may strike many modern minds as anachronistic. Modern society has omitted references to deity from some oaths.⁶⁸ The sovereign state or its representative now stands in place of the sovereign God. The oath, however, retains the imprint of its religious character. No wonder George Washington’s addition of the

67. *Id.* at 139.

68. *See supra* note 52; *see also* 2A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 405 (2000 & Supp. 2002) (“The common-law rule requiring that a witness believe in a Divine Being who, in this life or hereafter, will punish false swearing is not applied in the federal courts. It has long since been rejected on the basis of ‘reason and experience.’”) (quoting *Gillars v. United States*, 182 F.2d 962, 969 (D.C. Cir. 1958)); *see also* *Moore v. United States*, 348 U.S. 966 (1955) (*per curiam*); *United States v. Looper*, 419 F.2d 1405 (4th Cir. 1969).

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words “so help me God” to the constitutionally prescribed presidential oath has remained untouched and seems so natural.

2. *The religious character of marriage*

Marriage, the other example of second-degree promises discussed here, also has deep religious roots. In American culture, one who marries often recognizes the role of God in creating the union and sustaining it. The United States inherited a substantial amount of its marriage law from England, where marriage was for many years within the exclusive jurisdiction of the ecclesiastical courts and the common law.⁶⁹ Marriage has always been under the jurisdiction of the civil courts in this country, but the clergy have always been authorized to preside over the exchange of marriage vows, and often do so. When a priest or pastor acting as God’s servant officiates over a marriage ceremony, the entire ceremony becomes an essentially religious one. Of course, nonreligious weddings solemnized by civil officers are also common. But the connection between God and marriage is prominent in our national consciousness.

For a substantial number of Americans, marriage is an essentially religious sacrament, ordinance, or observance—a form of third-degree promising.⁷⁰ Although many people in this country have chosen, and continue to choose, to marry in strictly civil ceremonies, religious weddings remain common and, in some places, predominant.⁷¹ God is not merely a witness to or enforcer of the promise but an active participant with the husband and wife and the source of the blessings

69. CLARK, *supra* note 37, § 2.2, at 31.

70. It is true, of course, that marriage has been regarded as a secular institution in a number of cultures, such as ancient Rome before the establishment of Christianity. See H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (3d ed. 1972).

71. The relative numbers of religious and civil marriage ceremonies vary among the states. In Indiana, for example, 28.2% of marriage ceremonies were civil and 71.4% religious, with 0.4% unknown in 1995. See IND. STATE DEP’T OF HEALTH, *INDIANA MARRIAGE REPORT*, <http://www.in.gov/isdh/dataandstats/marriage/1995/table3.htm> (last visited Nov. 18, 2002). For 2000, the numbers were 31.1% and 68.6%, with 0.3% unknown. See IND. STATE DEP’T OF HEALTH, *INDIANA MARRIAGE REPORT 2000*, (2002) <http://www.in.gov/isdh/dataandstats/marriage/2000/table3.htm> (last visited Nov. 18, 2002). In Minnesota, in 1996, 24.74% of couples opted to marry in civil ceremonies. MINN. CTR. FOR HEALTH STATISTICS (Oct. 16, 2001) (on file with author). By 1999 the percentage of couples opting for civil ceremonies increased slightly to 26.72%. See MINN. DEP’T OF HEALTH, *1999 MINNESOTA HEALTH STATISTICS ANNUAL SUMMARY* (2001), <http://www.health.state.mn.us/divs/chs/99annsum/index2.htm> (last visited Nov. 18, 2002). In Vermont, the percentage of civil ceremonies has been increasing gradually from 47.2% in 1990 to 55.4% in 1997. VT. DEP’T OF HEALTH, *MARRIAGES AND DIVORCES* <http://www.state.vt.us/health/vs97/mardiv.htm> (last visited Nov. 18, 2002).

marriage can bring. As described above, that is the belief in the LDS community.⁷² It is so in other religious traditions as well.⁷³ That understanding of marriage is sufficiently pervasive that it remains an important part of modern culture, even though it is far from universally accepted.

V. INSIGHTS FROM THE THREE DEGREES OF PROMISING

The three degrees of promising reflect the tension between the competing “economic” and “eternal” sides of human nature. Each exerts an affirmative pull on individual behavior and understanding and on the broader culture, including the practice of promising. When both conceptions apply an approximately equal force, second-degree promising and the “moral” being appears.

A. The Contest Between the Economic and the Eternal Being

The self-interested economic being is dominant in first-degree promising. But that domination is not complete. Social conscience manifests itself in numerous ways, such as in the principles and doctrines of unconscionability, illegality, avoidance of forfeiture, and good faith. Although some of these doctrines can be clothed in economic dress, I believe they cannot be fully accounted for without reference to the

72. “Eternal marriage is a covenant, a sacred promise that a wife and a husband make with each other and with God.” James T. Duke, *Eternal Marriage*, in 2 ENCYCLOPEDIA OF MORMONISM, *supra* note 43, at 858.

73. According to the Catholic Church, for example, “The consent by which the spouses mutually give and receive one another is sealed by God himself. From their covenant arises ‘an institution, confirmed by the divine law, . . . even in the eyes of society.’ The covenant between the spouses is integrated into God’s covenant with man.” CATECHISM OF THE CATHOLIC CHURCH § 1639, at 409 (1994).

Although formal vows are not exchanged in the marriage rituals performed in the Orthodox Christian tradition, marriage is an important sacrament. It is understood that the “spouses promise reciprocal fidelity before the Church; the grace of God is bestowed through the blessing of the minister of the Church. It sanctifies their union and confers the dignity of representing the spiritual union of Christ and the Church.” PAUL EVDOKINOV, *THE SACRAMENT OF LOVE* 119 (1985) (quoting METROPOLITAN MARCARIUS, *ORTHODOX DOGMATIC THEOLOGY* (1883)).

Protestant writers also emphasize the role of God in marriage.

[I]t takes three to make a marriage: a man, a woman, and God. It is His presence that hallows it, offering whatever permanence it is to have. . . . [C]ovenant marriage is capable of bridging the depths of despair that wreck so many couples. It looks to a higher power far beyond the partner, making it possible for each to give to the other the love and understanding that is needed.

JOHN CHARLES WYNN, *PASTORAL MINISTRY TO FAMILIES* 131–32 (1957).

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influence of a higher conception of the individual. Thus, in first-degree promising we find evidence of an upward pull.

Third-degree promising is the province of a being who, in LDS theology, is not only spiritual but eternal.⁷⁴ Those who make promises explicitly on the basis of their relationship to Deity draw on that part of human nature that is least self-centered and most concerned with the well-being of others. But third-degree promisors are not immune to the influence of the economic being. They find it difficult to free themselves from material self-interest in understanding their covenants and in living up to what they understand. Nonetheless, such individuals strive to draw closer to God.⁷⁵

Second-degree promising is pulled simultaneously by, and in a sense suspended between, the economic and the eternal sides of our natures. It assumes the promisor is acting on more than economic self-interest. Yet it stops short of treating the promise as creating a direct relationship with God. The resulting compromise conceives of the promisor as a moral being, acting on personal and social, but not necessarily religious, principles.

Poised between, and clearly influenced by, both the economic and the eternal being, the promises made by the moral being serve as a kind of cultural barometer. They show whether the pressure is rising toward the spiritual realm or falling toward the material realm, thus demonstrating the relative strength each enjoys in our culture. If third-degree promising flourishes and society holds religious covenants in high esteem, the respect we give the oath and marriage vows will naturally be higher. By contrast, if the contracts of the commercial world are not only central to economic life, but are considered the template for all promises, second-degree promises are pulled closer to, and become more like,

74. Latter-day Saint theology considers men and women to be not only spiritual beings, but also eternal beings, with mortality being but one segment of an existence stretching timelessly in both directions. See *Doctrine & Covenants* 93:29 (“Man was also in the beginning with God. Intelligence, or the light of truth, was not created or made, neither indeed can be.”); see also *Doctrine & Covenants* 138:47–60.

75. Unfortunately, this description of third-degree promising as entirely edifying is incomplete, particularly in relation to oaths. There is a dark side to taking oaths as well. Latter-day Saint scriptures, particularly the Book of Mormon, make that point repeatedly, with accounts of those who used the oath for the purpose of working and concealing evil. See, e.g., *Helaman* 1:11, 2:3 (Book of Mormon); *Ether* 8:9–18 (Book of Mormon). The “secret combinations” created by these oaths are described as “most abominable and wicked above all, in the sight of God.” *Ether* 8:18 (Book of Mormon); see also *Moses* 5:29–30, 6:27–29 (Pearl of Great Price). An individual who becomes involved in the spiritual elements of life has a greater capacity for both good and evil. My purpose in this paper is to explore the potential of the oath for good.

those of the first degree.

B. Marriage and Contract

In fact, over the last decade marriage vows have become increasingly vulnerable to the influence of first-degree promises. Traditionally, marriages that were not third-degree promises rested comfortably in the second degree. American culture has viewed marriage as an exchange of basic, very general commitments based on the high principle of mutual caring and assistance: “for better or for worse, in sickness and in health.” Some agreements relating to marriage have long coexisted with, and do not threaten, an understanding that elevates marriage vows above first-degree promising. Specifically, a contract controlling the disposition of their property upon the death of a spouse, particularly when one or both have children from a prior marriage, is ancillary to the obligations of the marriage itself and can bring stability and certainty to extended family relationships.⁷⁶

The relationship of contract to marriage changes when the spouses (usually as prospective spouses) enter an agreement governing their financial affairs in the event of a divorce. For many years, the courts declined to enforce such contracts on the ground that they were conducive to divorce and were therefore contrary to public policy.⁷⁷ A more accurate statement of the objection might be that they were conducive to marriage—marriages reflecting lack of full commitment to the union.

Over time, as the rate of divorce rose steadily, the policy against agreements in contemplation of divorce eroded substantially. Courts interpreted public policy as much more tolerant of divorce and therefore

76. For instance, in *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), the court stated: Antenuptial or so-called ‘marriage settlement’ contracts by which the parties agree upon and fix the property rights which either spouse will have in the estate of the other upon his or her death have . . . long been recognized as being conducive to marital tranquility and thus in harmony with public policy.

Id. at 383.

77. A 1964 court, for instance, held:

It may be stated as a general rule that any antenuptial contract which provides for, facilitates, or tends to induce, a separation or divorce of the parties after marriage, is contrary to public policy, and is therefore void. It has often been held that an antenuptial agreement limiting the liability of the husband to the wife for alimony, or fixing the property rights of the parties, in the event of a separation or divorce, is void.

Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964) (quoting 17 AM. JUR. *Divorce and Separation* § 16, at 267 (1938)).

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not opposed to premarital agreements designed to facilitate the dissolution of marriage. For example, some courts have suggested that planning for divorce in advance of marriage may bring stability to the union.⁷⁸ Although one occasionally still encounters cases in which courts refuse to enforce premarital agreements creating a strong financial incentive to divorce on grounds of public policy,⁷⁹ the notion that premarital agreements are inherently suspect is scarcely visible in modern case law.⁸⁰

The courts and legislatures have, at least nominally, imposed safeguards, making the formation of such contracts subject to standards of procedural or substantive fairness greater than those applicable to ordinary commercial contracts.⁸¹ In the typical case, one potential spouse, usually a man with relatively great economic power, presents the woman, on the eve of their wedding, with a proposed, one-sided financial agreement that will govern in the event of a divorce and, expressly or impliedly, conditions his assent to the marriage on her assent to the contract. The momentum for the wedding is well underway. The event cannot be postponed without public embarrassment. In those stressful

78. The court stated in *Newman v. Newman*, 653 P.2d 728 (Colo. 1982):

Although the state has an interest in marriage and in preserving family relationships, the public policy of this state has altered dramatically in regard to marriage and divorce. . . . [D]issolution may [now] be obtained with relative ease. We cannot say that public policy . . . is eroded by agreements which anticipate and provide for the economic arrangements upon dissolution of a marriage. On the contrary, *it is reasonable to believe that such planning brings a greater stability to the marriage relation by protecting the financial expectations of the parties*, and does not necessarily encourage or contribute to dissolution. . . . Thus, we reject the contention urged by the wife that such agreements violate public policy and are void *ab initio* in Colorado.

Id. at 731–32 (footnotes omitted) (emphasis added).

79. *See, e.g., Neilson v. Neilson*, 780 P.2d 1264, 1269 (Utah Ct. App. 1989) (refusing to enforce premarital agreement under which wife was to receive half of husband's considerable holdings of company shares in the event he initiated divorce proceedings, then promptly after marriage went on a spending spree with husband's money; "a promise in a prenuptial agreement regarding the disposition, upon divorce, of property brought to the marriage by the parties is unenforceable if it tends unreasonably to encourage divorce or separation"); *Dajani v. Dajani*, 251 Cal. Rptr. 871, 872 (Cal. Ct. App. 1988) (refusing to enforce Jordanian marriage contract under which wife would receive payment of dowry upon divorce, since it "clearly provided for wife to profit by a divorce").

80. Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 233 (2001) ("Premarital agreements now appear to be enforceable, at least in some circumstances, in all American jurisdictions.").

81. *See, e.g., Newman v. Newman*, 653 P.2d 732–36 (Colo. 1982); IOWA CODE ANN. ch. 596. The "Principles of Family Dissolution" recently adopted by the American Law Institute proposes a number of procedural requirements for the enforcement of premarital agreements. Bix, *supra* note 80, at 236–40.

circumstances, she signs the agreement. Some years later the marriage comes to an end, and she attempts to avoid enforcement of the agreement.⁸² As premarital agreements have become increasingly common, the standards governing them in some jurisdictions vary little from those that control contracts in the world of commerce.⁸³

Such agreements typically focus exclusively on financial arrangements upon the dissolution of a marriage. The door is now open to an additional step in “contractualizing” marriage: agreements that focus on noneconomic matters in an ongoing, legally intact marriage. Contracts of that type are apparently not yet widespread in practice, but their legislative foundation already exists. The Uniform Premarital Agreements Act (“UPAA”), adopted with modifications in twenty-six jurisdictions,⁸⁴ appears to authorize agreements of that sort. After specifying various kinds of terms premarital agreements may contain, with an emphasis on economic matters, the UPAA provides that the parties “may contract with respect to . . . [a]ny other matter, including their personal rights and obligations, not in violation of public policy or statute imposing a criminal penalty.”⁸⁵

Apparently few people have sought to make detailed, enforceable bargains over the “personal rights and obligations” of married life, so the extent to which “public policy” might limit such arrangements has not been determined.⁸⁶ But the influential Conference of Commissioners on

82. *See, e.g.*, *DeLorean v. DeLorean*, 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986).

83. *See, e.g.*, *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (“Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.”).

84. The following jurisdictions have adopted the UPAA: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Virginia. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (West 1987 & Supp. 2001).

85. UNIF. PREMARITAL AGREEMENT ACT § 3(8), 9C U.L.A. 43 (2001). *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, ANALYSIS AND RECOMMENDATIONS §§ 7.01-.12, at 945 (2002), for a recent attempt to articulate standards governing premarital agreements. Agreements between unmarried cohabitants have become common in the last few decades. Some courts, at least initially, refused to enforce them on the ground that doing so would make nonmarital cohabitation an attractive alternative to marriage. *See, e.g.*, *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209 (Ill. 1979). A number of other courts, including the California Supreme Court in its famous decision *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), have rejected that argument. *See also* *Cook v. Cook*, 691 P.2d 664 (Ariz. 1984); *Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987); *Watts v. Watts*, 405 N.W.2d 303, 310 (Wis. 1987). The common use of agreements in nonmarital cohabitation strengthens the sense that families are the creation of bargaining very similar to first-degree promising.

86. The courts have not been sympathetic to the occasional pre-UPAA case in which the

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Uniform State Laws' promotion of the basis for such bargains in the UPAA is evidence that the idea of thinking in contractual terms about the meaning of marriage has left the realm of mere academic speculation.⁸⁷ Whether contracts governing the personal or intimate elements of married life become commonplace remains to be seen.⁸⁸

I do not mean, by this sketch of the developments in the law of marital contracts, to argue for a refusal to enforce all such agreements. Indeed, I believe there is an important role for many of them. Rather, I seek only to suggest that a powerful social acceptance of first-degree promising as a primary cultural norm has the potential to draw the law of marriage into its wake.⁸⁹

That tendency probably is not only, or even primarily, reflected in attempts to make formal contracts about marriage and to enforce them in court. Its greater impact may be in an attitude that views marriage and other family relationships in a contractual way, even if informally or

parties have purported to regulate the nonfinancial elements of marital life through contract. *See, e.g., Favrot v. Barnes*, 332 So. 2d 873 (La. Ct. App. 1976) (refusing, in divorce action, to consider alleged breach of premarital agreement concerning physical intimacy), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976). I have found no decided cases dealing with the scope of UPAA § 3(8). *See generally* Difonzo, *supra* note 42; Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037 (1993).

87. For a discussion on contracts within marriage and contracts in lieu of marriage, see Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974). *See also* LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* (1981).

88. The recent adoption of "covenant marriage" in a few jurisdictions may represent a reaction to this trend. So far, three states have adopted covenant marriage laws, and legislators have introduced covenant marriage bills in several other states. For current covenant marriage laws, see ARIZ. REV. STAT. §§ 25-901 to 25-906 (1998); ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (Michie 2002); and LA. REV. STAT. ANN. §§ 9:272--:275 (West 2000). For thoughtful discussions of covenant marriage, see MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 29-34 (2000); Margaret F. Brinig & Steven Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9 (2000). It is unclear whether covenant marriage will have a significant impact.

89. I have not explored here whether a similar movement exists in relation to the oath. One might start by asking whether the oath is coming to be seen primarily as a vehicle for advancing self-interest rather than the good of the community. Is it becoming common for persons making promises under oath to consider themselves entitled to recalculate the oath's advantage to them as circumstances change? Do they excuse breaking their promises because of others' bad behavior or for other reasons that justify nonperformance of a contract? Might one find such a pattern in the ultimate lack of public censure for President Clinton's willingness to make false statements under oath? *See Jones v. Clinton*, 36 F. Supp. 2d 1118, 1127 (E.D. Ark. 1999) ("[T]he record demonstrates by clear and convincing evidence that the President responded to plaintiff's [deposition] questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process.").

subconsciously. Such thinking is grounded in the view that exalts self-interest over the good of the family, not merely as a result of periodic and inevitable moral weakness but as a settled personal philosophy. A marriage viewed primarily as a vehicle for self-fulfillment rather than as a commitment to the good of the family is a marriage based on first-degree promising.⁹⁰

Direct empirical evidence of that attitude is necessarily elusive. But the explosion of divorce in recent decades and other forms of family dissolution certainly point in that direction. Jennifer Roback Morse has explored that phenomenon.⁹¹ “A family held together by a series of contractual understandings,” she says, “even the most reasonable and elaborate, turns out to be less stable than a family held together by that vague, much misunderstood, intangible quality called love.”⁹² I assume her religious commitment to Catholicism,⁹³ which considers marriage vows as third-degree promises, makes evident to her the risks of viewing marriage as nothing more than a collection of first-degree promises.

VI. CONCLUSION

The three degrees of promising have coexisted for a long time. Each responds to particular needs in our culture: First-degree promising is essential to the effective functioning of the commercial world. Second-degree promising fosters the making of commitments essential to civic institutions and responsibilities in a pluralistic society. Third-degree promising gives those who believe in God the possibility of eternal promises. For Latter-day Saints, in particular, those promises provide a basis for hope in the continuation after death of our most important relationships. That hope is not simply a metaphorical prop to encourage the faithful in fulfilling their duties or keeping their marriages strong. It is the assurance of a literal, eternal union with our loved ones in the presence of God.

90. For an extensive critique of the movement toward “privatizing” family law, see Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443. Professor Singer’s examination includes, but extends well beyond, the specific marriage contract issues discussed here. She expresses concerns about the private ordering of marriage but on bases quite different from those discussed in this paper. For a contrasting argument that family law should be expressly assimilated to the law of business associations, see Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. REV. 79 (2001).

91. JENNIFER ROBACK MORSE, *LOVE & ECONOMICS: WHY THE LAISSEZ-FAIRE FAMILY DOESN’T WORK* (2001).

92. *Id.* at 3.

93. *See id.* at 214–20.

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Although they appropriately fill different and important functions, these three degrees of promising are connected with each other. The emphasis each receives in our individual lives, in our communities, and in the broader culture affects the others. That emphasis needs to be kept in proper balance.

Suppose third-degree promising were treated not just as a privilege and opportunity for those exercising their faith in God but as mandatory in commercial matters. The result would be a serious imposition on those who do not share the believer's faith. Even if practiced within a community of believers, such a mandate might devalue third-degree promising itself to the extent that promisors were not spiritually prepared to make their commercial arrangements a matter of religious covenant. Although acting with honesty and integrity in all affairs, including commercial transactions, is expected of Latter-day Saints, the history of their church teaches the perils of undertaking daily, communal obligations on a third-degree basis before a community is prepared to do so.⁹⁴

But the reverse problem is also possible. First-degree promising can become so predominant that it sets the pattern for all our promissory relationships with others. In particular, as third-degree promising loses respect in modern society, it also loses its capacity to act as a counterbalance to first-degree promising. The economic being drives the eternal being from the stage as we increasingly evaluate our commitments and obligations, including those of the vital second degree, through the cold eye of self-interest. I suggest that we are now witnessing that phenomenon, to some degree, in our culture generally as

94. During the early 1830s, members of the LDS Church began to settle in Jackson County, Missouri. They were expected to live the "law of consecration," a communitarian order under which individuals placed all their possession in a common treasury; received back an "inheritance" from which to earn a living through farming, business, etc.; and voluntarily returned to the treasury at the end of each year any surplus earnings beyond personal and family needs. Frank W. Hirschi, *Law of Consecration*, in *ENCYCLOPEDIA OF MORMONISM*, *supra* note 43, at 313. Within a few years, mob violence forced the Mormons from the area. Their own failure to live the law of consecration was cited as an underlying cause of their distress in a revelation received by the LDS prophet Joseph Smith:

[T]hey have not learned to be obedient to the things which I required at their hands, but are full of all manner of evil, and do not impart of their substance, as becometh saints, to the poor and afflicted among them; [a]nd are not united according to the union required by the law of the celestial kingdom [the third "degree of glory" in LDS theology]; [a]nd Zion cannot be built up unless it is by the principles of the law of the celestial kingdom; otherwise I cannot receive her unto myself.

Doctrine & Covenants 105:3–5; see B.H. ROBERTS, *THE MISSOURI PERSECUTIONS* 60–61 (1900).

evidenced by the tendency to contractualize marriage, whether formally or informally.

Third-degree promising is important beyond the content of the specific covenants that Latter-day Saints and other believers make with God. The very existence of third-degree promising—if taken seriously—pulls in opposition to first-degree promising. A belief in the reality of our eternal nature competes with the tendency toward materialism and self-promotion. Serious third-degree promising shows that the assumptions that underlie second-degree promising are at the midpoint, not the endpoint, of a spectrum. One need not (in my view, should not) think that all promises should be eternal. But knowing that *some* promises are eternal emphasizes that not all promises are temporal and economic. People who share a belief in the eternal and the divine—even when their beliefs diverge on important matters of religious principle—find a heightened, mutual basis for their most important social promises. They share assumptions at least about second-degree promising that can edify and enrich law and social policy.

I conclude with an illustration of the influence that a promise under oath can have in modern life when one does not recalculate the costs and benefits to self of keeping the promise as challenges arise, but treats the commitment as something higher than a first-degree promise. New York Fire Battalion Chief John Moran died in the collapse of the World Trade Center. Not long before the September 11, 2001 disaster, he spoke to a reporter in connection with a fire he had fought on Fathers Day—a fire that killed three men. I do not know if he considered his oath to be a religious commitment or merely a high civic duty. But his statement reveals the power of the oath both in his own life and, through him, in the lives of others: “The firefighter performs one act of bravery in his career, and that’s when he takes the oath of office. After that, everything else is in the line of duty.”⁹⁵

95. *CNN Saturday Morning News: Firefighters Cope With Tragic Losses* (CNN television broadcast Sept. 15, 2001 (quoting Moran, Statement to Dateline NBC)).