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# Finding Marriage Amidst a Sea of Confusion: a Precursor to Considering the Public Purposes of Marriage

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## FINDING MARRIAGE AMIDST A SEA OF CONFUSION: A PRECURSOR TO CONSIDERING THE PUBLIC PURPOSES OF MARRIAGE

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### INTRODUCTION

Before one can consider the public purposes of marriage in America, one must understand what marriage means in America. As one engages in that task, however, one realizes how misunderstood the concept of marriage has become here. Without even reaching the issue of same-gender unions, for example, the United States Supreme Court has seemingly led the way for the last forty years in confusing the concept of marriage as both a legal and social institution, ultimately reducing it to a temporary, limited, and potentially harmful relationship to which neither sexuality nor procreation need be bound.<sup>1</sup>

Still, the Court can hardly claim all the credit. Many factors have contributed to the breakdown in our understanding of marriage. One might begin with the public's historic "hardness of . . . hearts" and desire to conform marriage to that with which we are comfortable living rather than to try to live out that which marriage is.<sup>2</sup> Long before the debate over same-gender unions, that desire had undermined the vision of marriage as a permanent bonding of the totality of two people's lives for the good of the spouses and the creation of new life and, instead, incorporated into the marriage mix divorce, contraception, abortion, pre-nuptial agreements, and separate finances. In addition, as these new dynamics have infiltrated the concept of marriage, those bodies within our culture with an obligation to protect the meaning of marriage have been profoundly reserved, even as

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<sup>1</sup> See *infra* notes 92–123 and accompanying text.

<sup>2</sup> *Mark* 10:2–12 (New American).

the meaning of terms like “to have and to hold,” “for richer or for poorer,” and “till death do us part” have eroded away.

By their insistence in characterizing marriage as a right, the judiciary generally has only further confused the concept. In fact, as the Supreme Court in particular has characterized marriage, the right to marry, at least in the constitutional context, is legally an oxymoron. To understand why this is so, one must first recognize that a constitutional right is a guarantee against state interference.<sup>3</sup> Coupling this understanding of right with the legal concept of marriage, one is left to ask, particularly given the current debate over a right to marry for gay and lesbian couples, what state interference would a right to marry prevent that the Court has not already blocked?

As a matter of both culture and tradition, it seems beyond question that the State cannot prevent two adults from sharing a residence.<sup>4</sup> As the State cannot interfere with how one thinks or feels,<sup>5</sup> the State also cannot prevent two adults from deciding to love one another. Finally, after *Eisenstadt v. Baird*<sup>6</sup> and *Lawrence v. Texas*,<sup>7</sup> the State cannot interfere with the private sexual intimacy of adults outside of marriage. Therefore, if under the current assortment of rights the State cannot interfere with any two adults living together, loving one another, or being sexually intimate, there seems to be little additional state interference against which a right to marry could protect.

In fact, the legal concept of marriage seems inhospitable to the status of a right. Rather than isolate a couple from state involvement in their relationship, marriage invites state involvement. Until two people seek to be married, their relationship need not be licensed by the State nor witnessed by the community, they need not have a blood test to create it, they are free to order their personal, financial, and legal affairs as they

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<sup>3</sup> See, e.g., *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993).

<sup>4</sup> In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974), the Supreme Court upheld a zoning ordinance limiting, with certain exceptions, the occupancy of one-family dwellings within the village to traditional families or to groups of not more than two persons “not related by blood, adoption, or marriage.” The Court noted that had the ordinance not allowed for “two unmarried people” to share a single family dwelling and had, therefore, reflected “an animosity to unmarried couples who live together,” *id.* at 8, the case would have been decided under *Department of Agriculture v. Moreno*, 413 U.S. 528, 529 (1973), in which the Court had struck down a regulation denying food stamps to any household “containing one or more members who are unrelated to the rest.” *Belle-Terre*, 416 U.S. at 8 & n.6 (citing *Moreno*, 413 U.S. 528).

<sup>5</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (“The right to think is the beginning of freedom . . .”).

<sup>6</sup> 405 U.S. 438, 443 (1972) (guaranteeing single people the right to use contraceptives).

<sup>7</sup> 539 U.S. 558, 566–67 (2003) (holding that the imposition of criminal sanctions for sexual intimacy by same-sex couples in their homes is unconstitutional).

wish, and either person can leave the relationship whenever they want without obtaining permission from the State. Once they decide to marry, however, the couple invites the State to interfere with their relationship on multiple levels. As the Supreme Court itself has acknowledged, once two people have entered into the marital agreement, “[t]heir rights under it are determined by the will of the sovereign, as evidenced by law,”<sup>8</sup> and their relation “partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.”<sup>9</sup> Thus, we have an oxymoron: one cannot have a right to be interfered with by the State.

The opinion of the Massachusetts Supreme Judicial Court in *Opinions of the Justices to the Senate*<sup>10</sup> sheds light on this contradiction. In *Opinions of the Justices*, the court reviewed a legislative attempt to remedy the concerns the Supreme Judicial Court had expressed in *Goodridge v. Department of Public Health*; the concerns had required the court to find that the Massachusetts Constitution prohibited the Commonwealth from defining marriage as a relationship between one man and one woman.<sup>11</sup> The bill in question created for same-sex couples the legal status of a “civil union[,]” which would guarantee such couples “all ‘benefits, protections, rights and responsibilities’ of marriage.”<sup>12</sup>

In *Goodridge*, the court had insisted that by denying marriage to same-sex couples, the Commonwealth denied to such couples “concrete tangible benefits that flow from civil marriage, including, but not limited to, rights in property, probate, tax, and evidence law that are conferred on married couples.”<sup>13</sup> By seeking to give same-sex couples “all ‘benefits, protections, rights and responsibilities’ of marriage” while only withholding from them the label of “marriage,” the bill attempted to address the concern expressed in *Goodridge*.<sup>14</sup> The court, however, rejected this attempt because it still withheld from same-sex couples the “‘intangible benefits [that] flow from marriage.’”<sup>15</sup> The court maintained that by not allowing same-sex couples to call themselves married under the laws of Massachusetts, the Commonwealth assigned such couples “to second-class status,” stigmatized them, denied them “a status that is

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<sup>8</sup> Maynard v. Hill, 125 U.S. 190, 211 (1888).

<sup>9</sup> *Id.* at 213. *But see infra* notes 92–123 and accompanying text.

<sup>10</sup> 802 N.E.2d 565, 570 (Mass. 2004).

<sup>11</sup> 798 N.E.2d 941, 948 (Mass. 2003).

<sup>12</sup> *Opinions of the Justices to the Senate*, 802 N.E.2d at 566 (quoting Senate No. 2175, a bill entitled “An act relative to civil unions”).

<sup>13</sup> *Id.* at 567.

<sup>14</sup> *Id.* at 566, 569 (quoting Senate No. 2175).

<sup>15</sup> *Id.* at 567 (quoting *Goodridge*, 798 N.E.2d at 955).

specially recognized in society,” and “label[ed] the unions of same-sex couples as less worthy than those of opposite sex couples.”<sup>16</sup>

Ultimately then, the Massachusetts Supreme Judicial Court saw the issue of a right to marry for same-sex couples not as a right to be free from state interference nor even a right to be interfered with by the State, but as a right to receive community endorsement. While that vision removes the problem of a right to be interfered with, it carries with it confusion of its own. It is one thing to tell people in a free-thinking society that they must tolerate a behavior without interference or regulation. It is quite another thing to order people in a free-thinking society to give their approval, even their endorsement, to a behavior, in essence to tell people that they must think in a certain way.

The Massachusetts Supreme Judicial Court might well both embrace and reject this characterization of their vision. In *Opinions of the Justices*, the court acknowledged that its requirement of equal marriage status between gay and heterosexual couples might not affect the views of society, views the court attributed to “personal residual prejudice.”<sup>17</sup> Yet, the court insisted that “such prejudice,” such thinking on the part of the Commonwealth’s residents, could not change the view of or status accorded gay relationships by the Commonwealth’s constitution.<sup>18</sup> Thus, the court acknowledged that it could not force the community to perceive committed gay relationships as equal in status to heterosexual marriages even as it pronounced that the community, through its constitution, had granted that equal status. In effect, the court acknowledged that what it tried to give, it could not give.

While elsewhere in the opinion the court dismissed the suggestion that the distinction between a civil union and marriage was merely “semantic[s],”<sup>19</sup> it could not deny that in the end, all it had to offer gay and lesbian couples was only semantics and not substance, the words of community approval without the reality of it. Like the Wizard of Oz, when the court reached into its black bag, it could bring out a paper but not

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<sup>16</sup> *Id.* at 570–71. The court’s words were echoed by gay rights advocates while lobbying against a civil union provision proposed as part of a Massachusetts constitutional amendment that would define “marriage” in that commonwealth as a relationship between a man and a woman. These lobbyists maintained that labeling their relationships as “civil unions” “would revert gay people to second-class citizenship.” Jennifer Peter, *Massachusetts Lawmakers Recess for Month Without Gay Marriage Resolution* (Feb. 13, 2004), available at <http://www.dfw.com/mld/dfw/news/nation/7946222.htm?1c>.

<sup>17</sup> *Opinions of the Justices to the Senate*, 802 N.E.2d at 571.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 570.

a brain, a watch but not a heart, and a medal but no courage.<sup>20</sup> It could offer these couples a label of acceptance, but ultimately the acceptance of their neighbors only their neighbors could give them. The court could only demonstrate that which the song *Tin Man* observed: “Oz never did give nothing to the Tin Man that he didn’t, didn’t already have.”<sup>21</sup>

Thus, the right to marry in this context collapses as the anomaly of a right to be regulated or the illusion of a right to force other people to accept one’s own views. Acknowledging that the right to marry is only an anomaly or illusion is neither the end of the discussion of gay and lesbian Americans’ status nor the clarification of the confusion regarding marriage in America. Rather, in both cases, it must be only the beginning.

To continue with the former, the American community must decide whether the issue with respect to gay and lesbian Americans truly is whether their relationships are worthy of the respect of the community, or whether the better issue is whether gay people are entitled to the love of the community. This love refers not to the semantic “love” associated with simply parroting “hate the sin but love the sinner” but to a real appreciation of the human being who transcends the label.<sup>22</sup>

In fact, in the realm of hating the sin and loving the sinner, one could accuse the world of much more eagerly embracing the former than of doing the latter. A brilliant, creative mind and a loving heart is not less worthy of praise simply because of the sexual orientation of the person who wields them.<sup>23</sup> Although admiration of that heart and mind does not require that one endorses all of that person’s choices, the example of a loving God is most often to confirm the strength of the love from which

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<sup>20</sup> THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939). A similar, but perhaps even emptier, game has been playing out in San Francisco where the mayor’s office has been issuing to gay and lesbian couples marriage “licenses” with no legal effect.

<sup>21</sup> AMERICA, *Tin Man*, on HOLIDAY (Warner Bros. 1974).

<sup>22</sup> See Randy Lee, *Recognizing Friends Amidst the Rubble: Seeking Truth Outside the Culture Wars*, 13 WIDENER L.J. 825, 829 (2004).

<sup>23</sup> For example, the Christian organization Focus on the Family recently interviewed Ian McKellan, the actor who plays Gandalf in *The Lord of the Rings* films, about any “particular life lesson[s]” that he had learned that “would be valuable for teens today,” even though McKellan is gay. Bob Smithouser, *High Voltage—More Life Lessons from Middle Earth*, BRIO, April 2004, at 38. McKellan offered that “everyone has a different prime of life. Mine just happened rather late. Here I am at 64 and this is my prime of life. That would be my message: Don’t worry. Don’t try to hit it too early because your time might be later on.” *Id.*; see also Lee, *supra* note 22, at 827 (describing a gay friend, who, much to the delight of his neighbors, insists all winter on plowing the driveways of everyone on his street). I might also add the obvious: that my colleague Professor John Culhane has not ceased to be a brilliant scholar, respected teacher, and world-class swimmer because he is gay.

His wisdom flows before exercising the judgment that flows from that wisdom.<sup>24</sup>

The Supreme Judicial Court might argue that such an attitude subjects people who are gay to unequal treatment because society does in fact embrace heterosexuals fully in all of their choices. That, however, is hardly the case. No two people are so like-minded that there is never cause for disagreement and there is always total acceptance.<sup>25</sup> Instead, at least in my experience of friendship, my friends recognize that I am not “the way [they] wish [I ] were; [I am] just the way [I am].”<sup>26</sup> In light of that, they do not “despise [me] for [my] weakness,” nor do they “regard [me] for [my] strength.”<sup>27</sup> Furthermore, while they do not “take away [my] freedom,” they do long to “help [me] learn to stand.”<sup>28</sup> I do not feel cheated by friends who accept me on such limited terms. Rather, I feel blessed by them. I suspect that I am not alone in that regard. Therefore, perhaps if society did not have such a dismal history with respect to not treating people who are gay as people and as friends, there would not be so much of an issue about endorsing their decision to engage in a homosexual lifestyle today.

Having considered the status of gay and lesbian relationships with respect to marriage, this paper seeks to address the confusion surrounding the concept of marriage in America’s heterosexual community. American heterosexual couples know well the pain this confusion has inflicted. So do their children. This article seeks not to condemn those who have been victims of this confusion, but to offer hope that we need not continue within its grasp. In that vein, this paper seeks to compare three meanings that marriage has retained throughout our culture in an effort to discuss what benefits marriage can provide to this culture. In so doing, the paper will consider marriage as a legal, sacramental, and lived-out institution. Inevitably, it is the living out of honest, loving and courageous sacramental marriages that send the clearest and most powerful sense of what marriage is, what distinguishes marriage from other relationships, and what value it offers our lives and communities.

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<sup>24</sup> See, e.g., *Genesis* 3:21–23 (New American) (God, addressing Adam and Eve’s concerns about being naked by clothing them before sending them out of Eden).

<sup>25</sup> See, e.g., Dr. James Dobson, *The Greatest Story Ever Told*, DR. DOBSON’S NEWSL. (Focus on the Family), Feb. 2004, available at <http://www.family.org/docstudy/newsletters/> (praising Mel Gibson’s work on *The Passion of The Christ* while reserving judgment on Gibson’s other work and ideas).

<sup>26</sup> RICH MULLINS, *Brother’s Keeper*, on BROTHER’S KEEPER (Reunion Records 1995).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Although the paper offers the sacramental view of marriage as a path to the lived-out examples of marriage also discussed, it is not the intent of this paper to suggest that only couples that adhere to a particular religious tradition can have such a marriage. In fact, such marriages are found in many religious traditions, and even amongst couples without any religious tradition. Rather, this paper asserts that such marriages may be achieved by a particular orientation of the heart and mind, regardless of the label that one assigns to that orientation.

#### I. MARRIAGE IN THE FLESH

When thinking of marriage, one might turn to *The Little House* books. Ma and Pa Ingalls move out to somewhere,<sup>29</sup> and the Army chases them off their land.<sup>30</sup> Then the fires come.<sup>31</sup> Then the war parties come.<sup>32</sup> Then the droughts come.<sup>33</sup> Then disease blinds one daughter<sup>34</sup> and weakens another daughter.<sup>35</sup> And then just when they are finally getting a little ahead, the grasshoppers come.<sup>36</sup> And after the grasshoppers have completely eaten the family's crop, they lay their eggs in Ma and Pa's field so next year there can be no crop again.<sup>37</sup> And yet, the family continues to draw joy from one another just as they continue to find hope in their future: Pa keeps fiddling, Ma keeps smiling, and the girls keep dancing.<sup>38</sup>

There is another couple in *These Happy Golden Years* of *The Little House* books. Laura stays at their house while she teaches at their school.<sup>39</sup> One can easily picture them as beautiful people. In fact, the husband is also powerful in a worldly sense, sort of the mayor of the community.<sup>40</sup> But for all the beauty and romance and power, that couple's marriage is dissolving because they cannot survive the long winter.<sup>41</sup>

<sup>29</sup> LAURA INGALLS WILDER, *LITTLE HOUSE ON THE PRAIRIE* 1 (Harper & Row 1953) (1935).

<sup>30</sup> *Id.* at 316–17.

<sup>31</sup> *Id.* at 201–03.

<sup>32</sup> *Id.* at 290–99.

<sup>33</sup> LAURA INGALLS WILDER, *ON THE BANKS OF PLUM CREEK* 214 (Harper & Row 1953) (1937).

<sup>34</sup> LAURA INGALLS WILDER, *BY THE SHORES OF SILVER LAKE* 2 (Harper & Row 1953) (1939).

<sup>35</sup> LAURA INGALLS WILDER, *LITTLE TOWN ON THE PRAIRIE* 155 (Harper & Bros. 1953) (1941) (describing how Carrie's weakness almost caused her to faint).

<sup>36</sup> WILDER, *supra* note 33, at 194–202.

<sup>37</sup> *Id.* at 208.

<sup>38</sup> *See id.* at 336.

<sup>39</sup> *See* LAURA INGALLS WILDER, *THESE HAPPY GOLDEN YEARS* 2–5 (Harper & Brothers 1953) (1943) (noting Laura's stay at the Brewster settlement).

<sup>40</sup> *See id.* at 63.

<sup>41</sup> *See id.* at 64–66.



Neither beauty, romance, nor power is enough to sustain a marriage. The reality of marriage is that the grasshoppers do come, and if marriage is not a relationship strong enough to transcend the grasshoppers, it serves neither the couple nor the family nor the community that surrounds it.

Of course real marriages are not found only in books. I recently attended a funeral for a friend named Paul. About a month before his death, Paul had married Susan. Paul had met Susan five years earlier, about the time he had developed renal cancer, or cancer of the kidneys. As the cancer had spread into Paul's spine, Paul and Susan had become friends. In fact, Susan not only stood by Paul, but as Paul's condition had deteriorated, Susan had grown closer to him. When Paul had to go on disability, when he had to have his spine cut open and the cancer carved out of it, when the pain had grown so great that Paul could no longer care for himself, when the paralysis had set in, Susan had remained "patient" and "kind."<sup>42</sup> Never insisting on her own way,<sup>43</sup> Susan had borne all things, believed all things, hoped all things, and endured all things.<sup>44</sup>

At the end of his life, Paul was living in Susan's house. For the last five years, Susan had seen Paul in the midst of a very noble, very heroic, very holy struggle, and she had wanted to share it with him even if that meant suffering pain herself. As Paul struggled with his helplessness and total dependence on others in the final stages of the disease, he said to Susan, "I don't have anything I can give you," and Susan responded, "I want to marry you." What Susan wanted was to give words to the relationship that already existed between them.

At the funeral a woman said:

You know what I tell my kids? I tell them, "If you want to know what marriage is, you look at Paul and Susan. You don't look at who's on the cover of People Magazine this month. You don't look at the couple with the glitziest reception or the neatest honeymoon or the fastest start in life. You look at the people who, when confronted with the harshest realities of their vows, re-embrace their spouse even more passionately than before.

Father Bernard of the Community of Franciscan Friars of the Renewal captures the reality of marriage in a story about a young couple he knew who immigrated to the United States from Poland.<sup>45</sup> In their first five years in the United States, the couple had three children. The first two

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<sup>42</sup> See 1 *Corinthians* 13:4 (New American).

<sup>43</sup> See *id.* at 13:5.

<sup>44</sup> See *id.* at 13:7.

<sup>45</sup> Father Bernard, Chastity Talk at Mount 2000 at Mount Saint Mary's in Emmitsburg, Md. (Feb. 14, 2004).

children were born with a severe spinal condition that should have killed them in their first days after birth. Although without any support network in America, the couple willed, loved, and prayed these children through every trial, and to everyone's surprise, the children grew and flourished even as the condition persisted.

As their family thrived, the couple saved enough money to bring one of their mothers over from Poland. Once the children's grandmother was comfortable with caring for the children, the couple was able to go out on their first date in years. The couple went out to dinner, saw a movie, and on their way home to their family were struck by a drunk driver. The wife was left in a permanent coma.

Those who knew him best suggested the husband divorce his wife so he could remarry. After all, the settlement from the accident would guarantee her physical needs were met, and in her diminished state she could contribute nothing to her family. In a similar vein, other well-meaning advisors suggested her life and any suffering be terminated.

The husband, however, remains married to his wife, and his children continue to know her as a mother, and if she has been denied death with dignity, whether she knows it or not, she continues to enjoy life with love. Her life, mysterious as it has become, still teaches her children. Through that life and their father's response to it, they learn that all life is precious, that marriage is not an empty promise, and that love is both strong and unselfish.<sup>46</sup>

Several months ago, I was asked to speak on marriage at a men's conference, and after my talk we all broke up into small discussion groups. As my group was concluding, our moderator looked across the table at an elderly gentleman and said, "I can tell the talk really touched you. Is there something you'd like to share?"

Tears welled up in the gentleman's eyes, but it was not from anything in my talk. In fact the man had been losing his hearing recently and had completely missed my talk. He had known, however, that I would be talking about marriage so as I had been speaking, his thoughts had turned to his wife of sixty-three years who had died recently. He acknowledged that her death had left him very depressed.

As our little group sought to console the man, it became clear that he was most confident that his wife was in heaven and his grief was not for her. Rather, he grieved for himself. In the end, sixty-three years spent married to the woman he loved had proven too short a time. In a culture

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<sup>46</sup> See 1 Corinthians 13:4-7 (New American).

that insists that people live too long to stay married to one person, his tears testified that even a lifetime is not long enough for love.

Finally, one cannot respond to a call of the Marriage Law Project and not talk about David Coolidge, the Project's former director, and his wife Joan: this married couple, this family, united in faith and purpose, dynamic and joyful and then struck by cancer. When I learned that David was fighting brain cancer, David and Joan's relationship became for me *marriage* made flesh. Let our legal systems and social orders define the word as they may, there was a realness, a truth, to those final months that transcended legal or cultural discourse. What are promises like "for better or for worse," "in sickness and in health," or "till death do us part," in the context of an illness that ravages and debilitates, erodes speech, erases memory, and inflicts pain in unimaginable doses?

The victories that followed could not stop that illness and, yet, transcended it: friends who built a wheelchair ramp for the home, brought meals, sent money, watched their children and visited from around the globe; children who sped through the neighborhood on their father's lap in his wheelchair; a husband and a wife, a father and a mother, who consistently would look for "the face of Christ" where others might have found despair.<sup>47</sup> The couple did not preach, but their example touched lives "in an unexplainable way."<sup>48</sup> Anyone blessed with the opportunity to see this battle unfold had to acknowledge that this husband and wife, this family, this community of friends proved that *love* is not simply a word we may define as we will;<sup>49</sup> "love is the most living thing there is."<sup>50</sup>

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<sup>47</sup> The author has previously discussed the following six paragraphs in Randy Lee, *A Tribute to my Friend David Orgon Coolidge*, 11 WIDENER J. PUB. L. 353, 357–59 (2002).

For a chronicle of all these victories, see Carolyn Clarke and Beth Leimbach, *Patient update, dcool at* <<http://medicalstatus.com/dcool/>> (last visited June 13, 2002). For a tribute to David Coolidge, see Culture and Family Institute, *David Coolidge: A Tribute* (Apr. 3, 2002), at <http://www.cwfa.org/articles/580/CFI/cfreport/> (last visited Sept. 30, 2004).

<sup>48</sup> Posting of Shannon Riley, A Message to Joan and Dave, to Patient update page for David Coolidge (March 25, 2002), at <http://medicalstatus.com/dcool/> (last visited June 13, 2002).

<sup>49</sup> For a discussion of words, labels, and law, see Anthony J. Fejfar, *An Analysis of the Term "Reification" As Used in Peter Gabel's Reification in Legal Reasoning*, 25 CAP. U. L. REV. 579, 588–92 (1996); see also Randy Lee, *Reflections on a Rose in its Sixth Season: A Review of H. Jefferson Powell's The Moral Tradition of American Constitutionalism*, 32 CREIGHTON L. REV. 1205, 1245–59 (1999) (discussing differences in the meanings of words in the languages of Christianity and American law and the implications of those differences).

<sup>50</sup> *Why Do You Seek the Living Among the Dead?*, Tribute at the Mass of Christian Burial of David Coolidge (Mar. 15, 2002), available at <http://jamesbowman.net/articleDetail.asp?pubID=1032> (last visited Sept. 25, 2004).

On March 10, 2002, David's battle with cancer ended.<sup>51</sup> Joan gathered their children around David and, holding David's hand, explained, "It's time for Daddy to go to Heaven now." Family and friends together read Psalm 139, a psalm of the omnipotence, omnipresence, timelessness, and wisdom and love of God,<sup>52</sup> and sang hymns until a single tear rolled down David's cheek and he left them.

The Coolidge family sings *The Goodnight Song* every night at bedtime. Now they sang it for David. Then Joan told their children, "Daddy is with Jesus now." Their son Sammy said, "Let's sing the *Seek Ye* song—so loud that Daddy can hear it." And as dawn approached, they did.

When David Coolidge died in his home, surrounded by his wife and children and supported by his community, something paradoxical was present. As Joan witnessed the death of her husband, she was lifted up by the life in their children. At that juncture when we are most confronted with the bonds of time, Joan and David could see in the faces of their children proof of the transcendent and enduring nature of their union. At that juncture when time seems so real, they were filled with the promise of their faith that eternity is more real than time. Rather than hopelessness, there was hope. Rather than death, there was life.

David and Joan's faith and that of their family demands that one wonder whether there is indeed more to us than the apparent, autonomous, fleshy subjects we call our "selves," these subjects so seemingly trapped in time and space. Could it be that something more than a piece of paper and rings of gold, something mysterious and mystical, transcendent and eternal, binds the co-creators of children. Could it be that the bond between children and parents goes beyond the sharing of biochemical structures? Why did life and hope rein in a room of death? Did David Coolidge hear his children sing the *Seek Ye* song and sing back to them?

The grasshoppers do come. Lives do spin 180 degrees. In light of that, can "Till death do us part" really mean what it says? What is the public benefit in watching a family fight their battles filled with love and faith? What is the public benefit in watching a community, a church, a body of Christ come together to support a family? What is the public purpose in seeing a spouse or parent investing his energy in caring for a partner or taking his kids on rides in his wheelchair rather than spending it being angry with God or feeling sorry for himself? What is the public purpose in hearing a mother lead the children in the "Seek Ye" song the

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<sup>51</sup> Beth Leimbach, *Home Free*, Mar. 11, 2002 at <http://medicalstat-us.com/dcool> (last visited June 13, 2002).

<sup>52</sup> *Psalm* 139 (New American).

morning her husband dies? We may struggle to articulate it, but can anyone truly deny that such a purpose does exist?

The relationship shared by all these couples, whatever one chooses to call it, is unique. Each couple truly gave flesh to the words in their vows. Through their openness to their marriage and to their children, they created a future even when the present denied one could exist. Through their faith and joy they invited those who knew them “to enrich their lives in the same way.”<sup>53</sup> Even Paul and Susan, who could not have children, share in the sending of this message. By their very openness to and longing for children in a culture too quick to measure the cost of children,<sup>54</sup> by their poignant and gracious sharing in the suffering of Hannah,<sup>55</sup> couples such as Paul and Susan guarantee that parents who know those couples cannot take their own children for granted.

Having seen what marriage looks like lived-out and having acknowledged the uniqueness and power of that relationship, one is left to ask how religious and legal institutions in America succeed in capturing this relationship in words. In the next two sections, we shall consider the attempts of the Catholic Church and American constitutionalism to do so.

## II. MARRIAGE AS A SACRAMENT

In the Catholic vision, the marriages in the flesh just discussed are not merely nice stories but go to the heart of community. In this vision, one does not merely recognize that marriage has public purposes but, more profoundly recognizes that “‘[t]he well-being of the individual person and of both human and Christian society is closely bound up with the healthy state of conjugal and family life.’”<sup>56</sup> In this regard, Catholics believe that “‘God himself is the author of marriage’”<sup>57</sup> and that Christ has raised marriage “‘to the dignity of a sacrament.’”<sup>58</sup>

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<sup>53</sup> Shannon Riley, *A Message to Joan and Dave*, Visitor’s Comments for Dcool Nov. 4, 2002, at <http://medicalstatus.com/dcool/visitors.html> (last visited Dec. 31, 2002).

<sup>54</sup> See, e.g., Mary Beth Schultheis & John Webster, *USDA Report Estimates Child Born in 1999 Will Cost \$160,140 to Raise* (Apr. 27, 2000), available at [www.usda.gov/news/releases/2000/04/0138](http://www.usda.gov/news/releases/2000/04/0138) (last visited Sept. 30, 2004). But see Kevin Lowry, “*I Can’t Afford Kids*”: *Why Does Our Culture of Excess Demand Temperance in Just One Area?*, NEW COVENANT 20, May 2000, at 21 (“Never lose sight of the wealth that children bring to a family. . . . I owe it to my children to appreciate them and value them for the incredible gifts that they are.”).

<sup>55</sup> Hannah was a childless wife who longed for a child and ultimately bore the prophet Samuel. 1 *Samuel* 1:1–23 (New American).

<sup>56</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 1603 (1994) (quoting GS 47 §1).

<sup>57</sup> *Id.* (quoting GS 48 §1).

<sup>58</sup> *Id.* at ¶ 1601 (quoting CIC, can. 1055 §1; cf. GS 48 §1).

To capture the attributes of marriage as a sacrament in the eyes of the Church, one may turn to canon law.<sup>59</sup> Section 1 of Canon 1055 describes marriage as:

[t]he matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, [a covenant that] has been raised by Christ the Lord to the dignity of a sacrament between the baptized.<sup>60</sup>

This description identifies five characteristics that define marriage in the eyes of the Church. First, the matrimonial covenant must be between a man and a woman. Second, the covenant creates a partnership. Third, this partnership is for “the whole of life”<sup>61</sup> in both a qualitative and quantitative sense. Qualitatively, the partnership is for the whole of life because the couple becomes “one body”<sup>62</sup> so completely that rather than thinking of a married couple as complementing one another, we should think of them as completing one another.<sup>63</sup> Quantitatively, the partnership is for the whole of life because it ends only with death.<sup>64</sup>

Fourth, the purposes of this partnership are for “the good of the spouses” and for “the procreation and education of offspring.”<sup>65</sup> Fifth, the matrimonial covenant and the resulting partnership have “been raised by Christ the Lord to the dignity of a sacrament.”<sup>66</sup> As a sacrament, marriage “strengthens and, as it were, consecrates the spouses in a Christian marriage for the duties and dignity of their state.”<sup>67</sup>

Three additional characteristics can be gleaned from other canons. Section 2 of Canon 1057 indicates first that the matrimonial covenant must

<sup>59</sup> Descriptions of Catholic and constitutional marriage here are based on descriptions originally appearing in Randy Lee, *From Words to Sacrament, from Sacrament to Flesh: Reflections on the Concept of Marriage*, 8 CATH. SOC. SCI. REV. 151, 152–56 (2003).

<sup>60</sup> CODE OF CANON LAW, Canon 1055 §1 (1989).

<sup>61</sup> *Id.*

<sup>62</sup> *Genesis* 2:24 (New American) (“That is why a man leaves his father and mother and clings to his wife, and the two of them become one body.”).

<sup>63</sup> See Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245, 1250 (1998) (“Through the marital union, heterosexual partners experience a completeness previously unknown to them as individuals. This completeness arises from the complementarity of the two persons.”); see also text accompanying note 90, *infra*.

<sup>64</sup> CODE OF CANON LAW, Canon 1141 (1989) (“A marriage that is *ratum et consumatum* can be dissolved by no human power and by no cause, except death.”).

<sup>65</sup> *Id.* at Canon 1055 §1; see also *id.* at Canon 1063 (acknowledging that “spouses signify and share in the mystery of the unity and fruitful love between Christ and the Church”).

<sup>66</sup> *Id.* at Canon 1055 §1.

<sup>67</sup> *Id.* at Canon 1134. Its status as a sacrament also makes marriage a sign and means “which express[es] and strengthen[s] the faith, render[s] worship to God, and effect[s] the sanctification of humanity and thus contribute[s] in the greatest way to establish, strengthen, and manifest ecclesiastical communion.” *Id.* at Canon 840.

arise out of “an act of the will by which a man and a woman mutually give and accept each other,” and second that the covenant so created is “irrevocable.”<sup>68</sup> Finally, Canon 1063 indicates that the ecclesiastical community must offer “the Christian faithful the assistance by which the matrimonial state is preserved in a Christian spirit and advances in perfection.”<sup>69</sup> This community aid must take at least four forms:

- 1) General instruction to people of all ages “in the meaning of Christian marriage and about the foundation of Christian spouses and parents”;
- 2) “[P]ersonal preparation to enter marriage which disposes the spouses to the holiness and duties of their new state”;
- 3) “[A] fruitful liturgical celebration of marriage . . . to show that the spouses signify and share in the mystery of the unity and fruitful love between Christ and the Church”; and
- 4) “[H]elp offered to those who are married so that faithfully preserving and protecting the original covenant, they daily come to lead holier lives in their family.”<sup>70</sup>

One could reduce the sacramental view of marriage to a set of rules that channels the relationship between a man and a woman to an irrevocable partnership for the whole of life, for the good of the spouses, and for the procreation and education of offspring. This partnership would arise out of an act of the will and be strengthened both by its status as a sacrament and by the community in which it takes life. Such a reduction, however, would not only oversimplify this view but, in fact, would completely mischaracterize it. More appropriately, the sacramental view must be understood as itself a product of love designed not to lead couples to the lived-out marriages described earlier,<sup>71</sup> but even to transcend those marriages in their own lives.

To so understand the sacramental view, one must begin with the understanding, most notably preserved within the faith of the Jewish people, that in the hands of God rules are a gift of love designed to lead one in the fullness of life.<sup>72</sup> Thus, the sacramental view is best seen as a gift of the love affair between God and His people intended by God to enable His people to attain the happiness they seek.<sup>73</sup> Within this

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<sup>68</sup> *Id.* at Canon 1057 §2.

<sup>69</sup> *Id.* at Canon 1063.

<sup>70</sup> *Id.*

<sup>71</sup> See *supra* text accompanying notes 29–53.

<sup>72</sup> Lawrence A. Hoffman, *Response to Joseph Allegretti: The Relevance of Religion to a Lawyer's Work*, 66 FORDHAM L. REV. 1157, 1162 (1998).

<sup>73</sup> See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 56, ¶ 27 (describing the purpose and desires of man).

understanding, the veil of rules expressed in words is parted, our perception of rules as vehicles of power is cast off, and we are thus confronted not with the abstraction of law but with the reality of a relationship between Creator and created,<sup>74</sup> a relationship that hungers to give good fruits to the life of the beloved.

This relationship between God and His people becomes not only the source of the path to the sacramental view of marriage, but it becomes, in fact, the model for this view. As proof of this, God does not hesitate to refer to the marriage of God to His people,<sup>75</sup> and throughout Scripture His prophets articulate the relationship between God and man as one would articulate the relationship between a man and a woman. When the prophet Sirach, for example, speaks of his own experience with the wisdom of God, he speaks of growing “resolutely devoted to her,” “burn[ing] with desire for her,” and becoming “preoccupied with her.”<sup>76</sup> Sirach indicates that his “whole being was stirred as [he] learned about” God’s wisdom, and he “made her [his] prize possession.”<sup>77</sup> One must admit that in the fast-paced modern world of commutes, car pools, careers, kids, and everyday concerns, even the most secure spouse would feel flattered by such attention. The apostle Paul, meanwhile, instructs husbands to “love your wives, even as Christ loved the [C]hurch,”<sup>78</sup> a call that unavoidably means the totality of both living and dying for the salvation of one’s bride just as Christ “handed himself over for [the Church] to sanctify her.”<sup>79</sup>

Perhaps the clearest sign of the inter relatedness of the two relationships is seen when one looks across the expanse of the Bible, which may be viewed as illustrating the entirety of human experience before God. The revelation of that experience in “Sacred Scripture begins with the creation of man and woman in the image and likeness of God and concludes with a vision of ‘the wedding-feast of the Lamb.’”<sup>80</sup>

Yet, just as the sacramental view of marriage must not be misinterpreted as mere rules, it also must not be mistaken for romantic poetry or theology on paper. As the apostle James asked, “[W]hat good is it, my brothers, if someone says he has faith but does not have works?”<sup>81</sup> Thus, the sacramental *view* must be understood as a way of life. If it is

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<sup>74</sup> *Genesis* 1:27–28 (New American).

<sup>75</sup> *Revelation* 19:7–9 (New American).

<sup>76</sup> *Sirach* 51:18–19 (New American).

<sup>77</sup> *Id.* at 51:21.

<sup>78</sup> *Ephesians* 5:25 (New American).

<sup>79</sup> *Id.* at 5:25–26.

<sup>80</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 56, ¶ 1602 (quoting *Revelation* 19:7, 9).

<sup>81</sup> *James* 2:14 (New American).



understood as anything else, it “is dead.”<sup>82</sup> As such, the sacramental view of marriage must manifest itself, with the support of God and the community,<sup>83</sup> as the love of God, the love of Christ, for His people.<sup>84</sup> Marriage, then is a relationship where people find completeness beyond personage, the two persons become one,<sup>85</sup> much as the three Persons of the Trinity are one.<sup>86</sup> It is a relationship designed for the good of the members,<sup>87</sup> and it is creative in the highest level of God’s creation,<sup>88</sup> as “God created man in [H]is image.”<sup>89</sup>

Professor Teresa Collett has sought to articulate the reality of living this sacramental view of marriage:

Through the marital union, heterosexual partners experience a completeness previously unknown to them as individuals. This completeness arises from the complementarity of the two persons. They are distinct persons, yet made for each other, as evidenced by the creative capacity of their union on all levels. The union of their minds is evidenced by the willing exchange of their thoughts and perceptions of their experiences. The union of their souls is evidenced by their loving embrace of the mysterious other who is their spouse. The union of their bodies is evidenced by the procreative potential of marital intercourse.<sup>90</sup>

Thus, one can see that because the sacramental view of marriage is facilitated in rules, it can appear to resemble what we know as secular law. Yet the view exists not in law but as a path toward a reality that transcends even the marital experiences in flesh described earlier. Secular law, thus, presents two dangers to the sacramental vision. First and most obviously, it may confuse the sacramental vision of marriage by offering a competing set of rules *to define* the contours of marriage. Second and more profoundly, secular law threatens the sacramental view of marriage by suggesting that a set of rules can be understood to define marriage; therefore, it undermines the truth that the rules do nothing more than provide a path to a relationship that must be shared in the flesh. In the next

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<sup>82</sup> *Id.* at 2:26.

<sup>83</sup> See CIC 1983 c.840; see also *supra* text accompanying notes 68–69.

<sup>84</sup> See *supra* notes 70–75 and accompanying text.

<sup>85</sup> See *Genesis* 2:24 (New American).

<sup>86</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 56, ¶ 2205 (“The Christian family is a communion of persons, a sign and image of the communion of the Father and the Son in the Holy Spirit.”).

<sup>87</sup> See *Genesis* 2:18 (New American) (“‘It is not good for the man to be alone. I will make a suitable partner for him.’”).

<sup>88</sup> *Id.* at 4:1 (Eve acknowledging Cain’s birth, saying “‘I have produced a man with the help of the Lord.’”).

<sup>89</sup> *Id.* at 1:27.

<sup>90</sup> Collett, *supra* note 63, at 1250 (footnote omitted).

section, we will consider the degree to which these threats are exemplified in American constitutional law.

### III. MARRIAGE IN AMERICAN CONSTITUTIONALISM

Having seen the Church's view of marriage as an irrevocable partnership between a man and a woman—for the whole of life and for the good of the spouses and the procreation and education of offspring, a partnership arising out of an act of the will and strengthened both by its status as a sacrament and by the community in which it takes life—one may now consider to what degree the concept of marriage as defined currently by American Constitutionalism resembles the concept of the Church. Prior to the line of cases that began in 1965, the Court described marriage as “an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>91</sup> Over the last half century, however, the Court has progressively deviated from a vision of marriage linked to family, society, purity, or even the mutuality of the couple.

This pattern of deviation began in 1965 with *Griswold v. Connecticut*.<sup>92</sup> There, seemingly seeking to align itself with the moral authority of a sacramental view, the Court called upon words like *sacred* and *enduring* to communicate its concept of marriage:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>93</sup>

Looking beyond the ornamentality, however, one can see that in *Griswold*, the Court departed from the sacramental view of marriage in significant ways. First, in *Griswold* the Court attributed the sacredness of

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<sup>91</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Despite the rhetoric, *Hill* is a far cry from the Ingalls family experience. In *Hill*, David Maynard left his family in Ohio in 1850 and set out for California, promising to send for them. He never did. He ended up in Oregon and ultimately asked the territorial legislature there to grant him a divorce. He received the divorce and married a woman in Oregon. After his death, his original family discovered his whereabouts but were denied any inheritance because of the divorce. On appeal, the Supreme Court refused to void the divorce. *Id.* at 191–93, 209–10.

<sup>92</sup> 381 U.S. 479 (1965).

<sup>93</sup> *Id.* at 486.

marriage not to God<sup>94</sup> but to the intimacy of the marital relationship.<sup>95</sup> Having removed from marriage the strength to be derived from its sacramental status,<sup>96</sup> the Court had no choice but to consider as an aspiration, rather than a reality, the concept of marriage as a partnership for “the whole of life.”<sup>97</sup> Thus, although the Court described marriage as “a coming together for better or for worse,” quantitatively it became only “hopefully enduring.”<sup>98</sup> Furthermore, qualitatively, although the Court in *Griswold* acknowledged marriage as a “bilateral loyalty,”<sup>99</sup> that characterization does not rise to the level of becoming “one body.”<sup>100</sup>

Beyond these differences, which some might characterize as rhetorical, the Court in *Griswold* also diverged fundamentally from the Church’s vision of the purposes of marriage. In *Griswold*, the Court held that the right to marry includes a right to use contraceptives,<sup>101</sup> a holding that allowed the concept of marriage to be divorced from a purpose of procreation and education of offspring.<sup>102</sup> The Court did, however, preserve the sense that marriage is for the good of the spouses by claiming that marriage promoted a “harmony in living,”<sup>103</sup> but even that had to be tempered by the Court’s implicit message that children could undermine such harmony, a message that would become explicit in subsequent cases.<sup>104</sup>

The Supreme Court’s decisions in the forty years since *Griswold* only further distanced the Court’s view of marriage from the Church’s. In *Boddie v. Connecticut*,<sup>105</sup> the Court held that married couples enjoyed a “right to dissolve” their marriage, a decision that affirmed that American legalism considers marriage as bounded by less than death, and, thus, not

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<sup>94</sup> Cf. *supra* notes 57–58 and accompanying text.

<sup>95</sup> See *Griswold*, 381 U.S. at 486.

<sup>96</sup> See *supra* notes 66–67 and accompanying text.

<sup>97</sup> See *Griswold*, 381 U.S. at 486; see also *supra* notes 62–65 and accompanying text.

<sup>98</sup> *Griswold*, 381 U.S. at 486. But see *supra* text accompanying note 64 (indicating marriage endures to death).

<sup>99</sup> *Griswold*, 381 U.S. at 486.

<sup>100</sup> See *supra* notes 61–63 and accompanying text.

<sup>101</sup> *Griswold*, 381 U.S. at 485.

<sup>102</sup> See *supra* text accompanying note 65. Father Anthony Zimmerman notes that the number of divorces in the United States nearly tripled in the fifteen years after use of the pill began in this country. Anthony Zimmerman, *Couples on the Pill and Holy Communion*, THE PRIEST, Nov. 1, 2001, available at <http://www.osv.com/periodicals/periodicalarchive.asp> (last visited Oct. 1, 2004).

<sup>103</sup> *Griswold*, 381 U.S. at 486.

<sup>104</sup> See *infra* notes 112, 117 and accompanying text. For expressions of this view from popular culture, see Randy Lee, *supra* note 47, at 359.

<sup>105</sup> 401 U.S. 371 (1971).

necessarily for the whole of life.<sup>106</sup> The following year in *Eisenstadt v. Baird*,<sup>107</sup> the Court attacked its own vision of marriage in *Griswold* and indicated that marriage was also not for the whole of life in any qualitative respect.<sup>108</sup> As the Court said in emphasizing the degree to which marriage cannot interfere with personal autonomy:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>109</sup>

Gone from *Eisenstadt* was the Court's view that marriage was "a coming together . . . to the degree of being sacred," "an association that promotes a way of life" and "a harmony in living."<sup>110</sup> Instead, marriage in *Eisenstadt* had become "an association of two individuals each with a separate intellectual and emotional makeup."<sup>111</sup> In *Eisenstadt* the Court also explicitly embraced the implicit message of *Griswold* that marriage need not be for the purpose of procreation when it described "pregnancy and the birth of an unwanted child" as an unreasonable "punishment for fornication, which is a misdemeanor."<sup>112</sup> Furthermore, in *Eisenstadt* the Court made clear that the community's role in a marriage is not, as canon law maintains, to support and assist the marriage<sup>113</sup> but to avoid intrusions into it.<sup>114</sup>

Through *Eisenstadt*, the Court had established that in American legalism, marriage is not an irrevocable partnership, is not for the whole of life, is not for the purpose of procreation and is not to be strengthened either by sacramental status or by community involvement.

<sup>106</sup> *Id.* at 383.

<sup>107</sup> 405 U.S. 438 (1972) (guaranteeing single people the right to use contraceptives).

<sup>108</sup> Compare *Griswold*, 381 U.S. at 486, and *supra* notes 93–97 and accompanying text, with *Eisenstadt*, 405 U.S. at 453.

<sup>109</sup> *Eisenstadt*, 405 U.S. at 453.

<sup>110</sup> *Griswold*, 381 U.S. at 486; see *supra* note 93 and accompanying text.

<sup>111</sup> *Eisenstadt*, 405 U.S. at 453. The shift in view from *Griswold* to *Eisenstadt* highlights a more general distinction between American constitutional law and canon law. American constitutional law seeks to evolve over time and to adapt to a changing world. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Canon law, meanwhile, seeks to communicate eternal truth to a world in need of such stability. CODEX IURIS CANONICI (Canon Law Society of America trans. 2004), Apostolic Constitution *Sacrae Disciplinae Leges*, 7 (recognizing that "the whole juridical and legislative tradition of the church" is derived from "the books of the Old and New Testaments").

<sup>112</sup> *Eisenstadt*, 405 U.S. at 448.

<sup>113</sup> See *supra* notes 69–70 and accompanying text.

<sup>114</sup> *Eisenstadt*, 405 U.S. at 453.

The series of abortion cases<sup>115</sup> that followed *Eisenstadt* eroded even the little common ground that American legal marriage and canon law marriage had shared after *Eisenstadt*. Obviously, the abortion cases reinforced the position of American legalism that procreation was not a goal of marriage.<sup>116</sup> In fact, picking up on its child-as-punishment theme from *Eisenstadt*, the Court in *Roe v. Wade* focused exclusively on the hardships of motherhood:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. . . . [The] additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>117</sup>

In *Planned Parenthood v. Casey*,<sup>118</sup> the Court also reinforced its position that the marriage partnership is not qualitatively for the whole of life by holding in this line of cases that a woman may decide autonomously to abort without even notifying her husband of the pregnancy or her intent to abort.<sup>119</sup> In fact, in *Casey*, the Court went so far as to say that generally “[a] husband has no enforceable right to require a wife to advise him before she exercises her personal choices.”<sup>120</sup>

The Court also broke new ground in *Casey* when it embraced a view of marriage that undermined the position that the marital partnership is for the good of the spouses. The Court justified its decision to exclude husbands from even having a right to know of a marital pregnancy by noting “there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their

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<sup>115</sup> *E.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>116</sup> These cases also reject fundamentally the Church’s view that children are “a sign of God’s blessing.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 56, ¶ 2373. In fact, the Court essentially turned the Church’s teaching on sexuality and procreation on its head by making sexual intimacy outside of marriage the good and any consequent child the evil, rather than looking at sexual intimacy outside of marriage as the problem and children as an expression of God’s love.

<sup>117</sup> 410 U.S. at 153.

<sup>118</sup> 505 U.S. 833 (1992).

<sup>119</sup> *Id.* at 897–98 (characterizing the notice requirement as embodying “a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution”); *see also Danforth*, 428 U.S. at 67–70 (declaring spousal consent provision unconstitutional).

<sup>120</sup> *Casey*, 505 U.S. at 898.

husbands.”<sup>121</sup> In that context, the Court maintained that a woman could reasonably believe that if she told her husband of her intent to abort, he would

(a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive [her] of necessary monies for herself or her children. . . .<sup>122</sup>

Given such a negative sense of the marital relationship, one can hardly maintain that American legalism would claim the good of the spouses as a purpose of marriage. Thus, following *Casey*, the only thing left of the sacramental notion of marriage to which the American legal system has adhered is that marriage is a partnership between a man and a woman.<sup>123</sup>

As the sacramental view of marriage can be viewed as a path to a lived-out reality, so too might this constitutional law view be seen as a path to a lived-out reality.<sup>124</sup> It is beyond the scope of this paper to say whether, in fact, the Supreme Court has charted the course to a certain life of marriage or merely described what it believed it saw in marriages in our culture. Still, there is a lived-out physical reality for the vision of marriage reflected in the Court’s rules, much as there is a physical reality to the marriage rules set out in canon law. In this physical reality, marriage is a relationship burdened by children and consumed by grasshoppers. Far

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<sup>121</sup> *Id.* at 893.

<sup>122</sup> *Id.* at 888 (quoting *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1360 (E.D. Pa. 1990)). Despite the Court’s negative view of marriage, one study shows that of those married people “who initially rated their marriages as ‘very unhappy’ but remained together, nearly eighty percent considered themselves ‘happily married’ and ‘much happier’ five years later.” Dr. James Dobson, *New Information About Divorce and Happiness*, DR. DOBSON’S NEWSL. (Focus on the Family), Sept. 2002, available at <http://family.org/docstudy/newsletters/a0022148.cfm> (last visited Sept. 25, 2004). On the other hand, “only nineteen percent of those who got divorced or separated were happy five years later.” *Id.*

<sup>123</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145, 165–67 (1878) (rejecting arguments that marriage could include polygamy).

<sup>124</sup> See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Between Man and Woman: Questions and Answers About Marriage and Same Sex Unions*, Nov. 12, 2003, at <http://www.usccb.org/laity/manandwoman.htm> (“Laws play an educational role insofar as they shape patterns of thought and behavior, particularly about what is socially permissible and acceptable.”).

from the relationship that provided hope for the Ingalls,<sup>125</sup> the marriage embraced by the Court is that which dies in the long winter.<sup>126</sup>

One may fairly observe that the Supreme Court's vision of marriage has manifested itself in a large portion of American marriages. In light of studies indicating that forty to fifty percent of all couples in first marriages ultimately opt to exercise their right to dissolve their marriage,<sup>127</sup> the notion that marriages are to be even "hopefully enduring"<sup>128</sup> seems at best a random hope. Of first marriages ending in divorce, half are terminated within the first eight years.<sup>129</sup> The divorce rate for second marriages is estimated between fifty to sixty percent.<sup>130</sup>

The studies of American marriages also detect elements of the Court's view that marriage is a vehicle for two separate individuals to pursue their own independent happinesses and sexual fulfillment. Infidelity ranked first among the reasons marriages fail, and "no longer in love" ranked second.<sup>131</sup> Emotional problems, financial problems, and sexual problems rounded out the top five.<sup>132</sup> Problems with in-laws and job conflicts also ranked in the top ten.<sup>133</sup> One must acknowledge that thirty percent of divorces do involve couples in highly conflicted marriages, and physical abuse and alcohol rank eighth and ninth among reasons for divorce.<sup>134</sup> Still, as Dr. Brent Barlow observed, "[m]any marriages seem to end from burnout rather than blowout."<sup>135</sup> Thus, one is left to question whether the desire for personal fulfillment is sufficient to sustain a relationship between two people or whether, in fact, such a focus undermines a marriage. If the pursuit of personal fulfillment has had a negative effect on marriage, it also appears to be a less-than-perfect avenue to personal happiness. In fact, a large body of research indicates "men and women do markedly better in all measures of specific and general well-being when they are married compared to any of their unmarried counterparts."<sup>136</sup>

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<sup>125</sup> See *supra* note 38 and accompanying text.

<sup>126</sup> See *supra* notes 39–41 and accompanying text.

<sup>127</sup> Brent A. Barlow, Ph.D., *Marriage Crossroads: Why Divorce is Often Not the Best Option: Rationale, Resources, and References*, in MARRIAGE & FAMILIES 21, 21 (January 2003).

<sup>128</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *supra* note 98 and accompanying text.

<sup>129</sup> Divorce Magazine.com, *U.S. Divorce Statistics* (2002), at <http://divorcemagazine.com/statistics/statsUS.shtml> (last visited Oct. 25, 2004).

<sup>130</sup> Barlow, *supra* note 127, at 21.

<sup>131</sup> *Id.* at 22.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (quoting GLENN T. STANTON, *WHY MARRIAGE MATTERS* 73 (1997)).

The *Griswold-Eisenstadt-Roe* view that marriage is not for procreation and the education of children and instead that children can be viewed as a “punishment” or a burden for parents<sup>137</sup> has also manifested itself in the human reality of American marriage. The era seems passed for the belief that a couple must work through their problems to accommodate the happiness of their children.<sup>138</sup> Rather, that belief has given way to an understanding “that if the parents are happier the children will be happier, too.”<sup>139</sup> In line with this, “only 42 percent of children aged 14 to 18 live in a ‘first marriage’ family—an intact two-parent married family,”<sup>140</sup> and “[e]ach year, over 1 million American children suffer the divorce of their parents.”<sup>141</sup> Although it is true that many of these children transcend the divorce experience and grow to become healthy adults, “it is also becoming increasingly evident that many children of divorce are at risk for developing detrimental behaviors, personality disorders, and disruptive lifestyles.”<sup>142</sup> They are also more likely to engage in crime and drug abuse and “have higher rates of suicide.”<sup>143</sup>

This marriage reality is far different from that lived-out by the Ingalls, Paul and Susan, the couple from Poland, my friend from the conference and his wife, and the Coolidges.<sup>144</sup> The Court’s vision of marriage as a vehicle on the road to self-fulfillment has yielded a culture of divorce and “created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness.”<sup>145</sup>

<sup>137</sup> See *supra* notes 112, 117 and accompanying text.

<sup>138</sup> Barlow, *supra* note 127, at 23–24 (discussing the negative impact of divorce on children and the myths that happier parents—those who have removed themselves from unhappy marriages—equal happier children and that divorce is only a temporary crisis). The “happier parents, happier children” view stands in contrast to studies showing that most divorces leave children worse off educationally, financially, and psychologically. See *id.* at 23. In fact, “many adults who are trapped in very unhappy marriages would be surprised to learn that their children are relatively content. They don’t care if Mom and Dad sleep in different beds as long as the family is together. . . .” *Id.* (quoting JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE, A TWENTY-FIVE YEAR LANDMARK STUDY xxiii–xxiv (2000)).

<sup>139</sup> *Id.* at 24 (quoting JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE, A TWENTY-FIVE YEAR LANDMARK STUDY xxvi (2000)).

<sup>140</sup> Patrick F. Fagan & Robert Rector, *The Effects of Divorce on America*, in THE HERITAGE FOUND. BACKGROUNDER (the Heritage Found. Backgrounder, Executive Summary No. 1373, June 5, 2000), available at <http://www.heritage.org/Research/Family/BG1373.cfm> (last visited Sept. 25, 2004).

<sup>141</sup> Barlow, *supra* note 127, at 23 (quoting JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE, A TWENTY-FIVE YEAR LANDMARK STUDY xxiii–xxiv (2000)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* notes 29–55 and accompanying text.

<sup>145</sup> COUNCIL ON FAMILIES, MARRIAGE IN AMERICA: A REPORT TO THE NATION (1995), available at [http://www.americanvalues.org/html/r-marriage\\_in\\_america.html](http://www.americanvalues.org/html/r-marriage_in_america.html) (last visited Sept. 25, 2004).



Amongst the children of the post-*Roe* generation, one-third were aborted<sup>146</sup> and half of those born grew up in divorced homes.<sup>147</sup> As gay and lesbian couples look around them at this wreckage, it is no wonder that they have been moved to insist that their relationships can hardly be labeled less valuable.

Advocates of same-sex marriages also point to the changes the Supreme Court has imposed on marriage as evidence that America need not fear further deviation from the sacramental view of marriage. They insist that opponents of each of these changes argued at the time that each change would bring the sky falling down on our culture but that in fact no such disaster ever occurred and these predictions of doom and gloom were left to “sound foolish at best.”<sup>148</sup> Yet, as Generation X yields to Generation Y and we are now confronted by successive generations where more members of the generation are aborted than grow up in the home of both parents, one is left to ask how different our world would look if the sky had fallen and if it has not fallen already, how we will know when it does. In any event, one is hard pressed to articulate the public purposes of marriages in such a world.

As noted at the outset, the point here is not to condemn what has happened in our past or that which marks our present. Rather, this piece seeks only to recognize that both couples and children have suffered enough on this present road.

Marriage holds the promise of bringing “the spouses to holiness,” making “known God’s love in their family, communities, and society,” and providing “the best conditions for raising children.”<sup>149</sup> Marriage can do so, however, only if it seeks to manifest itself as “a faithful, exclusive, lifelong union of a man and a woman joined in an intimate community of life and love.”<sup>150</sup> In the end, the path through the long winter must be paved with that “love, manifested in fidelity, passion, fertility, generosity, sacrifice, forgiveness, and healing.”<sup>151</sup>

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<sup>146</sup> Randall K. O’Bannon, Ph.D., *Abortion Statistics and Trends over the Past Thirty Years: Out of the Long Dark Night*, at <http://www.nrlc.org/news/2003/NRL01/andy.html> (Jan. 2003) (reporting ratios of abortions to live births over last thirty years). For an example of data being used to state that nearly one-third of a generation has been aborted, see Bob Ricker, *The Sanctity of Life*, THE STANDARD, Jan./Feb. 2002, at 3.

<sup>147</sup> See *infra* note 149 and accompanying text.

<sup>148</sup> Evan Wolfson, Speech at Harvard Gay & Lesbian Caucus Annual Commencement Dinner (June 5, 2003).

<sup>149</sup> See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 124.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

## CONCLUSION

One might attempt to focus all this by maintaining that the problem with the State in its current approach to marriage is that it thinks that it has the power to define marriage as something other than what marriage is, and the problem with the religious community is that it has been tempted to believe that if it wins the battle in the law, it won't matter that it has lost the battle in the pews. Bishop J. Kevin Boland, who led a committee that drafted the Bishops' statement on marriage released November 12, 2003,<sup>152</sup> said, " 'Marriage is in crisis, and it would be further devalued and eroded unless we're very strong in pointing out that same-sex unions are not the equivalent of marriage.' " <sup>153</sup> No doubt the Bishops' statement was strong in pointing out just that. Before doing that, however, the statement spoke very clearly in reaffirming each aspect of the sacramental vision of marriage.<sup>154</sup>

Certainly, one could argue that through *Bowers v. Hardwick*,<sup>155</sup> *Romer v. Evans*,<sup>156</sup> and *Lawrence v. Texas*,<sup>157</sup> the Supreme Court has pursued a path that must ultimately culminate in a view that abandons the requirement that the marriage partnership be between a man and a woman,<sup>158</sup> and certainly some state supreme courts have been willing to take steps in that direction.<sup>159</sup> Yet, that discussion ultimately appears here as curious,<sup>160</sup> just as it earlier appeared confused.<sup>161</sup> Having compared the

<sup>152</sup> Daniel J. Wakin, *Bishops Open a New Drive Opposing Contraception*, N. Y. TIMES, Nov. 13, 2003, at A20.

<sup>153</sup> *Id.* (quoting Bishop J. Kevin Boland, chairman of the Committee on Marriage and Family).

<sup>154</sup> See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 124.

<sup>155</sup> 478 U.S. 186, 197, 199 (1986) (Powell, J., concurring and Blackmun, J., dissenting) (reflecting opinions of five members of the Court that imprisonment for acts of homosexual sodomy would violate the Constitution).

<sup>156</sup> 517 U.S. 620 (1996) (holding that an amendment to the state constitution that would make political advocacy by gays and lesbians more difficult is unconstitutional).

<sup>157</sup> 539 U.S. 558, 578 (2003) (holding that a statute making it a crime for two persons of the same sex to engage in sexual conduct is unconstitutional).

<sup>158</sup> See, e.g., Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 436 (2001).

<sup>159</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (recognizing potential problem with state statute's restriction of marriage to couples of one man and one woman under the state constitution's equal protection clause); *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002) (recognizing statutory right of gay and lesbian couples to adopt children); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (requiring the State to "extend to same-sex couples the common benefits and protections that flow from marriage" under the state constitution).

<sup>160</sup> Those who debate the relative merits of state recognition or regulation of same-sex relationships, of course, are engaged in a socially valuable discussion that clearly implicates the lives in many homes. See, e.g., Collett, *supra* note 63; David Orgon Coolidge, *Same Sex Marriage? Baehr v. Muike and The Meaning of Marriage*, 38 S. TEX. L. REV. 1, 23 (1997); Lee,

concept of sacramental marriage to that of marriage as defined by the American legal system, one must reach the conclusion that for heterosexual couples, the two concepts of marriage share no attributes. They are two radically different paths to two radically different relationships. Confronted with that reality, one is hard pressed to argue that the American legal system's notion of marriage will be suddenly undermined if it deviates from canon law on the issue of same-gender partnerships. Certainly, if all one does is fight the battle over same-sex unions, the crisis in marriage will only deepen.

One of the greatest hindrances to my growth in my faith is my tenacious belief that if I can just get two other people to become better, I will not need to improve myself. That instinct has relevance here for the heterosexual community—the crisis in marriage must be solved by addressing not only the truth about same-sex unions but also by addressing the truths about heterosexual unions, because there can be no value, no public purpose, in a relationship built on the pursuit of self-satisfaction rather than love, where spouses are abandoned when they become inconvenient, and children are counted not as blessings of God but for their costs, and as economic, social, and professional liabilities.

In a haunting concurrence in *Lawrence v. Texas*, Justice O'Connor wrote, "I am confident . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society."<sup>162</sup> Can the same be said of marriage? What if the Supreme Court said today, "We will accept your Judeo-Christian notion of marriage, between a man and a woman, but only if you are willing to take the whole package, an irrevocable partnership, for the whole expanse of daily life, for the good of spouse before self, and freely embracing the procreation and education of offspring?"

Perhaps Justice O'Connor is right: In our democratic society, such a definition of marriage would not long stand. But we must be willing to accept the challenge that we can sell as good that which Ma and Pa Ingalls,

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*supra* note 47, at 355–56; see also John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1125–26 (1999). Furthermore, as Saint Thomas More pointed out, "[W]hat you cannot turn to good, you . . . make as little bad as possible." ST. THOMAS MORE, *UTOPIA* 36 (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press 1989) (1516). Thus, the point here is not that Catholics should not engage in the debate of same-sex marriage in an effort to seek an incremental improvement in the status of this ravaged concept. Rather, the point here is more narrowly that, having seen the gap widening for forty years between canon law and the American legal system's notions of marriage, one should hardly now need to sound a warning that the two may be starting to separate.

<sup>161</sup> See *supra* notes 3–21 and accompanying text.

<sup>162</sup> 539 U.S. at 584–85 (O'Connor, J., concurring).

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Paul and Susan, the couple from Poland, and David and Joan Coolidge shared. In addition, our marketing of such an understanding of marriage cannot be limited to court houses or legislatures, for in the end the only victories that matter are those to be had in human hearts and lived in human lives.

