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# Trifling Violence: The U.S. Supreme Court, Domestic Violence and the Golden Rule

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Trifling Violence: The U.S. Supreme Court, Domestic Violence and the Golden Rule

By Jeffrey R. Baker<sup>1</sup>

“A page of history is worth a volume of logic.”<sup>2</sup>

**Introduction**

Domestic violence is ubiquitous across eras, cultures, economic strata, religions and political systems.<sup>3</sup> Empirically and theoretically, domestic violence is an issue of gender, so responses to domestic violence necessarily invoke the law and culture of families and marriage.<sup>4</sup> Effective legal responses to domestic violence empower women and girls and free them from gender subjugation, but such responses inevitably challenge traditional moral and cultural claims about marriage and family.

In the United States, this tension is manifest in the struggle at common law to adjust the moral language against the gradual, radical evolution of gender status in the 19<sup>th</sup> and 20<sup>th</sup> centuries. The history of domestic violence in American common law illuminates the challenge of liberating, empowering reform and the defensive resistance of traditional moral claims.

Here, to illustrate this dynamic and to suggest an alternative moral vision of gender and marriage in the law, I identify and analyze several U.S. Supreme Court cases which address or implicate domestic violence.<sup>5</sup> During the 19<sup>th</sup> century, the Court routinely deployed moral

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<sup>2</sup> “If ever there were an area in which federal courts should heed the admonition of Justice Holmes that “a page of history is worth a volume of logic,” it is in the area of domestic relations.” Santosky v. Kramer, 455 U.S. 745, 770 (1982)(Rehnquist, J. dissenting)(paraphrasing New York Trust Co. v. Eisner, 256 U.S. 345 (1921)(Holmes., J.).

In 1868, the North Carolina Supreme Court considered a case of wife beating, chastisement with a switch, and held, “We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.” State v. Rhodes, 61 N.C. 453, 459 (1868)(*per curium*), cited by Justice Breyer in his dissenting opinion in Giles v. California, 128 S.Ct. 2678 (2008), discussed more fully *infra*, n. ---).

<sup>3</sup> For purposes of this paper, “domestic abuse” or “domestic violence” means physical, emotional, sexual abuse or financial exploitation by one spouse or intimate partner against another, vastly most often perpetrated by men against women.

<sup>4</sup> Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, iv, 25 – 34 (U.S. Dept. of Justice, National Institute of Justice ) (Nov. 2000).

<sup>5</sup> Despite that family and domestic matters typically are state actions, the U.S. Supreme Court has scores of cases that address or include domestic violence: *See* Wagner, et al. v. Baird, et al., 48 U.S. 234 (1849)(a title dispute over land in Louisiana by old heirs and new bona fide purchasers with domestic violence figuring in the facts); Life Insurance Co. v. Terry, 82 U.S. 580 (1972) (an action against a life insurance company for not paying benefits to the widow of a suicide, using domestic violence facts as a illustrative hypothetical); Supreme Lodge, Knights of Pythias of the World v. Beck, 181 U.S. 49 (1901)(a similar life insurance dispute using domestic violence in hypothetical illustrations); Weems v. U.S., 217 U.S. 349 (1910)(a criminal case of treason and a challenge alleging cruel and

language and claims to nature to justify and promote traditional marriage which sublimated a wife's legal identity and person into her husband's. By the middle of the 20<sup>th</sup> century, the Court ceased deploying such claims to nature and reasoned about marriage without moral language. The Court left moral considerations dormant in these cases for about 80 years and did not put forth a new moral compass for marriage and domestic violence until 1992.

Then, Justice O'Connor and the Court finally rejected the moral structure of traditional marriage in the common law and replaced it with a moral calculus grounded exclusively in individual conscience and autonomous spiritual discernment.<sup>6</sup> On the right, the conservative justices did not rise to defend traditional, common law marriage and have not articulated an alternative moral norm for marriage, yet the originalists continue to import cases that rest squarely on the traditional subjugation of women.

As an alternative to both, I propose to revive an ancient idea, the Golden Rule, as the core moral, natural underpinning for marriage, especially as it implicates domestic violence.

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unusual punishment, using historic wife-beating sentences for comparison); *Simmons v. U.S.*, 348 U.S. 397 (1955)(a due process challenge to a conscientious objector hearing in which the Department of Justice challenged the plaintiff's religious sincerity because of a criminal history of wife battery); *Wyatt v. U.S.*, 362 U.S. 525 (1960)(an appeal from a Mann Act prosecution where the defendant transported his wife across state line for prostitution, noting that the Mann Act's primary purpose was "to protect women who were weak from men who were bad"); *Drope v. Missouri*, 420 U.S. 162 (1975)(an action considering mental health issues and capacity for trial, with domestic violence in the facts); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (an appeal from a sentence of death for a domestic violence homicide); *Santosky v. Kramer*, 455 U.S. 745 (1982)(considering the standards of evidence for severing parental rights, discussing the nature of family and the fundamental in interests of parenthood, including the quote above from Rehnquist and Holmes ); *Moran v. Ohio*, 469 U.S. 948 (1984) (considering the affirmative defense of Battered Woman's Syndrome); *Hunter v. Underwood*, 471 U.S. 222 (1985)(considering Alabama's sentencing element of "moral turpitude" for disenfranchising felons, referencing wife-battery in the 1901 state constitution as a felony of moral turpitude); *Thomas v. Arn*, 474 U.S. 140 (1986) (a habeas corpus action with allegations of Battered Woman's Syndrome in the facts); *U.S. v. Stanley*, 483 U.S. 669 (1987)(an action for damages by a former service member for experimental exposure to LSD, allegedly resulting in assaults on his wife); *Robertson v. California*, 498 U.S. 1004 (1990)(an appeal regarding recusal of a trial judge with a history with the parties, including the Court's first use of the term "domestic violence"); *Godinez v. Moran*, 509 U.S. 389 (1993)(an appeal regarding competency for guilty pleas, including domestic violence homicide in the facts); *U.S. v. Dixon*, 509 U.S. 688 (1993)(considering whether criminal contempt for violating a civil protection order created double jeopardy for prosecuting the underlying domestic violence); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (applying *Batson* standards to selecting jury members based on gender, with extended discussion of the history of gender discrimination, including comments on domestic violence); *U.S. v. Morrison (Brzonkala)*, 529 U.S. 598 (2000)(considering the constitutionality of the civil rights action provisions of the Violence Against Women Act on interstate commerce grounds); *Blakely v. Washington*, 542 U.S. 296 (2004)(considering departures from federal sentencing guidelines with domestic violence in the facts and incidental to the issue); *Castle Rock v. Gonzalez*, 545 U.S. 748 (2005)(considering tort liability of police who did not act to enforce a civil protection order); *House v. Bell*, 547 U.S. 518 (2006)(a habeas corpus appeal from the death penalty, with domestic violence in the facts); *Davis v. Washington*, 547 U.S. 813 (2006)(considering whether a victim's 911 call and a victim's affidavit were testimonial in a criminal prosecution for domestic violence); *Washington v. Recuendo*, 548 U.S. 212 (2006) (considering sentence enhancements with domestic violence in the facts and the antecedent charges); *Gonzales v. Carhart*, 550 U.S. 124 (2007)(a constitutional challenge to abortion restrictions with a discussion about the nature of women and motherhood); *Irizarry v. U.S.*, 128 S.Ct. 2198 (2008)(considering sentencing guidelines in domestic violence cases including a discussion of "today's understanding" of domestic violence); *U.S. v. Hayes*, 129 S.Ct. 1079 (2009) (an appeal from a conviction for possessing a firearm after being convicted of a domestic violence misdemeanor).

<sup>6</sup> *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992), discussed more fully *infra* at n. -

Although the old common law of marriage made stark and bold claims to nature and morality, the traditional view did not accommodate a superior, antecedent moral principle of love so permitted violent disturbance to the trust and vulnerability of wives. The Court's newly articulated moral metric, in its sharp deference to individual conscience, likewise ignores this fundamental, universal moral rule, upon which Western moral philosophy must and ought to hang.

Domestic violence and its stubborn, generational persistence in our families and cultures spring directly from the subjugation of women in families and intimate partnerships. For centuries, the common law actively, intentionally promoted and defended such subjugation, shielding perpetrators and ignoring victims. Legal protection reinforced cultural mores that permitted and encouraged family violence. The immoral roots of the common law of marriage survive to this day, in generations of victims and perpetrators. If the common law's old claims to morality and nature had grappled with love and the Golden Rule, courts could not have discarded or diminished the ugly effects of subjugation. Without the common law's imprimatur, perhaps the generational cycle of violence and family abuse might have slowed earlier than it has.

If the Supreme Court's present metric of individual sovereignty as the marker for morality could accommodate love and the Golden Rule, rather than stark individualism, perhaps the Court might discard the bleak, zero-sum culture wars of individual rights, privacy, life and politics and draw closer to shared ideals. If those who would import case-law from the 18<sup>th</sup> century appreciated the flawed, incomplete and hurtful moral premises in the cases, perhaps the Court would deploy a more fulsome, critical originalism.

Here, first, I explore philosophical and religious articulations of the Golden Rule, considering the import of love in moral reasoning and suggesting how the Golden Rule might inform the jurisprudence of family. Next, I observe and demonstrate the Court's historic evolution of moral reasoning in its domestic violence cases and suggest how the Golden Rule might have affected the Court's analysis and outcomes. Last, I offer a caution for our age, suggesting that courts should be wary of importing the moral reasoning of the founding era as it relates to families and marriage and suggesting that an ethic of love is a sounder foundation than a genuflection to the sovereignty of autonomous moral discernment.<sup>7</sup>

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<sup>7</sup> I do not undertake the fiercely and constantly debated place of morality in the law. *See, e.g.* ROSCOE POUND, *THE IDEAL ELEMENT IN LAW*, 66 – 108 (2002, originally 1958); H.L.A. HART, *THE CONCEPT OF LAW*, 185-212 (2d ed., 1961); JOSEPH RAZ, *PRACTICAL REASON AND NORMS*, 162-170 (1975); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW*, 107 – 110 (1999) Rather, I assume that moral philosophy and religious ideas are at work in judicial thought, whether expressed or ignored. The Court cannot be and should not be free of moral considerations, and, thus, moral philosophy. I agree with Hart who says, “[I]t cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideas of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.” HART, *THE CONCEPT OF LAW* at 185. I disagree when he next says, “it does not follow from it that the criteria of legal validity of particular laws used that in a legal system must include, tacitly if not explicitly, a reference to morality or justice.” *Id.* Rather, I suggest that the Court cannot avoid moral reasoning, however hard it may try to be positivist or amoral or merely reasonable. For law among humans, morality is endemic and inescapable. As Dean Pound wrote,

Yet we should not be too patient under lag of the law behind morality and morals. Beyond reasonable regard for security any manifest lag should be corrected. . . . [J]urisprudence is a practical science. As such, it must consider the end of law, the measure of valuing interests, and

## I. The Supreme Court's Moral Compass and the Golden Rule

In 1839, the United States Supreme Court considered its first case involving domestic violence. The Court was weighing spousal immunity and testimonial privilege and made a moral declaration to ground its decision:

This rule [of spousal privilege] is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.<sup>8</sup>

Presumably, within the context of the case, the Court finds that the confidence of spousal communication is one of those “great principles” that is among “the deepest and soundest principles of our nature,” and that marriage itself is the “basis of civil society” and the “best solace of human existence.” This proposition is not controversial in itself, yet the Court’s presumption about the centrality of marriage will shade its criticism of spousal subjugation under the sway of order and tradition.

For example, in 1904, the Court considered whether a husband could press a judgment against his wife’s paramour through bankruptcy.<sup>9</sup> Using the language of natural law, the Court recognized the rights of a husband in the body and life of his wife embedded in the tradition of the common law:

It is also said that the husband has, so to speak, a property in the body and right to the personal enjoyment of his wife. For the invasion of this right the law permits him to sue as husband. . . . Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. *This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right.*<sup>10</sup>

Notably, the Court is defending the property rights of a husband in his wife’s body against a third-party adulterer but it addresses not at all the wife’s role or rights in her own person. It does not explore the husband’s right to enjoy his wife’s body against her objections. By describing

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the adaptability of systematic application of the force of politically organized society to achieving the end and applying the measure of values. It cannot dispense with ethics. It cannot depend wholly on ethics.

POUND, *THE IDEAL ELEMENT IN LAW* at 108.

<sup>8</sup> *Stein v. Bowman*, 38 U.S. 209, 223 (1839), discussed more fully *infra* at note --.

<sup>9</sup> *Tinker v. Colwell*, 193 U.S. 473 (1904).

<sup>10</sup> *Id.* 483-484(emphasis added).

the property right as among “the highest kind, upon which the thorough maintenance of which the whole social order rests,” the Court implies, at least, the she has no standing to alienate it.

Likewise, in 1910, construing a D.C. statute which expanded a wife’s standing to sue on her own behalf, the Supreme Court denied a wife’s standing to sue her husband in tort for his physical violence toward her, saying, “We do not believe it was the intention of Congress. . . to revolutionize the law governing the relation of husband and wife as between themselves.”<sup>11</sup> This was a clash between the rapidly changing political and statutory reforms affecting women’s rights and the entrenched common law of marriage. The Court could not brook the revolutionary notion that a wife might sue her husband for violence against her. The Court lagged behind the actual revolution coming for women’s suffrage.<sup>12</sup>

Between 1910 and 1992, the Court considered many cases involving domestic violence and marriage but did not invoke morality or nature in these decisions.<sup>13</sup> As discussed later, this may be because of a growing reluctance to frame legal decisions in moral terms.<sup>14</sup> I suggest that the common law version of marriage, sustained by its claims to morality and nature, could no longer accommodate a quickly transforming world in the wake of women’s suffrage and its attendant revisions of property and status laws. The language of nature and natural law sounded frankly anachronistic by the middle of the 20<sup>th</sup> century and was unsustainable. Only at the end of the century, after significant post-war social revolution and critical, feminist headway, could the Court adopt a new, deferential moral metric.

In 1992, considering a Pennsylvania abortion statute, a famously divided Court struck down a spousal-notification provision which the Court found to be an undue burden on women.<sup>15</sup> There, Justice Sandra Day O’Connor made this observation about the nature of marriage:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. . . . Only one generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibilities” that precluded full and independent legal status under the Constitution. . . . *These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution. . . . Women do not lose their constitutionally protected liberty when they marry.*<sup>16</sup>

On its face, Justice O’Connor’s historical observation is unassailable. From the first cases before the Court confronting family matters, domestic violence and women, the Court had relied, explicitly or implicitly, on claims to the nature of womanhood, the nature of marriage, the nature of the law and nature itself. These claims manifest themselves in the common law, but the claims themselves have changed in their essence and effect.

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<sup>11</sup> Thompson v. Thompson, 218 U.S. 611, 619 (1910) (discussed more fully *infra* at n. - -).

<sup>12</sup> See, *i.e.*, U.S. Const. amend. XIX, ratified 1920, recognizing a right to vote regardless of sex.

<sup>13</sup> See n. 6, *supra*.

<sup>14</sup> See n. 160, *infra*.

<sup>15</sup> Planned Parenthood v. Casey, 505 U.S. 833 (1992).

<sup>16</sup> *Id.* at 896-897 (emphasis added)(quoting Bradwell v. State, 16 Wall. 130, 21 L.Ed. 442 (1873); Hoyt v. Florida, 368 U.S. 57 (1961)).

As a matter of historical record, “Our understanding of the family [and] the individual” had changed markedly. These marked changes either belie the old moral claims themselves, or they may mark a radical deviance from the principles upon which “the whole social order rests.” If the common law claims to nature were mutable over the course of our national history, they were not claims to nature at all. Rather, they must have been claims to culture, to a dominant power structure or to moral arguments grounded elsewhere than “the soundest principles of our nature.”

Justice O’Connor describes and adopts a very different landscape for moral reckoning:

Our cases recognize the “right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents “have respected the private realm of family life which the state cannot enter. . . . At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state. . . .”<sup>17</sup>

Although the Court divided on the outcome of the case, no one disputed Justice O’Connor’s rejection of the common law of marriage or her swift deference to individual, autonomous moral reckoning. At least, such an objection was not a basis for the dissenters in their opinions. This is the Court’s current step on its evolving moral journey. It rejects the old moral vision of marriage that would subjugate wives, but it does not yet accommodate the Golden Rule.

The old common law buttressed the legal sublimation of wives into their husbands’ identities with claims to nature and the social order. This traditional view of marriage, and the Supreme Court’s early moral proclamations, unmoored the structure of family from the deeper, truer moral principle. Neither predominant Western philosophies nor religious traditions should have required such gender subordination. The deep roots of natural law, of Jewish and Christian religion, and Western law do not demand that a wife be subordinated to the role of chattel or ward, like a slave, servant or child. The common law’s deviance from love invited chastisement and the toleration of physical violence.

The common law manifested custom and culture, not a sound moral or spiritual principle. John Stuart Mill was no Christian moral philosopher, but even in his altruistic, secular utilitarianism, he observed with historical accuracy:

[T]he adoption of this system of inequality never was the result of deliberation, or forethought, or any social ideas, or any notion whatever of what conduced to the benefit of humanity or the good order of society. It arose simply from the fact that from the very earliest twilight of human society, every woman (owing to the value attached to her by men, combined with her inferiority in

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<sup>17</sup> *Id.* at 851.

muscular strength) was found in a state of bondage to some man. Laws and systems of polity always begin by recognizing the relations they find already existing between individuals . . . . No presumption in its favour, therefore, can be drawn from the fact of its existence. . . .

. . . . What is now called the nature of women is an eminently artificial thing - the result of forced repression in some directions, unnatural stimulation in others.<sup>18</sup>

Mill condemns this system, more Darwinian than divine, and resolves for a new social structure:

That the principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other – is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other. . . .<sup>19</sup>

This utilitarian call for equality tracks the prime moral directive in Western thought to which the common law failed to conform. If the common law presumed to derive from the natural law, which it did and often still does, and if the natural law is presumed to flow from God and the scriptural witness, then the common law and its defenders missed the deeper principle of marriage in the Bible, that is, love for one's neighbor. This love, *agape* in New Testament Greek, does not permit subjugation of one or the other.<sup>20</sup>

The Apostle Paul instructed husbands to “love their wives as they do their own bodies. He who loves his wife loves himself. For no one ever hates his own body, but nourishes and tenderly cares for it, just as Christ does for the church, because we are all members of his body.”<sup>21</sup> This instruction on marriage surely is his specific application of the general idea he delivered to the community at Philippi: “Do nothing from selfish ambition or conceit, but in humility regard others as better than yourselves. Let each of you look not to your own interests, but to the interests of others.”<sup>22</sup>

Paul's admonition is an applied version of the second greatest command of Christ: to love one's neighbor as oneself.<sup>23</sup> This is summed up in the precept we call the Golden Rule: Do

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<sup>18</sup> Mill, *supra* n. ---, at 137-138, 144 – 146, 155, 160-161.

<sup>19</sup> John Stuart Mill, *The Subjection of Women*, in JOHN STUART MILL: ON LIBERTY AND THE SUBJECTION OF WOMEN 133 (Alan Ryan, ed. Penguin 2006).

<sup>20</sup> See TIMOTHY P. JACKSON, THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE 1-3, 10 (2003). *Agape* is “charity” or “neighbor love.” “When viewed interpersonally, as the conversion of human relations wrought by the grace of God, *agape* involves three basic features: (1) unconditional willing of the good for the other, (2) equal regard for the well-being of the other, and (2) passionate service open to self-sacrifice for the sake of the other.” *Id.* at 10. “Love appreciates the plentitude and ambiguity of the world, balancing affirmation of what is believed to be worthy or sacred with resistance to what is believed to be ugly or evil. . . . Love seeks to elicit those virtues in self and others without which human flourishing is impossible. . . .” *Id.* at 15.

<sup>21</sup> Eph. 5:28-30.

<sup>22</sup> Phil. 2: 3-4.

<sup>23</sup> See Matt. 22:37-38, 22: 39. See also n. ---, *supra*..



to others as you would have them do to you.<sup>24</sup> The Golden Rule was far older than Jesus, though, and he was referring to the Torah, where in Leviticus, the Law directs to the people to love their fellows as themselves.<sup>25</sup> This teaching springs from the *imago dei* of Genesis 1 where God “created man in his own image, in the image of God he created him; male and female he created them.”<sup>26</sup> This is the fundamental theory of human dignity, the cornerstone of liberal democracy, the proposition that “all men are created equal.”<sup>27</sup>

The natural law, if it is anything at all, must surely be the ancient Golden Rule at its very root and core. The Bible tells us so.<sup>28</sup> The Golden Rule assumes that humans live in community with other humans, in varying degrees of relationship, not merely as vessels for the manifestation of ethical propositions and methods. In Christian theology, this community is called *koinonia*, Greek for “fellowship.” Twentieth century theologian Paul Lehmann reckons a Christian contextual ethic from this Biblical concept:

Ethical action is a matter of so having lived that God will recognize that one has been on the track of God’s doing, of having lived in the confidence that at the point of one’s ethical failure God will surround one with the promise and assurance of his forgiveness. *The complexity of the actual human situation, with which a koinonia ethic tries seriously to deal, is always compounded of an intricate network of circumstance and human interrelationships bracketed by the dynamics of God’s political activity on the one hand and God’s forgiveness on the*

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<sup>24</sup> See Matt. 7:12, from the Sermon on the Mount. The Gospel of John also reports how Jesus magnified the principle: “I give you a new commandment, that you love one another. Just as I have loved you, you also should love one another. By this everyone will know you are my disciples, if you have love for one another.” John 13:34-35. “This is my commandment, that you love one another as I have loved you. No one has greater love than this, to lay down one’s life for one’s friends.” John 15:12-13.

<sup>25</sup> See Lev. 19:18.

<sup>26</sup> Gen. 1: 27. Paul Ramsey explains the attenuation of creation theology and secular democracy:

The religious man’s understanding of his own personal existence “before” God guarantees widespread and persistent acceptance of a “this-applies-to-me” attitude which must undergird every effective effort to establish justice. It has frequently been affirmed that the main individualistic elements of secular democratic theory, natural rights, the dignity of man, etc., historically may be traced to their source in the religious tradition of the west. Equally likely (and equally difficult to demonstrate) is the connection between the “objective generality” of law and a religious sense of the inescapable and universal judgment of God, between “equality of application” and equality before God, between willingness to be no more than equal to another before the law and acknowledgement that we are not more than equal before God.

PAUL RAMSEY, BASIC CHRISTIAN ETHICS at 348-349 (1950).

<sup>27</sup>DECLARATION OF INDEPENDENCE, para. 2; see also, e.g., Margaret Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 545-551 (2010)(offering a secular, critical description of individual, not autonomous, human dignity in law reforms devoted to responding to domestic violence).

<sup>28</sup> See Matt. 22: 40 (“On these two commandments hang all the law and the prophets.”) In the light of centuries and tomes of discourse on morality, ethics, theology, jurisprudence and politics, perhaps some might say this is entirely too simple, yet the Golden Rule, quite apparently is the beginning of virtually all Christian moral and ethical thought, in which the seeds of jurisprudential natural law and Western moral philosophy sprout. St. Paul would say, “And if I have prophetic powers, and understand all mysteries and all knowledge, and if I have all faith, so as to move mountains, but do not have love, I am nothing.” I Cor. 13:2.

*other*. It is always in such a context that the Christian undertakes to determine what he is to do in the world.<sup>29</sup>

Lehmann begins his ascent toward this point by noting the earliest sources of Christian ethics, with the great command of scripture to love our neighbors as ourselves.<sup>30</sup>

Love, articulated in the Golden Rule, springs up among the earliest voices of Western ethics and jurisprudence. Matthew Levering explains this thread of natural law through Christian orthodoxy:

The natural law is counted as an image in human beings of divine love which draws them toward the fulfillment of their nature, i.e, deification and union with the Godhead. Basil expressed this point of view in the following fashion: “Instruction in divine law is not from without, but simultaneously with the formation of the creature – man, I mean – a kind of rational force was implanted in us like a seed, which, by an inherent tendency, impels us toward love.”<sup>31</sup>

J.M. Kelly likewise observes this ancient, abiding notion in the roots of natural law:

The doctrine that human law and actions should conform with an eternal, higher law, having survived from classical antiquity into the early medieval and Christian world, and having been there reinforced by a separate stream of specifically Christian teaching centered on the Ten Commandments and the Gospels, underwent in the twelfth and thirteenth centuries a notable development, associated particularly with St. Thomas Aquinas. The *Decretum* of Gratian published not long after 1139, a collection and reconciliation of the canon laws in force and ultimately the basis of the *Codex Iuris Canonici*, distinguished divine or natural law from human law, but like the writings of the earliest Church Fathers, related this natural law to the Decalogue and to Christ’s commandment of love for one’s neighbour: “The law of nature is that which is contained in the Law and the Gospel, but which everyone is commanded to do unto others as he would wish to be done unto him, and is prohibited from doing unto others that which he would be unwilling to be done unto himself.” *This natural law “is antecedent both in point of time and in point of rank to all things. . . .”*<sup>32</sup>

John Ponet, an English theologian and scholar of the early 1500s, agrees and criticizes those who would rely solely on their own reason and logic; he would resort to the revelation of love:

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<sup>29</sup> PAUL LEHMANN, ETHICS IN A CHRISTIAN CONTEXT 141 (1963).

<sup>30</sup> See *id.* at 32-33 (quoting for example the pre-canonical text, *The Didache* (Cyril C. Richardson, transl. and ed. ) 1.1-6, in THE LIBRARY OF CHRISTIAN ETHICS (1953): “First, you must love God who made you, and second, your neighbor as yourself. And whatever you want people to refrain from doing to you, you must not do to them.”).

<sup>31</sup> MATTHEW LEVERING, BIBLICAL NATURAL LAW 13 (Oxford 2008) (quoting VIGEN GURORIAN, INCARNATE LOVE: ESSAYS IN ORTHODOX ETHICS 21 (Notre Dame Press 1987)).

<sup>32</sup> J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THOUGHT 141-142 (emphasis added).

This rule is the law of nature, first planted and grafted only in the mind of man, then after (for that his mind was through sin defiled, filled with darkness, and encumbered with many doubts) set forth in writing in the Decalogue or Ten Commandments, and after reduced by Christ our Savior to these two words: “Thou shalt love thy Lord God above all things, and thy neighbor as thyself.” The latter part whereof he also thus expoundeth: Whatsoever ye will that men do unto you, do ye even so to them” (Matt. 22:37-39, 7:12).

*In this law is comprehended all justice, the perfect way to serve and glorify God, and the right mean to rule every man particularly, and all men generally; and the only stay to maintain every commonwealth.*<sup>33</sup>

John Locke echoes the sentiment 300 years later as he gives a brief, practical discourse on the implications of natural law. He discusses the corrupting effects of religious popularity, power and isolation:

We intermeddle not with anything that concerns just and legal power of the civil magistrate; the government and laws of our country cannot be injured by such as love, truth, virtue, and justice; we think ourselves obliged to lay down our lives and fortunes in the defence of it. No man can say that he loves God that loves not his neighbor; no man can love his neighbor that loves not his country. ‘Tis the greatest charity to preserve the laws and rights of the nation whereof we are. A good man, and a charitable man, is to give to every man his due. From the king upon the throne to the beggar in the street.<sup>34</sup>

In the 20<sup>th</sup> century, John Finnis, the “new” natural law philosopher, in his neutral language of “practical reasonableness” articulates a diluted version of the virtue as he describes one of the few basic goods of society, what he calls “friendship:”

[T]here is the value of that sociability which in its weakest form is realized by a minimum of peace and harmony amongst men, and which ranges through the forms of human community to its strongest form in the flowering of full friendship. Some of the collaboration between one person and another is no more than instrumental to the realization by each of his own individual purposes. But friendship involves acting for the sake of one’s friend’s purposes, one’s friend’s well-being. To be in a relationship of friendship with at least one other person is a fundamental form of good, is it not?<sup>35</sup>

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<sup>33</sup> John Ponet, *A Short Treatise of Political Power, and of the True Obedience Which Subjects Owe to Kings and Other Civil Governors, with an Exhortation to All True Natural Englishmen*, in FROM IRENEUS TO GROTIUS 696-697 (quoted in pertinent part, emphasis added).

<sup>34</sup> See John Locke, *Philanthropy, or the Christian Philosophers*, in Political Writings of John Locke 233-234.

<sup>35</sup> JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 88 (1980). Of course, this is just the beginning of the Christian articulation, which demands love of all, not just love of friends. See, e.g., Matt. 5:43-45: “You have heard that it was said, ‘You shall love your neighbor and hate your enemy.’ But I say to you, love your enemies and pray for those who persecute you, so that you may be sons of your Father who is in heaven, for He causes His sun to rise on the evil and the good, and sends rain on the righteous and the unrighteous.”

Even John Rawls hints at the Golden Rule in his pluralistic, secular version of natural “duties” incumbent on individuals and society:

Whereas all obligations are accounted for by the principle of fairness, there are many natural duties, positive and negative. . . . The following are examples of natural duties: the duty of helping another when he is in need or jeopardy, providing that one can do so without excessive risk or loss to oneself; the duty not to harm or injure another; and the duty not to cause unnecessary suffering. . . . Now in contrast with obligations, it is characteristic of natural duties that they apply to us without regard to our individual acts. Moreover, they have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements. Thus, we have a natural duty not to be cruel, and a duty to help another, whether or not we have committed ourselves to these actions. . . . In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. This feature in particular suggests the propriety of the adjective “natural.”<sup>36</sup>

Dr. Martin Luther King proclaimed with prophetic and credible witness the stark and forceful primacy of love at the base of every moral precept.<sup>37</sup> In his speech, *Where Do We Go From Here?*, to the Southern Christian Leadership Conference, King explained the core of his commitment to nonviolence and peaceful justice:

And I say to you, I have also decided to stick with love, for I know that love is ultimately the only answer to mankind’s problems. And I’m going to talk about it everywhere I go. I know it isn’t popular to talk about it in some circles today. And I’m not talking about emotional bosh when I talk about love; I’m talking about a strong, demanding love. For I have seen too much hate. I’ve seen too much hate on the faces of too many Klansmen and too many White Citizens’ Councilors in the South to want to hate, myself, because every time I see it, I know that it does something to their faces and their personalities, and I say to myself that hate is too great a burden to bear. I have decided to love. If you are seeking the highest good, I think you can find it through love. And the beautiful thing is that we aren’t moving wrong when we do it, because John was right, God

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<sup>36</sup> JOHN RAWLS, *A THEORY OF JUSTICE*, Revised Edition 98 (Belknap 1999) (quoted in pertinent part). Rawls, of course, eschews natural law inasmuch as it descends from divine instruction. His source for these “natural duties” is reason alone. He wrote,

Reasoning in its most basic forms is invariant with respect to the various kinds of beings that exercise it. Hence, God’s being, however great the divine powers, does not determine the essential canons of reason. Moreover . . . the basic judgments of reasonableness must be the same, whether made by God’s reason or by ours. This invariant content of reasonableness – without which our thought collapses – doesn’t allow otherwise, however pious it might seem to attribute everything to the divine will.

John Rawls, *My Religion*, in SAMUEL FREEMAN, *RAWLS* 10 (Routledge 2007) (quoting an unpublished work).

<sup>37</sup> As suggested by these passages, I entertain a philosophical hunch that the Golden Rule may be the great, potentially unifying theory of all Western philosophy and theories of justice, but I do not attempt that apology here.

is love. He who hates does not know God, but he who loves has the key that unlocks the door to the meaning of ultimate reality. . . .<sup>38</sup>

Reinhold Niebuhr, the Christian Realist theologian and political philosopher, explains how this too-perfect, precious ideal of the Golden Rule might inform a rigorous expression of justice and policy:

The love ideal which Jesus incarnates may be too pure to be realized in life, but it offers us nevertheless an ideal toward which the religious spirit may strive. All rational idealism creates a conflict between the mind and the impulses, as in Stoicism and Kantian morality. The mind conceives ideals of justice which it tries to force upon recalcitrant selfish impulses. Real religion transmutes the limits set them by nature (family, race, group, etc.) and includes the whole human community. . . . The fact that in Jesus the spirit of love flowed out in emulation of God's love, without regard to social consequences, cannot blind the eye to the social consequences of a religiously inspired love. If modern religion were really producing it, it would mitigate the evils of the social struggle. It would, to emphasize the obvious once more, not abolish the social struggle, because it would not approximate perfection in sufficient numerous instances. The fight for justice in society will always be a fight. *But wherever the spirit of justice grows imaginative and is transmuted into love, a love in which the interests of the other are espoused, the struggle is transcended by just that much.*<sup>39</sup>

Theologian Paul Ramsey agrees that love is the primitive root of all moral philosophy, and he takes up Niebuhr's problem of translating love into social policy.<sup>40</sup> He does not propose specific policies but describes the process by which people might seek to manifest the Golden Rule into social policies approaching love:

Christian love formulates social policy by taking into account every concrete element in the situation which determines how in fact some actual good may be

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<sup>38</sup> Martin Luther King, *Where Do We Go From Here? in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 191-193* (Clayborne Carson and Kris Shephard, eds. 2001)(originally delivered in 1967).

<sup>39</sup> Reinhold Niebuhr, *The Ethic of Jesus and the Social Problem, in LOVE & JUSTICE: SELECTIONS FROM THE SHORTER WRITINGS OF REINHOLD NIEBUHR* 38 (D.B. Robertson, ed. 1957)(originally published in *Religion in Life*, 1932)(emphasis added).

<sup>40</sup> PAUL RAMSEY, BASIC CHRISTIAN ETHICS at 326, 334 – 341 (1950).

If philosophy fails to uncover permanently valid norms, the Christian continues the search and determines or posits his action in terms of the best knowledge available to him through the social or psychological sciences. . . . This in turn poses the problem: How shall the neighbor's real need be determined, and what adjustments should be made among the competing needs and claims of many neighbors? . . . We saw other examples of the independent influence Christian love exerts in making use of themes drawn from outstanding philosophical theories of ethics in the revision and reconstruction Platonism underwent in the mind of St. Augustine and Aristotelianism in the mind of St. Thomas Aquinas; and our suggestion was then that this process simply needs to be renewed and made more thoroughgoing by constant reference to New Testament ethics.

*Id.* at 346.

done for the neighbor in the state of civil society and the relationship among people living at present. . . .

Christian social ethics consists neither of intuition in search of a social policy nor of natural law possessed of a social policy. Christian love itself contains more definite or determinate directions for social policy than natural law interpreted as an intuition; in terms of these intuition should be guided. On the other hand, the ethic of love approaches the task of finding a social policy with an indefinite, indeterminate and liberating norm when this is contrasted with any legalistic understanding of the law of nature. . . .

It cannot be too often said or too strongly emphasized that biblical “justice,” when it begins to establish some order, can make use of any of the ideas or norms for determining “worldly justice” which happen to be convincing. At the same time, it must be said with equal emphasis that a Christian, impelled by love whose nature is to incarnate itself wherever there is need, cannot remain aloof but must enter fully into the problem of determining right action under the particular, concrete circumstances which surround him and his neighbor. . . .

Whether conforming to the old or helping to create a new mode of conduct, a Christian man subjects everything to this imperial test: let every man *now* consult his neighbor’s need. This may call for respecting the tried and true ways of doing things. When however we observe how these have failed in so many ways to keep pace with the world in which we and our neighbors live, who can doubt that Christian love today requires us willingness to take some new departure? Even the humblest Christian man must rapidly become willing to have the structures and customs of his world otherwise than they now are.<sup>41</sup>

In the name of morality and natural law, the traditional, common law of marriage promoted and protected structures that failed the standard of love. In the cause of social order, the courts of common law sacrificed a precept of love in marriage and family that would not subjugate one’s bodily, personal and legal existence for the use and enjoyment of another. Courts were not shy to address marriage and make judgments between wives, husbands and their interlocutors, even as the law permitted gross injustices against her in the name of divine intent.

The common law would intervene to protect a husband from liability to his wife, but would not protect her from his fists. The common law ignored violence in the home for the sake of social order, while ignoring a woman’s moral standing within her *imago dei*. The common law would permit paternalistic, marital chastisement within a perceived divine state, but it did not contemplate a measure of justice that would allow husbands to have done to themselves what they would do their wives.

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<sup>41</sup> *Id.* at 341, 342-343, 345-346, 351. Roscoe Pound made a similar point in his discourses on law and morality: “So long as for good reasons we cannot deal with such things legally, we must fall short of the moral order. But we must not allow an analytical distinction between law and morals to blind us to the need of legal treatment of such cases whenever the onward march of human knowledge puts it in our power to deal with them effectively.” ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* at 96, *supra* n. --.

Had the courts considered the root premises of the Golden Rule in their rush to defend the sanctity of marriage in the common law, the willful tolerance of violence could not be sustained. Forcing women into their place in moral and natural terms eliminated a moral root that would not permit it. Had the common law cottoned to clear, ancient morality, the Golden Rule would have condemned domestic abuse, because a natural, moral marriage will not co-exist with violence. A husband who is bound to treat his wife as himself, to love her as he loves his own body, will not subjugate, abuse and batter her, and the law would not ignore it.

Likewise, the Golden Rule does not permit purely autonomous moral discernment and radical individualism. On its face, the Golden Rule requires reference to self and to others. One cannot reckon love to one's neighbor without appreciating the neighbor's own self and perspective as a dignified human. Thus, if a marriage is to mean anything at all, for the sake of society under law, the spouses cannot be autonomous moral actors but must navigate life in mutual submission to each other, in community. If either fails in this, the entire social order indeed is disrupted. The Court rejected the old, abusive common law of marriage but replaced it with an airy, convenient premise that does not reckon with endemic human fellowship.

## **II. Moral Claims and Domestic Violence in U.S. Supreme Court Jurisprudence**

Here, I examine the cases from the U.S. Supreme Court which involve domestic violence and which deploy moral language and reasoning. For 200 years, the Court grappled with the common law of traditional marriage before discarding it altogether. In fits and starts it contemplates the justice between men and women in marriage, wrestling with the tension between violence and exploitation and the common law's philosophical justification of gender inequity. I compare and contrast Western jurisprudence and moral philosophy to the Court's expressed moral precepts and seek to square the Court's approach to the common law with the Golden Rule.

### **A. *Stein v. Bowman* (1839).**

In 1839, the Court considered the case of *Stein v. Bowman*, a dispute among competing claims to a real estate in Louisiana.<sup>42</sup> The case involved claims by various foreigners and alleged strangers related to the deceased who had settled the land with prosperity.<sup>43</sup> The litigants each provided affidavits supporting and contesting the claims of consanguinity and inheritance, and the appeal involved an issue of spousal privilege and immunity, "whether the widow of Francis Stuffle can testify to what her deceased husband told her previous to his death; which statement would go to discredit his evidence."<sup>44</sup>

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<sup>42</sup> *Stein v. Bowman*, 38 U.S. 209 (1839).

<sup>43</sup> *See id.* at 212-213.

<sup>44</sup> *Id.* at 217.

The Court found that she was incompetent to testify to her dead husband's statements upon the old and lasting rule "that the wife is not competent, *except in cases of violence upon her person*, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse."<sup>45</sup>

This is the U.S. Supreme Court's first reference regarding marital violence, however passing and indirect. It found that the evidentiary rule is intended to protect "the domestic relations from exposure," and that it "rests upon considerations connected with the peace of families."<sup>46</sup> As quoted earlier, the Court rests the rule on a moral claim to nature:

This rule is founded upon the deepest and soundest principles in our nature. Principles which have grown out of those domestic relations, that constitute the basis for civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.<sup>47</sup>

Perhaps the issue in this case was an easy application of an ancient and persistent rule, but this statement of the "deepest and soundest principles in our nature" and of the consequences of "breaking down or impairing" the sanctities and confidentiality of marriage is profound.

Doubtless, marriage and family have been central to questions of morality and social structure from the very dawn of Western thought. The Court's pronouncement about the primacy of marriage is not controversial, but the great principles have shifted with culture for thousands of years.

The Court is right about the centrality of marriage but does not acknowledge the obviously changing forms of marriage and other institutions in natural law. For example, Isidore of Seville, between 560 and 636 A.D., wrote of the history and nature of law:

. . . . Natural Right is common to all nations, and consists of what is universally held by natural instinct, not by constitution, *e.g., the mating of male and female, the succession and education of children, universal common possession, universal liberty, the right to acquire by hunting whatever may be caught in the sky, on land, and at sea.* . . . All this (and anything like it) is never unjust, but is held to be natural and equitable.<sup>48</sup>

For Isidor, natural law commended child-bearing and child-rearing, in addition to communal property without title.

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<sup>45</sup> *Id.* at 222.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 223.

<sup>48</sup> Isidore of Seville, from *Etymologies, Book 5*, in TIOUS 210 (emphasis added). FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 210 (Oliver O'Donovan & Joan Lockwood O'Donovan, eds., 1999) ("FROM IRENEUS TO GROTIUS").



St. Thomas Aquinas is the fountainhead for natural law and moral philosophy in the West since he commenced to organize the law as it existed in medieval, Christian Europe.<sup>49</sup> Quoting Aristotle, Aquinas taught that “matrimony is of the natural law:”

[M]atrimony is natural, because natural reason inclines thereto in two ways. First, in relation to the principal end of matrimony, namely the good of the offspring. For nature intends not only the begetting of offspring, but also its education and development, until it reach the perfect state of man as man, and that is the state of virtue. Hence, according to the Philosopher, we derive three things from our parents, namely, existence, nourishment and education. . . . Secondly, in relation to the secondary end of matrimony, which is the mutual services which married persons render one another in household matters. For just as natural reason dictates that men should live together, since one is not self-sufficient in all things concerning life, for which reason man is described as being naturally inclined to political society, so too among those works that are necessary for human life some are becoming to men, others to women. Wherefore nature inculcates that society of man and woman which consists in matrimony.<sup>50</sup>

The priest Aquinas, of course, drew his philosophy from Christian faith, hinging natural law to Eternal law of divine origin. His proposition here is consistent with the Bible’s witness of humanity springing from a conjugal couple, Adam and Eve.<sup>51</sup> It is also consistent with the teachings of Jesus in the Gospels, when asked about divorce:

. . . Have you not read that the one who made them at the beginning “made them male and female,” and said, “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh”? So they

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<sup>49</sup> See Robert F. Cochran, *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 UNIV. ST. THOMAS L.J. 296, 299 – 300 (2006):

Natural law’s most dominant proponent through the ages has been Thomas Aquinas . . . . Natural law teaches that we as humans were created with a nature and that, through reason, we can discern moral values as well as laws that will conform to that nature and enable us to live the fullest lives. There are “goods” - things that humans universally value such as life, knowledge, recreation, beauty, and friendship – and through reason voters, legislators, and judges can develop laws that will maximize those goods for individuals and the community.

*Id.* See also MATTHEW LEVERING, *BIBLICAL NATURAL LAW* 22 (Oxford 2008), in which Levering cites to Pope John Paul II’s encyclical, *Veritas Splendor*, to explain the incorporation of Thomistic natural law into Christian moral teaching:

The Church has often made reference to the Thomistic doctrine of natural law, including it in her own teaching on morality. . . . Even if moral-theological reflection usually distinguishes between the positive or revealed law of God and the natural law, and within the economy of salvation, between “old” and “new” law, it must not be forgotten that these and other useful distinctions always refer to that law whose author is the one and the same God, and which is always meant for man.

*Id.* (quoting John Paul II, *Veritas Splendor* §§ 44-45 (1993)).

<sup>50</sup> THOMAS AQUINAS, *SUMMA THEOLOGICA* 2699 (Christian Classics 1981)(ca. 1272) (“Whether matrimony is of Natural Law?”).

<sup>51</sup> See Gen. 1-6.

are longer two, but one flesh. Therefore, what God has joined together, let no one separate.<sup>52</sup>

The Apostle Paul repeats this theme in his Epistle to the Ephesians, but the Bible's moral precepts about family do not end with the ordination of marriage and family life.<sup>53</sup>

Much later, John Locke built his Enlightenment political philosophy of social contracts and natural law through the roots of family life.<sup>54</sup> He was concerned about property rights and inheritance within families and saw nothing in the begetting of children to imbue a father with particular authority over his children, especially as it affected inheritance and the devising of property.<sup>55</sup> Locke rejected interpretations of the Bible that grant any particular authority to men over women by virtue of Creation; construing Genesis 3:16, he wrote: "God, in this Text, gives not, that I see, any Authority to *Adam* over *Eve*, or to Men over their Wives."<sup>56</sup> In his *Second Treatise on Government*, Locke addresses the nature and implications of marriage. Locke observes that God created man with necessary drive and inclination toward society and that the first society is between man and wife.<sup>57</sup> Locke considers marriage fundamentally a contract between two parties interested in their own preservation and propagation, including the necessary care and education of its offspring.<sup>58</sup> This will be very important to the Court in 1992.

In the 20<sup>th</sup> century, John Finnis in his central discourse on natural law implicitly recognizes the centrality of family, but not marriage explicitly, to moral reasoning and society when he discusses the orders of social communities.<sup>59</sup> Like Locke, he notes the family as the very beginning of political community: "Family is a very thoroughgoing form of association, controlling or influencing every corner of the lives of its members for a considerable proportion of their lifetime."<sup>60</sup>

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<sup>52</sup> Matt. 19:4 – 6, quoting Gen. 1:27, 2:24. (New Revised Standard Version, used throughout for quotations from the Bible unless otherwise noted.)

<sup>53</sup> See Eph. 5:21-33.

<sup>54</sup> John Locke's philosophy is ubiquitous and inescapable in American political and legal thought. J.M. Kelly notes: "Already in the American colonies in the early part of the [18<sup>th</sup> century] Locke was, 'after the Bible, the principal authority relied on by the preachers to bolster up their political teachings.'" KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 219 (quoting CORWIN, 'HIGHER LAW' BACKGROUND 74). Thomas Jefferson incorporated Locke's sentiments as a protesting colonial in *A Summary View of The Rights of British America*, published to King George III in August, 1777. See Thomas Jefferson, *A Summary View of the Rights of British America*, in THE BASIC WRITINGS OF THOMAS JEFFERSON 18-19 (Philip S. Foner, ed. 1944). Voltaire cited to Locke's influence on North Carolina's colonial protection of religious freedom. VOLTAIRE, TREATISE ON TOLERANCE 13, 22 (Cambridge Univ. Press 2000, originally 1763): "Cast your eyes across the Atlantic and take a look at Carolina, whose legislation was framed by the philosopher John Locke. . . ."

<sup>55</sup> Thomas L. Pangle, *The Philosophic Understandings of Human Nature Informing the Constitution*, in CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM. . . 58, *et seq.* (Alan Bloom, ed. 1990).

<sup>56</sup> See John Locke, *The Second Treatise of Government, Chapter 7: Of Political or Civil Society*, in POLITICAL WRITINGS OF JOHN LOCKE 300 (David Wooten ed. 1993). See also Pangle, *supra* n. – .

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 136 – 138 (1980).

<sup>60</sup> *Id.* at 147-148.

Thus, we may see, from Isidore in the 500s to Finnis in the 20<sup>th</sup> century, that marriage is among the prime organizing principles of society and Western philosophies.<sup>61</sup> The manifestations of marriage and family are diverse and evolve over time, but the dominant strains have emphasized the privacy and centrality of the marital home, with the husband as sovereign.

In *Stein v. Bowman*,<sup>62</sup> the Supreme Court rested its opinion, necessarily or not, on a bold moral claim that marriage and domestic relations are at the very root of society. This is a constant theme in Western political and legal tradition. Its import is unmistakable, and its sentiment appears throughout the Court's work. The problem with the Court's declaration is its breadth and lack of definition. While the primacy of marriage and the nuclear family to society

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<sup>61</sup> Plato is outstanding in the minority of Western philosophers addressing marriage. In *The Republic*, he does not build his ideal city, the *kallipolis*, upon the first thing of marriage. Rather, he constructs his hypothetical utopia on the trades and roles demanded of a community built on Reason and Nature. See PLATO, *REPUBLIC* (G.M.A. Grube, trans., Hackett Publishing Co. 1992)(ca. 30 B.C.). In his metaphor of a city in search for justice, he describes the vaunted class of "guardians" who would guide and protect the city's political life and security. See *id.* at 48-59. Channeling Socrates, Plato strikes a feminist note but suggests a social and domestic arrangement that, "since it is contrary to custom, would incite ridicule if were carried out in practice." See *id.* at 126.

We've agreed that different natures must follow different ways of life and that the natures of men and women are different. But now we say that those different natures must follow the same way of life. Isn't that the accusation brought against us? . . . .

We meant, for example, that a male and female doctor have souls of the same nature. . . . But a doctor and a carpenter have different ones? . . . . Therefore if the male sex is seen to be different from the female with regard to a particular craft or way of life, we'll say that the relevant one must be assigned to it. But if it's apparent that they differ only in this respect, that women bear children while males beget them, we'll say that there has been no kind of proof that women are different from men with respect to what we're talking about, and we'll continue to believe that our guardians and their wives must have the same way of life. . . .

Then there is no way of life concerned with the management of the city that belongs to a woman because she's a woman or to a man because he's a man, but the various natures are distributed the same way in both creatures. Women share by nature in every way of life just as men do, but in all of them women are weaker than men. . . .

We've come around, then, to what we said before and have agreed that it isn't against nature to assign an education in music, poetry, and physical training to the wives of the guardians. . . .

I suppose that the following law goes along with the last one and the others that preceded it. . . .

That all these women are to belong in common to all the men, that none are to live privately with any man, and that the children, too, are to be possessed in common, so that no parent will know his own offspring or any child his parent. . . .

I don't think that its being beneficial would be disputed or that it would be denied that the common possession of women and children would be the greatest good, if indeed it is possible.

*Id.* at 127-132 (quoted in pertinent part for clarity and brevity). To be clear that he is in earnest, Socrates insists on testing his conclusions for consistency and concludes, "Then, the cause of the greatest good for our city has been shown to be the having of wives and children in common by the auxiliaries." *Id.* at 138. Quite clearly, traditional marriage and nuclear families are not the fundamental, high expression of human society as Plato interprets nature. The English common law and the United States Supreme Court did not adopt Plato's vision of society and family life.

and society's civilized development is certain, less sure is the form and power structure of that family.<sup>62</sup>

### B. *Barber v. Barber* (1858).

*Barber v. Barber* was the next case before the U.S. Supreme Court to address the nature of marriage. Although it does not include physical violence, the facts do involve a husband's attempt to coerce and exploit his wife, and the dissent makes a critical observation of power and abuse in a marriage.<sup>63</sup> This is a case of divorce and alimony that turns on issues of the wife's standing to sue and her state of citizenship.<sup>64</sup> The Court disclaims any federal jurisdiction over divorce and alimony actions generally, but accepts federal jurisdiction in an interstate dispute "where the husband removed to Wisconsin [from New York] for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony."<sup>65</sup> The pertinent issue is whether "a wife divorced *a mensa et thoro* can acquire another domiciliation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction, to recover from him alimony due."<sup>66</sup> The defendant argued on the nature of a divorce *a mensa et thoro*, that is, from bed-and-board, and argued that under the law the husband and wife "are still so far one person [and that] while the married relation continues to exist, they cannot become at the same time citizens of different States, within the meaning of the Federal Constitution."<sup>67</sup>

The Court disagreed, noting that the parties "would stand upon a very unequal footing, it being in the power of the husband to change his domicile at will, but not in that of the wife."<sup>68</sup> This is a rare, positive manifestation of justice consistent with the Golden Rule in the common law. The husband would not have the result lodged against him that he would lodge against his wife, and Court perceives the fundamental unfairness to her. The majority got it right and found "that a wife under a judicial sentence of separation from bed and board is entitled to make a

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<sup>62</sup> Marriage and family certainly are central to society, to the law and to reasoning and understanding of moral arguments in human communities. I criticize Justice O'Connor for her seeming rejection of this centrality in *Casey* when defers radically to individual autonomy. See n. --, *infra*. The centrality of family life, however, does not necessarily lead to such familial privacy and marital sovereignty as to prohibit the law from intervening between a violent spouse and his victim. Two prominent examples of this are the Calvinist view of "sphere sovereignty" and its Catholic cousin, "subsidiarity." See Robert F. Cochran, *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 486, 487-490 (2001). In "sphere sovereignty" the state, the church, the family each have separate, divine and cooperative authority and order, and as "all believers and congregations are of equal standing, so are all citizens and groups within a nation." *Id.* at 488. In "subsidiarity," the Catholic Church emphasizes "the importance of institutions between the individual and the state remaining independent. . . . 'A family, no less than a state, is . . . a true society, governed by a power within its sphere.'" *Id.* at 488 (quoting Pope Leo XIII, *Of New Things (Rerum Novarum)* 1891.) Nevertheless, despite the sovereignty of the family, within its sphere, the state maintains a role in the family's order, peace and stability. Pope Leo also taught, "[I]f within the precincts of the household there occur grave disturbances of mutual rights, public authority should intervene . . ." *Id.*

<sup>63</sup> See *Barber v. Barber*, 62 U.S. 582 (1858).

<sup>64</sup> See *id.* at 583.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 548. The Court notes the general rule at the time, that a wife may only sue her husband at law by a next friend if she complains for relief against him but that a husband must sue for his wife against anyone else; she has no standing of her own. If she sues in equity, she may sue him but only by a next friend on her behalf. See *id.* at 589-590.

<sup>67</sup> *Id.* at 593.

<sup>68</sup> *Id.* at 595.

domicile for herself, different from her husband, and that she may by her next friend sue her husband for alimony.”<sup>69</sup>

The dissent, led by Justice Taney, makes a vigorous, conservative statement about the “undoubted law of marriage,” resting in ancient common law, and although it does not make an explicit claim to nature, citations to Coke and Blackstone imply the ancient notion that the common law expresses the natural law by long-standing custom.<sup>70</sup>

By Coke and Blackstone it is said: “That by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union, in husband and wife, depend almost all the rights, duties and disabilities, that either of them acquire by the marriage. For this reason, a man cannot grant anything to his wife, nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. . . . The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union.”<sup>71</sup>

Upon these pillars, Justice Taney would find, “. . . that a married woman cannot during the existence of the matrimonial relation. . . become a *citizen* of a State or community different from that of which her husband is a member.”<sup>72</sup>

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<sup>69</sup> *Id.* at 597-598. Notably, it would be much more completely just for the wife had she enjoyed the legal capacity to sue for herself instead of through a next friend.

<sup>70</sup> *See id.* at 600, et seq. *See n. - - , supra*, regarding Coke; *see n. - - , infra*, regarding Blackstone.

<sup>71</sup> *Id.* at 601 (Taney, J., dissenting.) Justice O’Connor will explicitly rebuke this proposition in her opinion in *Casey*. *See Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992), *infra n. - -*. Chief Justice Taney also said in *Dred Scott v. Sanford*, writing for the majority with originalist method and familiar reliance on the common law, that black people are inferior to the white race, for reasons of nature and morality:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

*Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856) (also noting that it is “too clear for dispute” that the Declaration of Independence’s claims to the self-evidence of divine precepts did not include black people: “The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection”).

<sup>72</sup> *Id.* at 602.

Justice Taney cleaves to the common law principles and is consistent with the development of custom as a pillar of moral philosophy and jurisprudence.<sup>73</sup> Custom is a precursor to common law, as Aquinas wrote:

A human group with its own customs can be in one of two conditions, self-governing or not. If it is a free country, where people are able to make their own laws, their common consensus about a particular observance, expressed in custom, is more important than the authority of the ruler, who has the power of making law only in so far as represents the people; a whole people can make law, not a single individual. If, however, people are not free to make their own laws, or to put aside a law laid down for them by superior authority, then all the same a prevailing custom among them obtains force of law when it is allowed by those whose office it is to make laws for them; by this very fact authority seems to approve what has been brought in by custom.<sup>74</sup>

Consistently, Justice Taney would have the Court adhere to the long-standing custom and common law rule that wife is subsumed into her husband's legal identity.

In this case, however, the Court's majority did not accept the implications of the "undoubted law of marriage," to create a situation that would make the parties "stand upon a very unequal footing," virtually binding the woman to the husband who would abandon her and preventing her realistic recourse for the alimony he owed her. Instead, "whatever may have been the doubts in an earlier day," the Court ruled that her right to sue her husband by next friend rests upon "higher considerations" of equity, and that "she should be permitted to change her

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<sup>73</sup> Kelly comments on the high status of custom during the Renaissance and Reformation eras as well: Yes another criterion for law's validity appears in some late medieval writers – as it had among their predecessors – in the context of the relation of law and custom. . . . In one system, certainly, custom in the ancient sense enjoyed a special institutionalized position. This was, of course, the system of England, where St. German spoke of the various customs observed throughout England as one of the foundations of English law; "these are the customs which are properly called common law. . . and from those general customs, and other principles and maxims, the greatest part of the law of England arises". At the end of the sixteenth century Hooker records the general opinion that - even at that date – statute law was supposed often only to declare and make concrete what was always common law anyway.

KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 184-185 (quoted in pertinent part)(citing St. German, *Doctor and Student*, in CARLYLES, *MEDIEVAL THEORY* 234, and HOOKER, *LAWS OF ECCLESIASTICAL POLITY* I. 10).

<sup>73</sup> *Id.* at 351. It was this Tradition that Edmund Burke later defended against the Enlightenment attack on ancient structures in the name of rational principles. *See id.* at 251. This idea of the Common Law as superior expression of the natural law ascended to trump statutes of Parliament by the early 1600s when Chief Justice Coke wrote in *Bonham's Case*,

And it appears in our books, that in many cases the Common Law will control acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against the common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void.

*Id.* at 223 (quoting *Bonham's Case*, 8 Co. Rep. 107a (1610)). Coke thus laid the ground for judicial review by which judges interpret the law, by virtue of reason and experience, which binds the sovereign. *See* R.W.M. DIAS, *JURISPRUDENCE* 83 (Buttersworth 1985).

<sup>74</sup> *Id.* at 351.

domicile, where she may live upon her narrow allowance with the most comfort and least mortification.”<sup>75</sup>

Justice Taney was right about the history, and he was, in fact, true to custom and the common law. He was not true, however, to the root of love at the base of moral philosophy, despite the claims of the common law and tradition. The majority’s diversion from the common law custom was an innovative departure from centuries of marital law, but the majority’s ruling is a better manifestation of the Golden Rule, and its Biblical manifestation in marriage. Even as St. Paul describes the “oneness” of a husband and wife, even observing the husband as spiritual head, he prescribes a spiritual relationship that would not permit the husband’s chicanery in this case: “Husbands, love your wives, just as Christ loved the church and gave himself up for her. . . . In the same way, husbands should love their wives as they do their own bodies. He who loves his wife loves himself.”<sup>76</sup>

Justice Taney would have no trouble spotting the premise that since husbands and wife are one flesh they could not have different legal domiciles, but if the moral precept is to hold sway then the husband would not be permitted to pull this jurisdictional trick on his wife. This is the Golden Rule applied to the case, and the majority recognized the inherent inequity in the common law which ignored it.

Twenty years before this case, an early Suffragist, Sarah Grimke, daughter of a South Carolina slave-owner, added another Biblical, theological argument regarding the nature of husbands and wives.<sup>77</sup> She was a Christian who found justification for women’s equality in scripture, grounding her argument in a theology of creation, natural law and the *imago dei*. She wrote to a fellow abolitionist in Boston:

We must first view woman at the period of her creation. “And God said, Let us make man in our own image, after our likeness; and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him, male and female he created he them.” In all this sublime description of the creation of man, (which is a generic term including man and woman), there is not one particle of difference intimated as existing between them. They were both made in the image of God; dominion was given to both over every other creature, but not over each other. Created in perfect equality, they were expected to exercise vicegerence intrusted to them by their Maker, in harmony and love.<sup>78</sup>

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<sup>75</sup> *Id.* at 597-598.

<sup>76</sup> Eph. 5:25 – 33 (quoted in pertinent part, quoting Gen. 2:27).

<sup>77</sup> Catt and Shuler wrote of Grimke in their political history of the suffrage movement: “Two courageous and remarkable women, the Grimke sisters of South Carolina, had freed their slaves in 1828 and gone North. They began speaking publically in favor of abolition and were mobbed many times. They contended for the rights of woman as well as of the slaves.” CARRIE CHAPMAN CATT AND NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT* 13-14 (1926).

<sup>78</sup> Sarah Grimke, *Letters on the Equality of the Sexes, and the Condition of Woman, Letter 1*, in *THE STRUGGLE FOR WOMEN’S RIGHTS: THEORETICAL AND HISTORICAL SOURCES* 89 (1999).

Justice Taney and the common law did not conceive of the potential for gender equity in the very nature of Creation. The common law's customary claims to nature and morality were selective and did not include a thorough reading of the ancient, authoritative sources. Thus, the moral reasoning is incomplete.

The majority, although certainly not quoting the Bible, takes a tack more familiar to John Locke at the dawn of the Enlightenment. Locke considers marriage a contract between two self-interested parties with common needs and purposes, but who are free to contract when their interests diverge on other matters.<sup>79</sup>

But the husband and wife, though they have but one common concern, yet having different understandings, will unavoidably sometimes have different wills too; it therefore being necessary that the last determination, i.e. the rule, should be placed somewhere, it naturally falls to the man's share, as the abler and stronger. But this, reaching but to the things of their common interest and property leaves the wife in the full and free possession of what by contract is her peculiar right, and gives the husband no more power over her life than she has over his. The power of the husband being so far from that of an absolute monarch that the wife has, in many cases, a liberty to separate from him, where natural right or their contract allows it, whether that contract be made by themselves in the state of nature, or by the common customs or laws of the country they live in; and the children upon such separation fall to the father or mother's lot, as such contract does determine.<sup>80</sup>

Locke says that marriage ought to be, by nature, a conjugal contract, between the man and the woman, implying that she have liberty and power to negotiate the terms and retain liberty over everything that is not the "one common concern," propagation and child rearing. The majority thus suggests that this case is the sort that falls beyond the common ground of conjugal procreation and is within the free contractual rights of the wife, who surely would not have made this bargain. The majority opinion is in closer alignment with St. Paul's directive of mutual submission in marriage, and Locke's Enlightenment view of contractual marriage.<sup>81</sup>

Between the majority and Justice Taney's dissent are two claims to great principles, a concept of the constitution of marriage in the common law, and to basic equity in favor of a legally impaired and victimized wife. In this 1859 case, equity prevailed over the "undoubted" common law. The majority succeeded in recognizing injustice manifest in "earlier days," and in a primitive form, liberated the wife from her husband's legal superiority, refusing to permit him to do to her what he would not have done to himself. *Barber* might have been a remarkable advance for women before the law, but it is historically isolated and did not have a lasting effect in the 19<sup>th</sup> century to improve the legal lot of wives and women.

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<sup>79</sup> See John Locke, *The Second Treatise of Government, Chapter 7: Of Political or Civil Society*, in POLITICAL WRITINGS OF JOHN LOCKE 300 (David Wooten ed. 1993).

<sup>80</sup> *Id.* at 302.

<sup>81</sup> As noted above, Locke also built his philosophy on the first thing of the Golden Rule. See n.--, *supra*.



**C. *Thompson v. Thompson* (1910).**

*Thompson v. Thompson*, coinciding with the surging woman suffrage movement in the United States, illuminates a dramatic social pivot in American society and law.<sup>82</sup> It is a classic struggle between a conservative defense of long-standing custom and a quickly evolving public sentiment made manifest in local statutes. The Court construed a new District of Columbia statute that granted new powers of standing for a wife to sue on her own behalf, and the question was, “Under that statute may a wife bring an action to recover damages for an assault and battery upon her person by the husband?”<sup>83</sup> The Court found that she could not.

Although the Court does not make an explicit claim to nature or morality in its decision, the implications are clear in its heightened language:

At the common law the husband and wife were regarded as one, - the legal existence of the wife during coverture being merged with that of the husband; and that, generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband’s consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other. In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the states looking to the relief of a married woman from the disabilities imposed her as a *femme covert* by the common law. Under these laws, she has been empowered to control and dispose of her own property free from constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as if she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property, and to protect the security of her person against the wrongs and assaults of other. . . .

. . . Their obvious purpose is, in some respects, to treat the wife as a *femme sole*, and to a large extent to alter the common-law theory of the unity of husband and wife.<sup>84</sup>

The issue in the case was whether D.C. had “gone so far” as to enable a wife to sue her husband in tort for domestic violence.<sup>85</sup>

Under the title of “Power of Wife to Trade and to Sue and Be Sued,” the D.C. statutes included this language, “Married women shall have the power . . . to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully

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<sup>82</sup> *Thompson v. Thompson*, 218 U.S. 611 (1910).

<sup>83</sup> *Id.* 614.

<sup>84</sup> *Id.* at 614-615.

<sup>85</sup> *See id.*

and freely as if they were unmarried.”<sup>86</sup> The Court explained that the issue turned on its interpretation of the statute and gave this rule of construction: “In construing a statute, the courts are to have in mind the old law and the change intended to be effected by passage of the new.”<sup>87</sup>

The court acknowledged that the obvious purpose of the statute was to give a right to maintain actions in her own name, but not to give a woman a cause of action against her husband because of the common-law institution of marriage.<sup>88</sup> The Court said that the legislature could not possibly have meant to “revolutionize the law governing the relation of husband and wife as between themselves.”<sup>89</sup> “Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such *radical and far-reaching changes* should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention.”<sup>90</sup>

It was or certainly would have been a remarkable departure from the common law. Just six years earlier, the Court made this finding in *Tinker v. Colwell*:<sup>91</sup>

We think the authorities show the husband had certain and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act; because the wife is in law incapable of giving any consent to affect the husband’s rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and wilful.<sup>92</sup>

The Court then made a bold claim about the nature of marriage:

It is also said that the husband has, so to speak, a property in the body and a right to the personal enjoyment of his wife. For the invasion of this right the law permits him to sue as husband. . . . Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. *This is a right of the highest kind, upon the thorough maintenance of*

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<sup>86</sup> *Id.* at 615-616.

<sup>87</sup> *Id.* at 616.

<sup>88</sup> *See id.* at 617.

<sup>89</sup> *Id.* at 619.

<sup>90</sup> *Id.* at 618 (emphasis added).

<sup>91</sup> *Tinker v. Colwell*, 193 U.S. 473 (1904) (considering whether a husband’s judgment against his wife’s paramour for “criminal conversation” with her could survive the adulterer’s bankruptcy and holding that the judgment survived because of the malicious harm against the husband’s property right in his wife’s body).

<sup>92</sup> *Id.* at 481. These are the “sanctities” of marriage, and the Court quotes Blackstone again: “Adultery, or criminal conversation with a man’s wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be none greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages are usually very large and exemplary.” *Id.* at 481-482 (quoting BLACKSTONE’S COMMENTARIES).

*which the whole social order rests, and in order to the maintenance of the action is may properly be described as a property right.*<sup>93</sup>

The Court's description of a right of the "highest kind" is nothing if not virtually divine. The Court declares that the entire social order rests on the idea that a husband has a property right in the sexual enjoyment of his wife.<sup>94</sup> If the Court only recently had ruled that a husband has a property right in the body of his wife, it would be hard pressed to let that property sue its owner for harming it, as the new D.C. statute would permit in *Thompson*.

The majority opined that this suit was just "another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of common law."<sup>95</sup> Forty years earlier, the Court had rejected another such attempt when Myra Bradwell attempted to join the Illinois bar.<sup>96</sup> The Court found that she had no such right because she was a woman, and Justice Bradley, in concurrence, went beyond the bare constitutional and state law claims to make made stark and normative findings about the very nature of a woman in society and her capacity within the law, human and divine, and it is worth a lengthy quotation:

[T]he civil law, as well as nature herself, has always recognized as wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a

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<sup>93</sup> *Id.* 507 (emphasis added).

<sup>94</sup> The court essentially is arguing that society has developed around this phenomenon of a husband's legal dominance of the wife so that the principle's existence becomes its justification. This is a manifestation of the *is/ought* problem in natural law; that is, can observable facts of human nature render normative guidance for moral activity? As Mill wrote, the institution of marriage that subjugates women is not the result of moral contemplation but is the result of physical weakness and dominance by men over history. See MILL, *THE SUBJUGATION OF WOMEN* at ---, *supra* n. ---. John Finnis explains that natural law should not flow from observations of what "is" in human nature but that natural law and its moral norms, should flow from reason. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 33-48 (2005, originally 1980). I argue that moral norms, even in judicial application, should derive from the Golden Rule, whether by revelation or reason, with its roots deep in the soil of human dignity.

<sup>95</sup> *Id.* at 619. See Jonathan L. Hafetz, "A Man's Home is His Castle?": *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 203-204 (2002):

[T]he great social changes of the late nineteenth and early twentieth centuries altered this conception of the home. Urbanization, industrialization, and mass immigration transformed the nation's landscape, sparking fears its homes and families were being undermined and endangering the entire social order. There was a growing consensus that the era's main social problems, including crime, poverty, and disease, could be addressed at the level of the family. Reformers expressed increasing concern about divorce, desertions, permissive child rearing, and the increasing "restlessness" of women in their role as homemakers. . . . Many saw the home – "the sacred, the holy word Home" – as both the primary source of social problems and the keys to their solution.

<sup>96</sup> *Bardwell v. Illinois*, 83 U.S. 130 (1872).

woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had not legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modification of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for women's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding social responsibilities. In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience in the due administration of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.<sup>97</sup>

These pronouncements were precedent to *Thompson* case, and they surely reflect the moral timbre of the 19<sup>th</sup> century.

In *Thompson*, besides its general aversion to the "revolution," the Court held that the "perpetration of such atrocious wrongs [of domestic violence] affords adequate grounds for relief under the statutes of divorce and alimony," and the wife "may resort to the criminal courts,

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<sup>97</sup> *Id.* at 141-142.

which it is to be presumed, will inflict punishment commensurate with the offense committed.”<sup>98</sup> Again, here is the law guarding women as wards, rather than recognizing women as people with independent rights against an abusive, violent husband, under whose legal identity she must subsist.<sup>99</sup>

The majority certainly was consistent with the common law. Blackstone said that, despite great legal disabilities and subordination of wives and women, the marriage laws of England “are for the most part intended for her protection and benefit.”<sup>100</sup> The paternal protection of women, however, required immersion into a man’s legal identity; otherwise she would be left exposed to the wilds of legal incapacity. This is consistent with the common law’s advance for two centuries:

At common law the husband had untrammelled right to his wife’s services whether rendered to him in his home or business or whether rendered to third persons. . . . [N]o case has been found where at common law the husband by a consensual act could emancipate his wife in manner similar to a parent’s gift to a child of his rights to its services. The equitable reforms of the eighteenth century gave little aid to the working woman as against her husband. . . .<sup>101</sup>

She thus could have no standing to sue him.

Justice Harlan, in dissent, agreed that the D.C. statute, in fact, “destroys the unity of the marriage association as it had previously existed. It makes radical change in the relation of man and wife as those relations were at common law in the District.”<sup>102</sup> He says this is clear in the language of the statute and that it is the majority who is ignoring, willfully, the plain, “irresistible” intent of the language.<sup>103</sup> “No discrimination is made. . . between the persons

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<sup>98</sup> *Id.* at 617, 619. The Court also worried that the liberal view would “open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander, and libel and alleged injuries to property of the one or the other, by husband against wife, or wife against husband.” *Id.* at 617-618. The Court was probably right. If a woman could sue her husband for the tort of battery while she was pregnant, she probably could sue for any other tort he might commit against her.

<sup>99</sup> If the Court here and the common law were attentive to the moral roots of the marital tradition they defended, they might have passed through Anglo-American custom to church teaching, like Aquinas, and onto scripture. In Malachi, the prophet condemns the people for being unfaithful to God, and he delivers this message:

And you do this well: You cover the LORD’s altar with tears, with weeping and groaning because he no longer regards the offspring or accepts it with favor at your hand. You ask, “Why does he not?” Because the LORD was a witness between you and the wife of your youth, to whom you have been faithless, though she is your companion and your wife by covenant. Did not the one God make her? Both flesh and spirit are his. And what does the one God desire? Godly offspring. So look to yourselves, and do not let anyone be faithless to the wife of his youth. *For I hate divorce, says the LORD, the God of Israel, and covering one’s garment with violence, says the Lord of hosts.* So take heed to yourselves and do not be faithless.

Malachi 2: 13-17 (emphasis added). The Court is defending a common law tradition that is the manifestation of a corrupt, incomplete moral position that is not consistent with its own foundational underpinnings.

<sup>100</sup> BLACKSTONE’S COMMENTARIES ON THE LAW OF ENGLAND, Vol. 1 341-342 (Wayne Morrison, ed. 2001); see *Walker v. Walker’s Executor*, 76 U.S. 743 (1869).

<sup>101</sup> See, e.g., Joseph Warren, *Husband’s Right to Wife’s Services*, 38 HARV. L. REV. 421, 421-422 (1925).

<sup>102</sup> *Id.* at 622.

<sup>103</sup> *Id.*

charged with committing the tort. No exception is made for the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by the statute.” He accepts the majority’s accusation that this is an attempt to effect radical changes on the common law but accuses the majority of defeating “the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning.”<sup>104</sup>

The new statute and Justice Harlan’s understanding of it are at odds with the common law and custom but are consistent with the arc of moral teaching in Western thought, namely, that all people should be free and equal. This is not a notion novel to the Enlightenment of 18<sup>th</sup> century revolutions but harks to classical and common roots. J.M. Kelly tracks the roots of the idea in the West, sounding deeply in human dignity springing from the *imago dei*:

The theory that in principle all human beings are equal - as God’s children – is held universally among the writers of the High Middle Ages as it is among their predecessors. Ivo of Chartres (d. 1116) uses it to support the rule that if a free woman knowingly takes a slave in marriage, the marriage is to be regarded as valid, for “we all have one Father in heaven.” In the *Decretum*, Gratian contains a canon which adds to this: “and all men, rich and poor, free and slave, will have to render equally an account of themselves and of their souls.” In the same era the Glossators expressed the same principle, if from the standpoint of the newly revived Roman law rather than from that of Christian doctrine. Bulgarus spoke of the “law of nature by which all men are equal,” and Placentinus said that “observation of nature” showed the equality of all.<sup>105</sup>

The Court’s adherence to tradition and the common law is not consistent with Plato’s rationale that would abolish marriage among the highest of the social order because women could perform all functions of men in the *kallipolis*.<sup>106</sup> The proposition is not consistent with Paul’s teaching of mutual submission between husband and wife, rather than subordination.<sup>107</sup>

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<sup>104</sup> *Id.* 623-624.

<sup>105</sup> KELLY, A SHORT HISTORY OF WESTERN LEGAL Theory at 146. Necessarily, however, he then proceeds to add to the list common exceptions to the principle, like lenience by rank in criminal law, immunity for clergy, slavery and political subordination.

<sup>106</sup> See Plato, *supra* n. - -.

<sup>107</sup> As Paul wrote in his discourse on propriety in worship: “In the Lord, however, woman is not independent of man, nor is man independent of woman. For as woman came from man, so also man is born of woman. But everything comes from God.” I Cor. 11: 11-12. In his letter to the Ephesians, Paul describes the Church with a metaphor of marriage:

Husbands, love your wives, just as Christ loved the church and gave himself up for her to make her holy, cleansing her by the washing with water through the word, and to present her to himself as a radiant church, without stain or wrinkle or any other blemish, but holy and blameless. In this same way, husbands ought to love their wives as their own bodies. He who loves his wife loves himself. After all, no one ever hated his own body, but he feeds and cares for it, just as Christ does the church— for we are members of his body. "For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh." This is a profound mystery—but I am talking about Christ and the church. However, each one of you also must love his wife as he loves himself, and the wife must respect her husband.

The Court may be consistent with Thomas Aquinas, at least in his theology, who would give a husband the right to sue for his wife's execution upon a finding of adultery.<sup>108</sup> Such a claim of property rights in a wife's body certainly is not consistent with Locke's vision of conjugal contracts in which a wife should have the ability to negotiate for anything she can beyond the common purpose of procreation and child-rearing.<sup>109</sup>

The *Thompson* case illustrates the battle lines set for 20<sup>th</sup> century innovations to change the status of women and wives in the law. The "old law," and the Court said, is common law that relegates a woman's civil and political rights to the guardianship and ownership of her husband. The popular opinion, however, was changing, and the suffrage movement was nearing its constitutional victory with the 19<sup>th</sup> Amendment.

The divided Court here illustrates another developing tension among the justices, the tension between long-held custom as common law principle and the actual lived-experience of the people. The majority and the dissent here did not delve deeply into the divide, but a difference is clear. The conservative majority, unwilling to stretch the new statute into the common law, spent no ink on the facts of the abuse. Justice Harlan, however, noted the circumstances of the wife's suit, three incidents over three days and "assaults by him upon her on different days. . . she being at the time pregnant, as the husband then well knew."<sup>110</sup> One might suppose that the majority was more comfortable rejecting her standing to sue if it did not dwell on the unpleasant reality. This foreshadows Justice O'Connor in *Casey v. Planned Parenthood*, basing her decision on the lived-experience of domestic violence victims rather than the common law's optimistic ignorance of the crime.

At the beginning of the 20<sup>th</sup> century, the common law's roots in claims to nature and diving order became increasingly suspect as a skeptical society shifted beneath the law.<sup>111</sup> These

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Eph. 5: 25-33. This is a teaching of mutual submission and service, not subordination or coercion, and it is underscored by his admonishment in Galatians as he criticized social hierarchies in the congregations: "There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus." Gal. 3:28.

<sup>108</sup> See Aquinas, *supra* n. - - .

<sup>109</sup> See Locke, *supra* n. - - .

<sup>110</sup> *Id.* 620. The majority did not discuss the facts of the abuse.

<sup>111</sup> To some extent at least, this is the 20<sup>th</sup> century's inheritance from the French Enlightenment, Voltaire at the front, who condemned social institutions and customs they felt were absurd in the light of empirical reason. For example, here is Voltaire on religious freedom, harshly criticizing religious dogma, which some might have called conviction:

We know, too, what has been the cost of Christians disputing over dogma: blood as flowed aplenty, both on the scaffold and on the battlefield, from the fourth century right up to our own day. We shall confine ourselves here to the wars and horrors which followed on the Reformation in France, and look into their causes. We must hope that a brief and honest account of so many calamities might open the eyes of the ignorant, as it will touch the hearts of the good. . . .

And so the history of our entire continent gives proof that it is foolish either to promulgate religious intolerance or to base policy upon it.

Cast your eyes across the Atlantic and take a look at Carolina, whose legislation was framed by the philosopher John Locke. There you need only seven heads of families to establish a religion approved by law, a freedom which has contrived to ferment no disorder whatever. . . .

In the end, tolerance has been responsible for not a single civil war, whereas intolerance has covered the earth with corpses. Let us therefore judge between two opposing figures, between the mother who would have us slay her son, and the mother who will part with him in order that he may live.

were and are massive upheavals in the established order of family life, but the new ideas of the equality and personhood of women made their own claims to nature, the nature of women, the nature of society and family. At the dawn of the suffrage movement, in 1848, the Seneca Falls convention delivered its Declaration of Sentiments and Resolutions, sounding its claims in the familiar, Enlightenment language of self-evident natural law:

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness . . . .

*Resolved*, That all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority.

*Resolved*, That woman is man's equal - was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such.<sup>112</sup>

The suffragists' notion of legal equality and political standing is consistent with Plato's view of women in the just city, his *kallipolis*, where he said, "Then there is no way of life concerned with the management of the city that belongs to a woman because she's a woman or to a man because he's a man, but the various natures are distributed the same way in both creatures."<sup>113</sup> It is even consistent in principle with Aquinas who believed that all people shared in the *imago dei*.<sup>114</sup> This is consistent with Locke's view of marriage as social and conjugal contracts, in which wives might bargain for any term outside or child-rearing.<sup>115</sup> This is certainly consistent with Voltaire's Enlightenment rejection of the social institutions he deemed

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VOLTAIRE, TREATISE ON TOLERANCE 13, 22 (Cambridge Univ. Press 2000, originally 1763). Perhaps he is throwing the baby out with the bathwater, but certainly the suffrage movement and the civil rights movement in America challenged long-established social and cultural conventions with moral and religious authority.

<sup>112</sup> See *Declaration of Sentiments and Resolutions, Seneca Falls*, in THE STRUGGLE FOR WOMEN'S RIGHTS: THEORETICAL AND HISTORICAL SOURCES (George Klosko and Margaret G. Klosko, eds.) 100-103 (1999).

<sup>113</sup> See Plato, *supra* n. --.

<sup>114</sup> John Finnis, in his survey of Aquinas, offers this explanation of Aquinas's method of understanding human nature:

One understands human nature by understanding human capacities, those capacities by understanding human acts, and those acts by understanding their objects. That is Aquinas' primary methodological or, if you like, epistemological principle for considering the nature of an active being. But the objects of humanly chosen acts are precisely the basic purposes, i.e. goods, with which Aquinas is concerned, as we have seen, in this most elaborated account of first practical principles. So the epistemic source of first practical principles is not human nature or a prior, theoretical understanding of human nature. . . . Rather, the epistemic relationship is the reverse: any deep understanding of human nature, i.e. of the capacities which will be fulfilled by action which participates in and realizes those goods, those *perfections*, is an understanding which has amongst its sources our primary, undemonstrated but genuine practical knowledge of those goods and purposes . . . . They are perfections, aspects of the *fulfilment*, flourishing, completion, full-being, of the flesh-and-blood human beings (and the palpable human groups or communities) in whom they can be instantiated.

JOHN FINNIS, AQUINAS (Oxford 1998) 90-91 (translation parentheticals omitted).

<sup>115</sup> See Locke, *supra* n. --.



absurd before rational thought.<sup>116</sup> It is the vital underpinning of John Stuart Mill's call for the liberation of women.<sup>117</sup> This is even consistent with the Apostle Paul's teaching in his Epistle to the Galatians:

Now before faith came, we were imprisoned and guarded under the law until faith would be revealed. Therefore the law was our disciplinarian until Christ came, so that we might be justified by faith. But now that faith has come, we are no longer subject to a disciplinarian, for in Christ Jesus you are all children of God through faith. As many of you as were baptized into Christ have clothed yourself with Christ. *There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.*<sup>118</sup>

Although rooted in sound philosophy and moral reasoning, the call for equal standing before the law was not consistent with the long-standing tradition of the common law, which entrenched a *status quo* that granted half of humanity superiority over the other half. The cultural habit of male-domination diluted the clear and ancient call for equality and dignity.<sup>119</sup> John Stuart Mill also marked this point, that entrenched power becomes custom which becomes culture, then sounds itself in perceived morality:

The sufferings, immoralities, evils of all sorts, produced in innumerable cases by the subjection of individual women to individual men, are far too terrible to be overlooked. . . . And it is perfectly obvious that the abuse of power cannot be very much checked while the power remains. It is a power given, or offered, not to good men, or to decently respectable men, but to all men; the most brutal, and the

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<sup>116</sup> See, n.--, *supra*.

<sup>117</sup> See Mill, *supra* n. --. Mill wrote in England in 1869:

What good are we to expect from the changes proposed in our customs and institutions? Would mankind be at all better off if women were free? If not, why disturb their minds, and attempt to make a social revolution in the name of an abstract right? . . . We may be told that the evil would outweigh the good, but the reality of the good admits of no dispute. In regard, however, to the larger question, the removal of women's disabilities - their recognition as the equals of men in all that belongs to citizenship - the opening to them of all honourable employments, and of the training and education which qualifies for those employments - there are many persons for whom it is not enough that the inequality has no just or legitimate defense; they require to be told what express advantage would be obtained by abolishing it.

To which let me first answer, the advantage of having the most universal and pervading of all human relations regulated by justice instead of injustice. . . . All the selfish propensities, the self-worship, the unjust self-preference, which exist among mankind, have their source and root in, and derive their principal nourishment from, the present constitution of the relation between men and women.

<sup>118</sup> Gal. 3:23-28.

<sup>119</sup> This echoes a controversy among early Christian writers about the natural law's command for communal property. See n - -, *supra*, regarding this issue between Isidore of Seville, Rufino the Canonists, and as observed by John Locke. They observed that, although communal property was the manifest law of nature, the imposition of private property ownership and the drive for wealth had eroded the divine precept, which became a custom, which became a law, which became essentially a new natural state of affairs. Thus, avaricious plotting for property and power became accepted, righteous custom, then law, despite an earlier moral prohibition against it.

most criminal. There is no check but that of opinion, and such men are in general within the reach of no opinion but that of men like themselves.<sup>120</sup>

The Court did not take up the moral philosophy of domestic violence and gender roles again until 1992, and by then, the traditional, common law of marriage had no defenders, not even among the originalists on the bench. In 1910, though, the Court was willing to reject unambiguous statutory language because it simply could not countenance such a “revolution.” Permitting a wife to sue her husband for physical violence simply was beyond the moral pale. The divine state of nature would not permit it. The 20<sup>th</sup> century would take that notion to task.

### **E. *Casey v. Planned Parenthood* (1992).**

Between 1910 and 1992, America experienced unprecedented and dramatic social and legal developments in family and gender roles, too expansive for thorough summary here, including universal suffrage, mobilizing the female work force during World War II, the civil rights movement, the second women’s rights movement and the rise of feminist politics to challenge the common law understanding of marriage.<sup>121</sup> During these tumultuous decades the Supreme Court considered several cases involving domestic violence.<sup>122</sup> Remarkably, however, in none of these cases did the Court invoke deploy moral arguments or discuss the tension between the “old law” of marriage and gender and an evolving social order. The language of morality and claims to nature ebbed dramatically from the Court’s discourse in the 20<sup>th</sup> century.

In the landmark case of *Casey v. Planned Parenthood*, however, the issue came roaring back to inform the Court’s stances on abortion rights.<sup>123</sup> *Casey* is a constitutional challenge to a Pennsylvania statute limiting access to abortions and mandating several prerequisites to obtaining an abortion, including a provision requiring “that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion.”<sup>124</sup> Justice Sandra Day O’Connor wrote the court’s opinion regarding this section.<sup>125</sup>

Before embarking on the constitutional merits of the statute, she began her opinion with long dicta setting the stage for her rulings. Among other issues, she wrote a lengthy section on

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<sup>120</sup> John Stuart Mill, *The Subjection of Women*, in JOHN STUART MILL: ON LIBERTY & THE SUBJECTION OF WOMEN 219-220 (2006, originally 1869).

<sup>121</sup> See, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000).; see, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000)(describing the effect of feminism and the women’s movement in explaining the phenomenon of domestic violence and in crafting laws in the 1970s and 1980s to address domestic violence with specificity); see also Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLORIDA ST. U. L.R. 1 (2009)(criticizing earlier forms of “dominance feminism” which viewed women primarily as subordinate victims to male domination in favor of a feminism which argues that women’s identities are shaped by various social, cultural and spiritual dynamics, not merely by forces of gender subjugation).

<sup>122</sup> See n – *supra* (listing cases related to domestic violence that did not include explicit discussions of morality or jurisprudence).

<sup>123</sup> *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992).

<sup>124</sup> See *id.* at 844 (citing Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203 – 3220 (1990)).

<sup>125</sup> See *id.* at 844.

the liberty of women under the law, a section that is clearly feminist and would have been a jolt to the Court of 1904 who wrote about the husband's property rights in the body of his wife for his enjoyment and for the begetting of children.<sup>126</sup> It is a remarkable, explicit departure from centuries of common law and is a testament to the mighty fluctuations of the 20<sup>th</sup> century, yet she is making unmistakable claims to spiritual, physical (and metaphysical) nature:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the "right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents "have respected the private realm of family life which the state cannot enter. . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state. . . .

Her moral claim is to defer moral claims to individual conscience, not systemic custom or legal direction. Had she written this before the cultural convulsions of the 20<sup>th</sup> century (had she been allowed to practice law and be a judge), these ideas would have been foreign heresy, especially as applied to women. The notion that a married or single woman had individually protected rights related to marriage, family and parenting could not have withstood any judicial scrutiny, even as of 1904, at least inasmuch as they apply to wives and women.<sup>127</sup> She continued:

. . . Abortion is a unique act. . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. *That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique in the law.* The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she make the sacrifice. *Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.* The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>128</sup>

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<sup>126</sup> See *Tinker v. Colwell*, *supra* n. --.

<sup>127</sup> See n.----, *supra*.

<sup>128</sup> *Id.* at 851-852 (first emphasis in original, others added) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977), and *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Perhaps this is ironic considering the North Carolina court's holding that the man's household was the intimate frontier beyond which the government should not intrude. See n.----, *supra*. Is Justice O'Connor merely narrowing the boundaries of individual sovereignty, or is the comparison of reproductive rights genuinely distinct from the sovereignty of private, family life?

Her turn from marital unity and marriage as the societal cornerstone toward a woman's individual "conception of her spiritual imperatives" is massively important, and perhaps even revolutionary. Her philosophy will turn the case and lead her to this remarkable statement: "Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family."<sup>129</sup>

This is no claim to the common law or to long-standing tradition; it is a rejection of those bases of reckoning nature and morality altogether. Rather, hers is an observation of nature from a woman's point of view on the characteristics of the personal experience itself, rather than upon the social mores and precepts that have informed the Court in the past. Although her moral metric of deference to the individual is a clear rejection of the immoral subjugation of women in the common law, it nonetheless is an incomplete moral proposition. As measured against the Golden Rule, Justice O'Connor's moral guide is only, "...as you would do to yourself;" she defers only to the individual's preference, without accommodating, "Do unto others." She is preeminently focused on the spiritual discernment of the individual, with only passing attention to the others involved in this transaction. Her moral framework is better than the traditional common law, but without infusing her deference to individual discernment with a heightened concern for the peaceful husbands and fathers, not to mention the future child, she tips the balance of equal protection of law from one favored class to another, without finding a sound moral equilibrium.

Justice O'Connor's opinion is a triumph for John Stuart Mill. He wrote of the "present system, which entirely subordinates the weaker sex to the stronger, rests upon theory only," and he proceeds to discuss the claims to nature that justify the subordination of women to men:<sup>130</sup>

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<sup>129</sup> *Id.* at 898. Even conservative John Finnis, claiming natural law roots in Aquinas and a vehement opponent of abortion rights, presumably would agree with Justice O'Connor, at least on this aspect of her reasoning in *Casey*:

The fact is that certain human rights can only be securely enjoyed in certain sorts of milieu – a context or framework of mutual respect and trust and common understanding, an environment which is physically healthy and in which the weak can go about without fear of the whims of the strong. . . .

Now if it is the case that sexuality is a powerful force which only with some difficulty, and always precariously, can be integrated with other aspects of human personality and well-being – so that it enhances rather than destroys friendship and the care of children, for example – and if it is further the case that human sexual psychology has a bias towards regarding other persons as bodily objects of desire and potential for sexual release and gratification, and as mere items in an erotically flavored classification (e.g. "women"), rather than as full persons with personal and individual sensitivities, restraints, and life-plans, then there is reason for fostering a milieu in which children can be brought up (and parents assisted rather than hindered in bringing them up) so that they are relatively free from inward subjection to an egoistic, impulsive, or depersonalized sexuality. . . . [T]hat this is an aspect of the common good, and fit matter for laws which limit the boundless exercise of certain rights, can hardly be doubted by anyone who attends to the facts of human psychology as they bear on the realization of basic goods. And while all this could be, and sometimes has been, expressed in terms of human rights, there is no need to consider inept, still less redundant, the reference to public morality, preferred by contemporary legislators with impressive unanimity.

JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 216-217 (1980).

<sup>130</sup> *Id.* at 137.

[T]he adoption of this system of inequality never was the result of deliberation, or forethought, or any social ideas, or any notion whatever of what conduced to the benefit of humanity or the good order of society. It arose simply from the fact that from the very earliest twilight of human society, every woman (owing to the value attached to her by men, combined with inferiority in muscular strength) was found in a state of bondage to some man. Laws and systems of polity always begin by recognizing the relations they find already existing between individuals . . . . No presumption in its favour, therefore, can be drawn from the fact of its existence. . . .

. . . . So true is it that unnatural usually means only uncustomary, and that everything which is usual appears natural. The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural. . . .<sup>131</sup>

Justice O'Connor's argument is a clear claim to nature, but one that observes the individual's lived, physical experience, personal relationships and spiritual reckoning, not society-at-large or the institution of marriage. As the Court had worried in 1839, the implications of her claims to nature might "break down or impair the great principles which protect the sanctities of husband and wife [which would] be to destroy the best solace of human existence."<sup>132</sup>

The Pennsylvania statute, in contrast to Justice O'Connor, reflects the traditional, common law view of marriage, at least inasmuch as the husband and wife are considered a unity in regard to childrearing. The statute requires a married woman who seeks an abortion to certify that she has notified her husband of her intention to undergo an abortion, or to certify that her husband was not one who impregnated her, that her husband cannot be located, that the pregnancy is the result of a sexual assault, or that the notification itself will provoke her husband or another to inflict violence upon her.<sup>133</sup> Justice O'Connor is explicit in her rejection of the common law: "The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices."<sup>134</sup>

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<sup>131</sup> *Id.* at 137-138, 144 – 146, 155, 160-161.

<sup>132</sup> *See* Stein v. Bowman, *supra* n. ---.

<sup>133</sup> *See* Casey, 505 U.S. at 887.

<sup>134</sup> *Id.* at 898. Justice Blackmun, concurring, observes and affirms Justice O'Connor's new framework and the step away from the common law's claim to Nature:

The State does not compensate women for their services; instead it assumes that they owe this duty as a matter of course. This assumption – that women can simply be forced to accept the "natural" status and incidents of motherhood – appears to rest on a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual or the Constitution.

*Id.* at 928-929.

The Court struck down the spousal notification provision of the statute as unconstitutional, as imposing burdens that were too great and unjustified before the woman's 14<sup>th</sup> Amendment rights to equal protection.<sup>135</sup> The greatest imposition the Court finds is the potential for the law to require a woman to obtain notification from a violent, abusive husband.

Here, Justice O'Connor embarks on the Court's longest and most detailed observations of domestic violence as a social phenomenon, something far greater than "trifling violence" in a marriage.<sup>136</sup> The Court finds that the potential for domestic violence is so great that mandating spousal notification will constitute "a substantial obstacle" to the woman's constitutional, Equal Protection rights.<sup>137</sup> If this is not a moral claim to nature, then it is a claim to the empirically observable phenomenon, the actual nature and dynamics of domestic violence.<sup>138</sup> Instead of noting domestic violence as a feature in the facts of a particular case, the Court finds a societal affliction, and in relieving women of this potential obstacle, the Court is choosing a new moral

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<sup>135</sup> *See id.* at 888.

<sup>136</sup> *See id.* at 888-894.

<sup>137</sup> *Id.* at 893-894.

<sup>138</sup> Justice O'Connor cited studies by the American Medical Association that reported two million victims of domestic violence in the preceding year and a 1985 survey that found that one in eight husbands had assaulted their wives in that year, and she noted that the AMA believed those to be underestimates. *See id.* at 891. She notes that 11,000 women are assaulted by their male partners on an average day in the United States, and "[i]n families where wifebeating takes place, moreover, child abuse is often present as well." *Id.* She then observes spousal abuse than may be coercive, even if it is not physically violent:

Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income.

*Id.* at 891-892 (citing LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 27-28 (1984); Herbert, Silver & Ellard, *Coping with an Abusive Relationship: I. How and Why do Women Stay?*, 53 *J. MARRIAGE & THE FAMILY* 311 (1991); Aguirre, *Why do They Return? Abused Wives in Shelters*, 30 *J. NAT. ASSOC. OF SOCIAL WORKERS*, 350, 352 (1985)).

She then explains the practical effect of domestic violence on the woman who would be required to notify her spouse before she undergoes an abortion:

[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse. . . . Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. . . . And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault. . . because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins. . . . If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence a great many spousal rape victims will not be exempt from the notification requirement. . . . We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

*Id.* at 893 – 894 (quoted in pertinent part).

framework.<sup>139</sup> Justice Harlan foreshadowed this note with his recitation of the details of domestic violence in *Thompson* in 1910, instead of ignoring the facts of the case for the principles of the common law.<sup>140</sup>

With some sympathy for husbands, Justice O'Connor moves to discuss the nature of marriage and its state in the law. This is her passing glance at “do unto others,” in her deference to the mother’s individual moral discernment. She confirms that “a husband has a deep and proper concern and interest . . . in his wife’s pregnancy and in the grown and development of the fetus she is carrying.”<sup>141</sup> “Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.”<sup>142</sup> The Court concludes that the wife and mother should have the “balance weigh in her favor” if she and her husband disagree on this decision because she is “more directly and immediately affected by the pregnancy.”<sup>143</sup> This is because “the marital couple is not an independent entity with a mind or heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup,” so the “Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.”<sup>144</sup>

Finally in her analysis, she makes manifest the rejection of the traditional, common law of marriage which had conveyed upon a husband “a right of the highest kind, upon the thorough maintenance of which the whole social order rests,” as the Court said in 1839.<sup>145</sup>

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bardwell v. State* [1873]. . . three Members of this Court reaffirmed the common-law principle that “a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states.” . . . Only one generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibilities,” that precluded full and independent legal status under the Constitution. . . . These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.<sup>146</sup>

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<sup>139</sup> In his concurrence, Justice Blackmun agrees and describes the Court’s shift: “In striking down the Pennsylvania statute’s spousal notification requirement, the Court has established a framework for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice.” *Id.* at 924-925.

<sup>140</sup> See *Thompson*, 218 U.S. at 620, *supra* n. --.

<sup>141</sup> *Id.* at 895 (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69 (1976)).

<sup>142</sup> *Id.* at 896.

<sup>143</sup> *Id.* This stands in sharp contrast to Locke’s liberal assumption that the husband would have the final word on matters of child-bearing and rearing. See Locke, *supra* n.--.

<sup>144</sup> *Id.* at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. at 453).

<sup>145</sup> See *Tinker v. Colwell*, *supra* n.---

<sup>146</sup> *Id.* at 897 (quoting *Bardwell v. State*, 16 Wall. 130, 21 L.Ed. 442 (1873); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). See *Bardwell*, *supra* n. --.

Naturally, the dissent was vigorous, but, notably, the dissent did not claim the common law version of marriage or the subordination of wives. No one rose to defend the old understanding of the family or the individual.

Generally stated, Justice Scalia dissented because his originalist analysis does not recognize a Constitutional right to terminate an abortion, so such a right cannot be violated.<sup>147</sup> He reaches this conclusion “for the same reason I reach the conclusion that bigamy is not constitutionally protected – because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the *long-standing traditions* of American society have permitted it to be legally proscribed.”<sup>148</sup> Justice Scalia defends the place of Tradition in constitutional analysis, saying that “we may not disregard a specific, relevant tradition protecting, or denying protection to the asserted right.”<sup>149</sup>

Justice Scalia makes no mention whatever of the millennium’s worth of Tradition that subsumed a wife’s preference over child-rearing to the husband into whose legal identity she is immersed. He does not address at all the Court’s rejection of the common-law principles of marriage and a wife’s rights in “coverture.” He does not defend that Tradition, while he dissents in favor of a tradition proscribing abortion. He likewise does not dispute the Court’s fact finding on domestic violence, although he does argue that the empirical facts of domestic violence should have no bearing on the constitutional analysis.<sup>150</sup>

Chief Justice Rehnquist, in his dissenting opinion, does take up the nature of marriage, but he likewise takes no issue with the Court’s final rejection of the common-law notions of marriage and gender. Instead, Chief Justice Rehnquist considers the State’s instrumental interest in the marital relationship.<sup>151</sup>

The State also has a legitimate interest in promoting “the integrity of the marital relationship. This Court has previously recognized “the importance of the marital relationship our society.” In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communications between spouses and encourages collaborative decisionmaking, and thereby fosters marital integrity. . . . Petitioners argue that the notification requirement does not further such interest; they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus petitioners see the law as a totally irrational means of furthering whatever

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<sup>147</sup> *Id.* at 980.

<sup>148</sup> *Id.* at 980 (emphasis added).

<sup>149</sup> *Id.* at 981 (quoting his own opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989).

<sup>150</sup> *Id.* at 992.

<sup>151</sup> *See id.* at 974. This is pertinent, because the plurality agree that strict scrutiny should apply to the analysis of the statute because they find that the right at stake is a fundamental right. The dissent does not find that it is a fundamental right, so the statute must merely survive a rational basis test. Chief Justice Rehnquist would find that the State has such a substantial interest in the marriage relationship so that the spousal notification provision would survive constitutional scrutiny. *See id.* at 974-976.



legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife.<sup>152</sup>

This is the extent of the Chief Justice's exploration of marriage. He makes a prudential argument, not a moral argument, in favor of the provision to sustain the State's interest in healthy marriages. This is a far stretch from the Court's declarations that a wife's legal unity with her husband is necessary to the maintenance of society. He, Justice Scalia and those who joined them apparently are satisfied with Justice O'Connor's and Justice Blackmun's declarations that the common law tradition of marriage is constitutionally dead.

No one on the Court disputes that a husband does not have a right in his wife's body or that she is not subordinate to him in the law. Justice O'Connor makes a very different explanation of the very nature of marriage and womanhood, and although the dissent is vigorous on the right to abortion, no one argues for the traditional view of marriage and gender. The very idea, once the crux of human society, seems to have vanished from the discussion.<sup>153</sup>

Justice O'Connor and the Court dispense with the flawed moral vision of the common law, but her deference to individualism swings the pendulum too far. Had the Golden Rule found its application in Justice O'Connor's discourse on the moral balance between a wife and husband, she still would not have moved off her rejection of spousal notification for those in a violent partnership. The corruption of violence and intimidation renders the calculus unbearable, and the imbalance of power and control could not accommodate justly a wife seeking to do to

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<sup>152</sup> *Id.* at 975. (citing *Danforth*, 428 U.S. at 69; *Labine v. Vincent*, 401 U.S. 532, 538 (1971)).

<sup>153</sup> The very terms of the discussion changed as well. The Court does not, either because of its reluctance or something less conscious, enter into the fray of moral philosophy or bold declarations of society's foundations. In the absence of comment within the opinion, we may surmise that this is the result of efforts in the 20<sup>th</sup> century, from liberals and conservatives, to adopt morally neutral language. An example from the left is John Rawls who struck out to describe a system of moral philosophy which threads a pluralistic needle through the religious and political thicket of American thought without resorting to any religious revelation of morality. See JOHN RAWLS, *POLITICAL LIBERALISM* xxiv – xxv (Columbia Univ. Press 2005), quoted on this point, *infra*, n. ---. From the right, John Finnis, champion of the “new” natural law, pursues the virtue of speaking in terms of reason, not explicit morality, to bridge denominational differences with universal, self-evident truths. Finnis identifies seven, exhaustive, self-evident “basic goods” which should prompt moral action: knowledge, life, play, aesthetic experience, sociability, practical reasonableness and religion. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 85-89 (1980). At the conclusion of his opus, he writes: “I have not presented natural law or the principles of practical reasonableness as expressions of God's will. And I have positively declined to explain obligation in terms of conformity to a superior will.” *Id.* at 403. Robert Cochran explains the reluctance by natural law philosophers to use the language of morality in favor of the language of reason:

One great advantage of both natural law and common grace is that they provide a basis for law that can be shared among those of various religions and of no religious faith. I believe that judicial decisions should generally be expressed in natural law terms, rather than explicitly religious terms. As Kent Greenwalt and Stephen Carter have noted, a judicial opinion “is not an explanation of how a decision was reached, but rather a formalized justification for it.” Law expressed in natural law terms is more likely to generate public support than law expressed in religious terms.

Robert Cochran, *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 301 (2006). The fight over the bases of the decision and its outcome, however, belie the respective attempts at moral neutrality or generality.

her husband as she would have him do to her. She would not have her own dignity erased, so he cannot extend his power to destroy it. The wife cannot allow her husband to eviscerate her dignity, her *imago dei*, her love for herself, if she ever hopes to love anyone else, because she must love them as she loves herself. She need not submit to abuse under the Golden Rule, because to love at all she must love herself. The Golden Rule is cyclical and mutually referential, demanding love of others, requiring the love of self as a measure.

On the other hand, for a peaceful, faithful husband, a wife ought not be able to end a pregnancy without his knowledge; his stake is too high. Their spiritual and moral intercourse in marriage would require a more fulsome, perhaps messier and more difficult, manifestation of the Golden Rule, where each would seek the better end of the other, in commerce with each other. A wife would not have her husband terminate her pregnancy without notice or her consent, so neither should she terminate the pregnancy in which he participated and will participate if he is peacefully and lovingly invested in the marriage. Justice O'Connor errs on the side of the domestic violence victim who would suffer the most in this dilemma, rather than the husbands who do not know of their wives pregnancies and abortions. Surely a balance may be had.

Justice O'Connor is manifesting a pure liberal devotion to individual autonomy, a likely response to centuries of cultural and legal relegation of wives to husbands, but she need not swing so far away from understanding the centrality of marriage to the problem. She treats the wife and husband as merely cooperating individuals rather than as a necessary, intermediate and integral community.<sup>154</sup> She discards the virtue of marriage altogether out of caution against abusive marriage.

The Golden Rule would not require it, although the Golden Rule would not permit domestic violence and the situation she anticipates either. She hung her moral conclusion on a radical autonomy for mothers but ought to have hung it on an ethic of love that would neither permit a husband to force his wife into or out of pregnancy by violence or abuse, nor permit a wife to abort a pregnancy without giving a peaceful, conscientious husband and father a say in the matter. Neither act is an act of love, and the moral conclusions for either situation are not mutually exclusive. The family and marriage inform the well being and flourishing of both wife and husband and their children, and they do not and cannot act truly autonomously. If so, there is no marriage or family at all.

Professor Timothy Jackson, using the Greek word *agape* to capture the ethic of love in the Golden Rule, laments the poverty of self-love that would elevate autonomy above all other

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<sup>154</sup> See Robert F. Cochran, *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 486, 490 (2001). Identifying "intermediate communities" as "families, religious congregations, and other associations that stand between the individual and the state." He continues,

[T]he megastructures of modern life (big government, big business, big unions) are "typically alienating, that is, they are not helpful in providing meaning and identity for individual existence," but in the modern world's alternative, private life, "the individual is left very much to his own devices, and thus is uncertain and anxious." In a sense, in modern America we are all homeless.

Intermediate communities provide opportunities for fellowship, friendship, and meaning.

*Id.* at 490 (quoting PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 2 (1977)).

virtues, and poverty of a moralism that would dispense with any attention to the individual in context:

Autonomy fails as a touchstone for Christian ethics. . . . [F]eminists are quite right to extol such virtues as honesty, courage,, and creativity and to reject all forms of heteronomy, for both men and women. Understood as either the external coercion of action and belief or the internal alienation from one's authentic self, heteronomy is destructive of persons. But autonomy . . . is not the only alternative to heteronomy. . . . Scripture suggests that when we try to begin morally with human autonomy, our own good and powerful will, we end up with either overweening pride or crippling despair. Either we think we are capable of always doing the right thing, of saving our own souls, of reforming the entire world, and the like, all on our own steam. Or we think that we are hopeless wretches caught, without recourse, in a futile and guilty universe. The latter is, no doubt, a truer picture of our lived reality, but it forgets the good news of the gospel: that we are not alone, neither left to our own devices nor simply at the mercy of blind nature or fallen human beings.<sup>155</sup>

Perhaps Justice O'Connor did not need to reform the Court's moral calculus to reach her decision, but she did. While her opinion is a relief from the immoral vision of the common law, it is not a complete moral idea. She rightly considers the context of the people in the conflict but not enough of it. Love would not force a woman into the violent clutches of her abuser, but it likewise would not alienate a peaceful husband from his family and children. The Court might then have sought to refine the law at issue, but then it risks legislative amendment rather than judicial review. Perhaps the Court could have done nothing more or less than it did, in the necessity to reject and bury the old common law and the moral precepts upon which it rested. If the Court were going to address the implicitly moral common law and reject it, it should have replaced it with a more fulsome moral framework.

#### F. *Georgia v. Randolph* (2006).

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<sup>155</sup> TIMOTHY P. JACKSON, THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE 57 (2003). Note that Jackson is not "pro-choice" but argues that *agape* leads to moral conclusions against elective abortions. I cite his reasoning here to explore Justice O'Connor's moral discourse as it affects the relationship between a wife-mother and husband-father. This is where she stakes out her moral claims. She defers any moral reasoning on the issue of abortion to individual women who are pregnant. She did not need to punt, as Jackson explains:

The genius of true love is its attention to personal detail; such love *is* a respecter of persons, in all their uniqueness. While Platonic love ignores or transcends the particular in order to love the pure form, thereby making more personal kinds of love impossible, *agape* attends to and even accents the particular, thereby enhancing individual commitments. The agapist is not unegoistic because she would lose all personal identity (including her own) in the white light of infinity, but rather because she judges all human lives to be sacred and (with God's help) treats them accordingly. Love of neighbor is preceded by and grounded in, but not negated by, love of God. . . . [L]ove honors the consciences of others (within widest possible limits) precisely because they are fellow creatures made in the Image of God; free beings with shared needs and potentials, yet fallible beings marred by the same Fall that touches everyone.

*Id.* at 53.

Between *Casey* in 1992 and *Georgia v. Randolph* in 2006, the Court heard at least two landmark domestic violence cases. Those two cases did not invoke discussions of morality and claims to nature in the law.<sup>156</sup> In *Randolph v. Georgia*, however, Justice Scalia and Justice Stevens engaged in a full-throated debate about Tradition, the status of women before the law, the nature of domestic violence, property and social change.<sup>157</sup>

In the midst of a “domestic dispute” with her husband, Janet Randolph complained to responding police that her husband had abducted their child, but he told police that he had taken the child to a neighbor’s house.<sup>158</sup> She and the police retrieved the child, but upon their return to the marital home, she told the police that her husband had “items of drug evidence” related to his cocaine use in the house.<sup>159</sup> The officer asked her husband for consent to search the house which he “unequivocally refused;” then the officer turned to Janet for consent which she “readily gave.”<sup>160</sup> The police searched the house, found the evidence, and Randolph was indicted for possession of cocaine.<sup>161</sup> He moved to suppress the evidence, arguing that it was an illegal search over his refusal, but the trial court admitted the evidence, finding that Janet had common authority to consent to the search.<sup>162</sup>

The intermediate appellate court reversed, and the Georgia Supreme Court affirmed, finding that “the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.”<sup>163</sup> Justice Souter wrote for the majority of the U.S. Supreme Court and affirmed the Georgia court, finding that Randolph’s refusal was clear, that Janet Randolph did not need immediate protection from domestic violence, and that the police identified no other exigent circumstances to justify the search.<sup>164</sup>

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<sup>156</sup> In *U.S. v. Morrison*, 529 U.S. 598 (2000), the Supreme Court addressed the constitutionality of a portion of the Violence Against Women Act of 1994, considering whether the Commerce Clause or the Fourteenth Amendment authorized VAWA’s federal civil cause of action. *See id.* at 601. The Court found that the civil cause of action, for a victim against her abuser, did not survive constitutional scrutiny and struck that portion of the act. *See id.* at 607. The majority found that domestic violence and crimes against women did not generate the sort of effect on interstate commerce that would authorize Congress’s reach. *See id.* at 615. The opinion does not take up any moral arguments or claims to nature, but it contains significant discussion of the scope and reach of domestic violence in the national economy.

In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the Court considered a wife’s civil rights action against her municipality, claiming that the police department’s failure to enforce the civil protection order against her husband amounted to a denial of her due process rights. *See id.* at 751. I discuss this case more fully below in Section IV, at note --- .

<sup>157</sup> *Georgia v. Randolph*, 547 U.S. 103 (2006).

<sup>158</sup> *See id.* at 107.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See id.* at 107-108.

<sup>163</sup> *Id.* at 108 (quoting 604 S.E.2d 835, 836 (Ga. 2004)).

<sup>164</sup> *See id.* at 122-123. In dictum in the majority opinion, responding to the dissent, Justice Souter pondered whether domestic violence in the home might have made a difference:

The dissent’s argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering,

Chief Justice Roberts led the dissenting justices with an originalist argument that the Fourth Amendment protects privacy, so a “warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Co-occupants have “assumed the risk that one of their number might permit a common area to be searched.”<sup>165</sup>

In the separate writings, however, the justices break from the straightforward Fourth Amendment issue to debate the place of societal changes in constitutional application; this is a classic discourse between originalism, resting on Tradition, and more active interpretations that grapple with “the ever-changing complexity of human life.”<sup>166</sup> Although the justices do not make explicit moral claims, in light of the history at issue, the underpinnings of each argument are implicitly, inherently moral, especially since both historic views, in their day, rested on moral and natural claims in society.

Justice Stevens confronts the dissenters’ originalist approach as neglecting the reality of a changing society. He begins, “This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance to changes in our society.”<sup>167</sup> He then deploys a brief survey of this evolution of home and family that was to be a cornerstone of moral society:

At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a “house” or “castle” unless authorized to do so by a valid warrant. . . . Every occupant of the home has a right – protected by the common law for centuries and by the Fourth Amendment since 1791 – to refuse entry. When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right. To be sure that the waiver is voluntary, it is sound practice – a practice some Justices of this Court thought necessary to make the waiver voluntary – for the officer to advise the occupant of that right. The issue in this case relates to the content of the advice that the officer should provide when met at the door by a man and a woman who are apparently joint tenants or joint owners of the property.

In the 18<sup>th</sup> century, when the Fourth Amendment was adopted, the advice would have been quite different from what is appropriate today. Given the then-prevailing dramatic differences between the property rights of the husband and

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say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. . . . The undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent.

*Id.* at 118.

<sup>165</sup> *Id.* at 128.

<sup>166</sup> *See id.* at 125 (Breyer concurring).

<sup>167</sup> *Id.* at 123.

the far lesser rights of the wife, only the consent of the husband would matter. Whether the “master of the house” consented or objected, his decision would control. Thus if “original understanding” were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that the male and the female are equal partners.

In today’s world the only advice that an officer could properly give should make it clear that each of the partners has a constitutional right that he or she may independently assert or waive. Assuming that both spouses are competent, neither one is a master possessing the power to override the other’s constitutional right to deny entry to their castle.<sup>168</sup>

Justice Scalia defends his dissenting analysis and corrects Justice Stevens’s characterization of his opinion. He writes that the original meaning of the Fourth Amendment need not change because the law to which it refers might change over time: “It is entirely clear. . . that *if* the matter *did* depend solely on property rights, a latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome – without altering the Fourth Amendment itself.”<sup>169</sup> He continues:

This reference to changeable law presents no problems for the originalist. No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights. If it is indeed true, therefore, that a wife in 1791 could not authorize the search of her husband’s house, the fact that current property law provides otherwise is no more troublesome for the originalist than the well-established fact that a State must compensate its takings of even those property rights that did not exist at the time of the founding.<sup>170</sup>

Justice Breyer enters the fray with his concurring opinion, eschewing bright-line Fourth Amendment analysis:

Rather, [the Fourth Amendment] recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms “unreasonable searches and seizures.” And this Court continuously emphasized that reasonableness is measured by examining the totality of the circumstances. . . . Thus, the “totality of the circumstances” present here do not suffice to justify abandoning the Fourth Amendment’s traditional hostility to police entry into a home without a warrant.<sup>171</sup>

The Justices’ colloquy does not make explicit moral claims, but the moral terms are implicit and necessary. Justice Scalia, defending originalism and deriding Justice Stevens’s “panegyric to the equal rights of women under modern property law,” explains that the Fourth

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<sup>168</sup> *Id.* at 123-125.

<sup>169</sup> *Id.* at 143.

<sup>170</sup> *Id.* at 144-145.

<sup>171</sup> *Id.* at 125-126 (internal citations omitted).

Amendment's constitutional lessons must be understood by the law to which it refers.<sup>172</sup> He stipulates, at least *arguendo*, that the law has changed regarding the property rights of women and wives. Neither he nor Justice Stevens note in their opinions that the old view was a fully moral proposition, that the legal subordination of wives to husbands was supposed to be the law of nature and God.<sup>173</sup>

If the ancient law to which the Fourth Amendment refers disposes of the issue, as Justice Scalia suggests, then the analysis occurs in a thoroughly moral landscape. The law to which the Fourth Amendment referred in the 18<sup>th</sup> century was a manifestation of morality and a claim to the nature of family and gender, so the law to which the Fourth Amendment now refers either must be a repudiation of those morals, an evolution of natural morality, a clearer understanding of the morality itself, or an amoral, positive proposition, which rejects the moral category.

Justice Stevens argues that constitutional law should shift to acknowledge change in our society, here the moral and legal status of women.<sup>174</sup> Justice Scalia argues that while the constitutional law must not change, despite society's changing views of morality and nature, the law to which it refers and upon which we must understand it, certainly does change, yet he would not permit the Court's constitutional interpretation to change to suit the evolution.<sup>175</sup> For either of these Justices, however, the case would turn on the stark contrast between the moral contours of marriage and gender at the founding and this day.

In the late 20<sup>th</sup> century, this is the tension John Rawls sought to alleviate with his theories of liberalism, trying to create societal and political stability through pluralism, reckoning the competing visions of moral life and working to accommodate old maxims to new issues. Rawls's purpose in his moral and political philosophy was to devise a system by which irreconcilable, competing "comprehensive" systems, like religion, might exist perpetually and stably in a political context.<sup>176</sup> He noted the need of such pluralism made necessary by history, specifically demanded by the Reformation:

Yet despite the significance of other controversies and of principles addressed to settling them, the fact of religious division remains. For this reason, political liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and non-religious doctrines. This pluralism is not seen as a disaster but rather as the natural outcome of the activities of human reason under enduring free institutions. To see reasonable pluralism as a disaster is to see the exercise of reason under the conditions of freedom itself as a disaster. Indeed the success of liberal constitutionalism came as a discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist society. Before the successful and peaceful practice of toleration in societies with liberal institutions, there was no way of

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<sup>172</sup> See *id.* at 144; compare with , n. ---, *infra*, where Justice Scalia employs a different analysis intent on sticking with the law of the founding era rather than admitting a "changeable" referent law.

<sup>173</sup> See, *i.e.*, n.----, *supra*.

<sup>174</sup> See *id.* at 123.

<sup>175</sup> See *id.* at 144-145.

<sup>176</sup> See JOHN RAWLS, POLITICAL LIBERALISM xxix (Columbia Univ. Press 2005).

knowing that possibility. It is more natural to believe, as the centuries-long practice of intolerance appeared to confirm, that social unity and concord requires agreement on a general and comprehensive religious, philosophical, or moral doctrine. Intolerance was accepted as a condition of social order and stability. The weakening of that belief helps to clear the way for liberal institutions. Perhaps the doctrine of free faith developed because it was difficult, if not impossible, to believe in the damnation of those with whom we have, with trust and confidence, long and fruitfully cooperated in maintaining a just society.<sup>177</sup>

He then offers an example from American history of applying the principles necessary to build and sustain this pluralist stability:

The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women. I think it is a matter of understanding what earlier principles require under changed circumstances and of insisting that they now can be honored in existing institutions.<sup>178</sup>

Rawls was not ignoring morality but striving to create a framework in which moral pluralism might thrive instead of destroying itself. The Court is playing out this conversation implicitly.

The Declaration of Independence professes that the Creator endowed humanity with the self-evident virtues of equality, an express, definite and universal moral claim to nature. In 1787, the common law did not contemplate that “all men” might include all women, but Rawls, whether he would claim it or not, would import the great moral claim in natural law to the great changing complexities of American life. He would project the moral precept of equality to all people, as America itself did in word and deed in the 20<sup>th</sup> century. This is Justice Breyer’s view, accommodating moral and cultural evolution, if not improvement, of the law, a gradual squaring of the common law with gender justice consistent with love and human dignity.

Justice Scalia’s originalism, hanging on tradition and the now-dead common law of marriage, likely would not accommodate such a contemporary application of the founding principles. In this case, to interpret the Fourth Amendment, he would consider potential changes in the law to which it refers, changes that might affect the outcome of the case. In the next case, however, he would refuse to look beyond the era of the constitutional founding, an era of common law subjugation of women.

### **G. *Giles v. California* (2008).**

In 2008, the Court took up the doctrine of forfeiture in a domestic violence case in which the defendant was convicted of murdering his girlfriend.<sup>179</sup> The Court considered “whether a defendant forfeits his Sixth Amendment right to confront witnesses against him when a judge

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<sup>177</sup> JOHN RAWLS, *POLITICAL LIBERALISM* xxiv – xxv (Columbia Univ. Press 2005).

<sup>178</sup> *Id.* at xxix.

<sup>179</sup> *Giles v. California*, 128 S.Ct. 2678 (2008).



determines that a wrongful act by the defendant made the witness unavailable to testify at trial.”<sup>180</sup>

In this case the witness-victim was the defendant’s girlfriend whom he had murdered and who thus was unavailable to testify.<sup>181</sup> The prosecutors presented and the trial court admitted the victim’s previous statements to a police officer in a domestic violence call three weeks before the shooting. She told the officer that the defendant had accused her of having an affair, had grabbed her by the shirt, lifted her off the floor and choked her; when she fell to the floor, he punched her in the head and face and threatened to kill her with a knife if he ever found her cheating on him.<sup>182</sup>

After his conviction, the defendant challenged the admission of these statements as a violation of his right to confront the witness testifying against him, but the California appellate court affirmed the conviction and the admission of the statements upon the theory of forfeiture by wrongdoing.<sup>183</sup> Here, Justice Scalia led the majority to apply its earlier ruling in *Crawford v. Washington* to determine whether the forfeiture theory accepted by the California court is a “founding-era exception to the confrontation right.”<sup>184</sup> After embarking on a historical review of cases considering confrontation, the majority declined the exception articulated by the California court, vacated the ruling and remanded the case.<sup>185</sup> This evaluation of history and the founding-era metric prompted a direct exchange between Justice Souter and Justice Scalia that implicates the moral underpinnings of the Court’s view of family life and domestic violence in addition to the evidentiary question.

To determine if founding-era common law recognized such an exception to the right to confrontation, Justice Scalia briefed two English cases of the era.<sup>186</sup> He concludes from those cases that unopposed testimony would not have been admitted unless the defendant acted with a specific intent to keep the witness from testifying; that is, murdering her to keep her from testifying rather than murdering her for some other reason.<sup>187</sup>

He first considered *King v. Woodcock*, in which William Woodcock stood accused of killing his wife whom he had beaten and left for dead.<sup>188</sup> Before her death, a magistrate took her account of the crime, under oath, and the prosecution sought to admit the statement against the defendant.<sup>189</sup> The English court explained that these out of court statements could only be admitted as a dying declaration or if the defendant had had opportunity to depose the witness against him. Because the defendant had not been brought before the examining magistrate and

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<sup>180</sup> *Id.* at 2681.

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*

<sup>183</sup> *See id.* (relying on *Crawford v. Washington*, 541 U.S. 36 (2004) in which the Court considered exceptions to the Confrontation Clause and limited exceptions to those that existed at the founding, including forfeiture by wrongdoing).

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* at 2693.

<sup>186</sup> *See id.* at 2684 – 2685. Justice Scalia also cited to treatises from 1814, 1816 and 1858, which are, at least, old.

<sup>187</sup> *See id.* at 2864.

<sup>188</sup> *See id.* at 2864 - 2865 (discussing *King v. Woodcock*, 1 Leach 500, 501-504, 168 Eng. Rep. 352, 353-354 (1789)).

<sup>189</sup> *See id.*

had not been given the opportunity of contradicting its facts, the court found that “unconfronted” statement was only admissible if the victim were in the “apprehension of death” or “quietly resigned and submitting to her fate.”<sup>190</sup> The court then admitted the statement as a dying declaration, yet Justice Scalia presents the case as an example defining the common law that informs the Confrontation Clause. He does see an exception there to admit the evidence despite that the witness was unavailable to testify against her murderer.<sup>191</sup>

Next, Justice Scalia discussed *King v. Dingler*, in which a man stabbed his wife to death.<sup>192</sup> She spent twelve days in the hospital before succumbing, and the magistrate took her statement under oath on the day after the stabbing.<sup>193</sup> The prosecutor agreed with the judge that the statement was not a dying declaration and that the defendant had not confronted the statement, but the prosecutor argued that “it was the best evidence that the nature of the case would afford.”<sup>194</sup> Citing to *Woodcock*, the court refused to admit the evidence.<sup>195</sup>

Justice Breyer dissents, disputes the majority’s historical analysis and argues that the defendant’s intent is clear in the very coercive nature of domestic violence.<sup>196</sup> Justice Breyer argues that the old cases do not demand a specific intent to keep the witness from testifying but that they require only a showing that the witness was kept from testifying by an intentional act by the defendant.<sup>197</sup> He cites to the Court’s own “leading case” on forfeiture and its maxim that “no one shall be permitted to take advantage of his own wrong. . . .

What more ‘evil practice,’ what greater ‘wrong,’ than to murder the witness?  
And what greater evidentiary ‘advantage’ could one derive from that wrong than  
thereby to prevent the witness from testifying, *e.g.*, preventing the witness from  
describing a history of physical abuse that is not consistent with the defendant’s  
claim that he killed her in self-defense?<sup>198</sup>

Justice Breyer next turns to the possibility that the ancient courts could not have begun to contemplate the dynamics of domestic violence or an abuser’s coercive intent manifest in the nature of the abusive relationship because of their social context.<sup>199</sup>

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<sup>190</sup> *See id.*

<sup>191</sup> *See id.*

<sup>192</sup> *See id.* at 2685 (discussing *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791)).

<sup>193</sup> *See id.*

<sup>194</sup> *See id.* (quoting *Dingler*, 2 Leach at 563).

<sup>195</sup> *See id.*

<sup>196</sup> *See id.* at 2695, *et seq.*

<sup>197</sup> *See id.* at 2695 – 2696 (citing Lord Morley’s Case, 6 How. St. Tr. 769 (H. & L. 1666) (finding that similar evidence could be read if the witness was “detained by the means of procurement of the prisoner”); Harrison’s Case, 12 How. St. Tr. 833 (H. & L. 1692); Lord Fenwick’s Case, 13 How. St. Tr. 537 (H. & L. 1696); Queen v. Scaife, 17 Ad. E. 238, 117 Eng. Rep. 1271 (Q. & B. 1851); Reynolds v. U.S., 98 U.S. 145 (1879); Drayton v. Wells, 10 S.C.L. 409 (1819); Williams v. State, 19 Ga. 403 (1856)).

<sup>198</sup> *Id.* at 2697 (quoting Reynolds, 98 U.S. at 158 - 159). Justice Breyer later quotes *Reynolds* for the proposition that the “Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.” Reynolds, 98 U.S. at 158.

<sup>199</sup> *See id.* at 2703-2794.

The defendant's state of mind only arises as an issue in forfeiture cases where the witness has made prior statements against the defendant and where there is a possible motive for the killing other than to prevent the witness from testifying. . . . We can see from modern cases that this occurs almost exclusively in the domestic violence context, where a victim of the violence makes statements to the police and where it is not certain whether the defendant subsequently killed her to prevent her from testifying, to retaliate against her for making statements, or in the course of another abusive incident. But 200 years ago, it might have been seen as futile for women to hale their abusers before a Marian magistrate where they would make such a statement.<sup>200</sup>

Here, to illustrate why a woman might have been reluctant to hale her abuser into court to seek relief from domestic violence, in the 18<sup>th</sup> or 19<sup>th</sup> centuries, he quotes the North Carolina court from 1868, standing up for the sanctity of the home: "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."<sup>201</sup>

This confirms and is consistent with John Stuart Mill's observation in his treatise, *The Subjugation of Women*, describing the plight of an abused woman who seeks to avail herself of the law against her husband:

In no other case (except that of a child) is the person who has been proved judicially to have suffered an injury, replaced under the physical power of the culprit who inflicted it. Accordingly wives, even in the most extreme and protracted cases of bodily ill usage, hardly ever avail themselves of the law made for their protection: and if, in a moment of irrepressible indignation, or by the interference of neighbours, they are induced to do so, their whole effort afterwards is to disclose as little as they can, and to beg off their tyrant from his merited chastisement.<sup>202</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 2704 (quoting *State v. Rhodes*, 61 N.C. 453, 459 (1868)(*per curiam*)). The North Carolina court explained: For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which could result from raising the curtain, and exposing to public curiosity and criticism, the nursery and bed chamber. Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.

*Rhodes*, 61 N.C. at 458. Demonstrating some contextual awareness, however, the North Carolina court noted, "From what has been said it will be seen how much the subject is at sea. And, probably, it ever will be so: for it will always be influenced by the habits, manners and conditions of every community." *Id.* at 456.

<sup>202</sup> John Stuart Mill, *The Subjection of Women* at 147-148. See also n.--, *supra*, in which the Supreme Court in 1910 said that wives could have no private causes of action but must rely on police and prosecutors to protect and vindicate her against domestic violence.

Arguing that the founding-era courts would not have and could not have considered such factors as domestic abuse of isolation, coercion, power or control, Justice Breyer declares that the majority's opinion rests "at most on common-law silence on the subject. The cases it cites tell us next to nothing about admission of uncontroverted statements," because they were either proper depositions or dying declarations.<sup>203</sup> Justice Breyer concludes,

The rule of forfeiture is implicated primarily where domestic abuse is at issue. In such a case, a murder victim may have previously given a testimonial statement, say, to the police, about an abuser's attacks; and introduction of that statement may be at issue in a later trial for the abuser's subsequent murder of the victim. This is not an uncommon occurrence. . . . Regardless of a defendant's purpose, threats, further violence, and ultimately murder, can stop victims from testifying. . . . A *constitutional* evidentiary requirement that insists upon a showing of purpose (rather than simply intent or probabilistic knowledge) may permit the domestic partner who made the threats, caused the violence, or even murdered the victim to avoid conviction for earlier crimes by taking advantage of later ones.<sup>204</sup>

For the majority, Justice Scalia accuses Justice Breyer of proposing two standards for the Confrontation Clause, one for domestic violence crimes and one for all others.<sup>205</sup> He acknowledges that domestic violence is an "intolerable offense," and he exhibits insight into the nature of domestic violence in this context, consistent with "today's understanding" of domestic violence:

Acts of domestic violence are intended to dissuade a victim from resorting to outside help, and includes conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>206</sup>

Justice Scalia understands domestic violence with contemporary sophistication but would rely on the founding-era tradition, manifest in the common law, rather than his own understanding. He would demand proof of specific intent required in the old cases of forfeiture, rather than by recognizing intent by the inherently coercive dynamics of domestic violence.

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<sup>203</sup> *Id.* at 2705. "All the more reason then *not* to reach firm conclusions about the precise metes and bounds of a contemporary forfeiture exception by trying to guess the state of mind of 18<sup>th</sup> century lawyers when they decided *not* to make a particular argument." *Id.* at 2707.

<sup>204</sup> *Id.* at 2708 – 2709 (emphasis in original).

<sup>205</sup> *See id.* at 2692 – 2693.

<sup>206</sup> *Id.* at 2693. He also notes that the trial court did not consider the defendant's intent because it found intent irrelevant to the forfeiture but said the trial court would be free to consider the defendant's intent on remand.

Justice Souter, in his concurring opinion, tempers Justice Scalia's opinion with a nuanced interpretation of the dynamics of domestic violence and precedent from the 1700s. He acknowledges that the founders would not have contemplated domestic violence *qua* domestic violence, but he hopes that they would have found such intent if they would have had such insight:

The historical record as revealed by the exchange simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; *today's understanding of domestic violence had no apparent significance at the time of the Framing*, and there is no early example of the forfeiture rule operating in that circumstance.

[Examining the early cases and commentary reveals the] absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.<sup>207</sup>

This is quite clearly “today’s understanding” of domestic violence projected onto the founding-era cases, but in light of the moral pillars of family life and gender roles at the founding, the Court might consider whether the 18<sup>th</sup> century Anglo-American courts could have conceived of a “classic abusive relationship.” They simply had no category for domestic violence as a function of coercion and domination or an abusive cycle of violence, power and control.

Here, despite the absence of explicit moral reasoning, arrives the import of the common law’s bad morality from the founding era and the generations around it. Justice Scalia has a contemporary, clear understanding of domestic violence, but in devotion to originalism, will not permit the backward projection to correct the common law of the founding era.<sup>208</sup> Rather, he would import the old cases that rested on immoral premises. Justice Souter attempts such a backward projection to suggest that the Founders might have applied our contemporary understanding of domestic violence as they appreciated the common exceptions of forfeiture in the 1700s.

Justice Breyer, on another hand, would carve out a new exception in light of evolving societal appreciation of the power and dynamics of domestic violence, because the courts of the founding era could not have pulled Justice Souter’s trick. Were the founding era laws not corrupted by the archaic and invidious moral notions that a woman’s identity was subsumed into

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<sup>207</sup> *Id.* at 2695 (emphasis added).

<sup>208</sup> This despite his willingness in the preceding case to allow for the evolution of property law to “produce a latter-day alteration of the Fourth Amendment outcome – without altering the Fourth Amendment itself.” *See n.--, supra.* In that case, Justice Scalia was willing to adjust his conclusion based on the changing antecedent law to which the Constitution referred, but he is not willing to move beyond the founding-era common law to inform his position here.

her guardian husband's as a matter of divine creation, then perhaps the analysis of the contemporary question would be clearer. Reference to the laws of the founding era is unreliable as a guide for moral reason, since the moral precepts surrounding marriage and family in the common law rested on the immoral subordination of women and wives.

### **III. A Caution from History and a Suggestion Moral Reasoning in Family Law**

The Golden Rule is the root of all Western moral philosophy, yet the common law, which claims the natural law, did not and does not calculate it fully as a moral principle, especially in the law of marriage and family. Doing to your spouse what you would have your spouse do to you does not permit domestic violence. A husband cannot love his wife as he loves his own body and accommodate physical abuse, or even violent chastisement. Had the common law's version of traditional marriage incorporated legitimate moral and philosophical principles, it never would have tolerated, ignored or sanctioned physical violence by a husband against his wife. It never would have demanded dissolution of a wife's identity or ignored her as a flourishing human being before the law. Rather, the law would have confronted and condemned domestic abuse, wife battery and chastisement, and the subordination of women, because it is morally wrong and without the imprimatur of any recognizable authority in religious or moral reason.

The common law version of marriage, specifically in the founding era, is a corruption of the deeper moral principles on which it assumes to rest. Thus, an originalist incorporation of that common law could invite the corruption into contemporary jurisprudence. On the other hand, a complete vacation of the moral principles that should have underpinned traditional marriage in the first place, leaves us with nothing but instrumental, utilitarian motives. If we are to insist on traditional marriage, then we must leaven it with liberty in love, lifelong commitment and mutual submission to common advantage. If we are to reject the legitimate moral and spiritual underpinnings of marriage and family, then we do indeed abandon the essential building block of society and civilization.

Domestic violence is a moral issue, implicating the nature of marriage, family and gender. Although the U.S. Supreme Court never has blessed wife-beating or intimate partner violence, it has sheltered it, ignored it or tacitly accepted it as an unfortunate way of life for much of its history. Through to the early 20<sup>th</sup> century, the Court reflected, and entrenched, the customary common law version of marriage and gender, often in sweeping moral terms, that incubated inequality, subordination, coercive control and violence. The Court reflected society and the long-held custom of dissolving a wife's legal identity into her husband's, but mistook it for a fact of human nature, a divinely ordained feature of natural law.

In the contemporary age, the Supreme Court has acknowledged domestic violence and considered its scope and dynamics, but it has virtually abandoned the language of morality and moral philosophy. If we consider justice to be a moral question, then the Court's work is inherently a moral task. Modern schools of jurisprudence like Law & Economics or the Critical Legal Studies may seek to reframe issues into terms of efficiency or power, but the questions before the Court and lawmakers still are fundamental questions of right and wrong within the

Rule of Law, or, at least, within the limits of society's tolerance for certain behaviors and outcomes.<sup>209</sup>

In the realm of family law, including gender roles and domestic violence, the common law is rooted in long-standing customs and institutions and ancient, stark moral propositions, so to engage the issues, even today, requires a moral reckoning. If a court is to consider the state of family, marriage and gender, it is bound to take up moral questions, even in a supposed rejection of the old tenets.<sup>210</sup>

In a critical feminist piece, albeit with a different thesis, Professor Reva Siegel demonstrates the potential of unhinging social change from a moral vocabulary:

With the demise of chastisement law, the situation of married women improved – certainly in dignitary terms, and perhaps materially as well. At the same time, the story of chastisement's demise suggests that there is a price for such dignitary and material gains as civil rights reform may bring. If a reform movement is at all successful in advancing its justice claims, it will bring pressure to bear on lawmakers to rationalize status-enforcing state action in new and less socially controversial terms. This process of adaptation can actually revitalize a body of status law, enhancing its capacity to legitimate social inequalities that remain among status-differentiated groups.<sup>211</sup>

Professor Siegel cautions against the unintended consequences of social movements and law reform. This illustrates the need to confront the immorality of the traditional view with a sound articulation of moral principles in support of the reform of social progress. Without a moral

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<sup>209</sup> See Kenneth G. Elzinga, *Law and Economics: Is there a Higher Law?* 36 PEPP. L.R. 507 (2009) (lamenting the absence of moral considerations in Law & Economics). By contrast, and optimistically, Professor Peter Gabel discusses the role of spiritual aspirations, morality and higher justice in Critical Legal Studies (CLS):

The CLS movement, after all, emerged in response to the moral intensity of the broader social movements of the 1960s, and was an attempt to join forces with the civil rights movement, the anti-war movement, the women's and workers' movements to challenge the status quo on behalf of a higher moral vision of what human relations could be like – a vision of a world in which people treated each other with true equality and respect and affection and kindness, and in which people saw each other as fully human and beautiful, rather than as cogs in a machine or as self-interested monads out for their own gain or as any of the other ways characterizing human beings that seemed to be commonplace within the system as it was.

Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L.R. 515 (2009). Professor Gable then mourns the turn the movement took when its mainstream “refused to embrace this transcendent spiritual impulse, to stand behind it, or to speak about it. We really were motivated by love, but it was a love that dared not speak its name.” *Id.* at 516.

<sup>210</sup> See Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2019 (2000) (noting a “nascent counter-trend. . . rooted in nostalgia for ‘the way things were’” in response to the contemporary trend toward family as “joint venture”). Here, I primarily deal with the common law's conception of marriage and its moral bases, but future work might consider how the Golden Rule should inform self-defense of domestic violence victims, Battered Women's Syndrome, the so-called Parental Alienation Syndrome, reproductive rights and resistance and pacifism in domestic contexts.

<sup>211</sup> Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996).

counterpoint to secure the social reform, apologists of tradition will entrench and regroup under cover of the problematic traditional claims.<sup>212</sup>

Recognizing the social and legal confusion over the state of American families, Professor Janet Dolgin accounts for the present uncertainty by tracking the decline of social guidance from churches, schools and communal groups in favor of guidance from the law:

Americans perceive the debate about family to set those who value “tradition” against those who value “modernity.” In fact, however, the ideological dynamic that underlies the debate about family reflects - and depends on - both traditional and modern visions of family and the contradictions each poses to the other. Thus, the various understandings of family are informed by each other, and each is continually reinterpreted in light of the others. In the American family, as understood and as experienced, tradition is constantly threatened by the allure of modernity (in particular, the allure of choice), and modernity is reshaped and reinterpreted to reflect the values of tradition (enduring solidarity and love). Indeed, adherents of modernity in the domestic arena also generally value traditional goals - affectionate, committed families, raising secure, happy children. At the same time, adherents of tradition rely on the ideological perspective of modernity (in particular, the presumption of choice) to effect traditional ends.<sup>213</sup>

This confusion also may flow from the rejection of traditional, subordinating marital unity, wrongly grounded as a moral bedrock, in favor of a contractual structure that ignores a moral structure for families. The question is fresh, as fresh as Supreme Court cases from this decade, where the common law of marriage and gender of the founding era are at issue to determine questions springing from or affecting the law’s understanding of domestic violence.

Thus, we should consider whether and how to navigate the moral dynamics within Supreme Court jurisprudence, despite a contemporary discomfort with framing legal questions in moral terms. This discomfort surely arises from the liberal, Rawlsian impulse to craft a moral and political philosophy that accommodates our plural culture and pluralistic state.<sup>214</sup> It may also spring from the vein of “new” Natural Law that would rather express questions in terms of

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<sup>212</sup> Professor Siegel appreciates this late in her article when discussing the fate of civil rights provisions in the Violence Against Women Act, although from her critical perspective:

[I]n federalism claims about the family, [h]istory typically assumes dispositive weight. . . . But as the paradigm case of slavery teaches us, before we defer to the weight of tradition in such matters, we need at least to consider the normative underpinnings of that initial allocation of federal and state regulatory responsibilities. In the case of family law, uncritical perpetuation of past practice is likely to prove normatively problematic for reasons that, upon reflection, are not terribly surprising: Federalism discourses about the family grew up in intimate entanglement with the common law of marital status. Indeed, as we examine the claim that marriage is a state-law concern, it begins to appear that federalism discourses about marriage bear strong family resemblances to common law privacy discourses about marriage, and in some instances are even direct descendants of the discourse of affective privacy.

*Id.* at 2202.

<sup>213</sup> Janet L Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. R. 337, 340 (2002).

<sup>214</sup> See n. --, *supra*.



reason and logic than in terms of moral revelation.<sup>215</sup> We seem to be inclined either to ignore a moral question as a moral question altogether or to gear up for outright battle in a culture war. Our courts are not apt to discourse well on morality.<sup>216</sup>

Domestic violence is a moral problem. Certainly the Anglo-American custom and common law of subordinate, unified marriage presented such a tussle between traditional precepts, the nature of marriage and the rejection of violence. One typically prevailed over another, and the problem, as C.S. Lewis might say, often was “solved wrongly.”<sup>217</sup> The fundamental injustice of domestic violence, sanctioned by the common law as long-held custom and moral precept, created a residue that still corrupts a legal vision of moral marriage.

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<sup>215</sup> See n. --, *supra*.

<sup>216</sup> Perhaps, however, we have made too much out of competing moral philosophies. Perhaps we agree more than we think we do. Thomas Jefferson wrote to a cousin and protégé of the dangers of spending too much energy on moral philosophy:

Moral Philosophy. I think it lost time to attend lectures on this branch. He who made us would have been a pitiful bungler, if he had made the rules of our moral conduct a matter of science. . . . Man was destined for society. His morality, therefore, was to be formed to this object. He was endowed with a sense of right and wrong, merely relative to this. This sense is as much a part of his nature, as the sense of hearing, seeing, feeling; it is the true foundation of morality, and not the "to kalon" (Greek: The beautiful), truth, &c., as fanciful writers have imagined. The moral sense, or conscience, is as much a part of man as his leg or arm. It is given to all human beings in a stronger or weaker degree, as force of members is given them in a greater or less degree. . . . State a moral case to a ploughman and a professor. The former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules . . .

Letter to Peter Carr from Thomas Jefferson of August 10, 1787, in JEFFERSON'S LETTERS 75, 76 (Willson Whitman, ed. 193-?).

With no irony, Professor C.S. Lewis, one of the most influential Christian thinkers of the 20<sup>th</sup> century, might have agreed with Jefferson, the Enlightenment deist. In his essay, *On Ethics*, Lewis addresses those who, on one hand, would fight for a return to traditional “Christian Ethics” for the sake of the nation’s soul and those, on the other, who would consider Christian Ethics a “return to a bondage from which we have at last fortunately escaped.” C.S. Lewis, *On Ethics*, in THE COLLECTED WORKS OF C.S. LEWIS 203 (1996, originally 1967). He observes a common unity among the supposedly competing moral systems and a common impossibility of avoiding moral reckoning:

You will not suspect me of trying to reintroduce in its full Stoical or medieval rigour the doctrine of Natural Law. . . . I deny that we have any choice to make between clearly differentiated ethical systems. I deny that we have any power to make a new ethical system. I assert that wherever and whenever ethical discussion begins we find already before us an ethical code whose validity has to be assumed before we can even criticize it. For no ethical attack on any of the traditional precepts can be made except on the ground of some other traditional precept. . . .

Obviously it is moral codes that create questions of casuistry, just as the rules of chess create chess problems. The man without a moral code, like the animal, is free of moral problems. The man who has not learned to count is free from mathematical problems. A man asleep is free from all problems. Within the framework of general human ethics problems will, of course, arise and will sometimes be solved wrongly. This possibility of error is simply the symptom that we are awake, not asleep, that we are men, not beasts or gods.

*Id.* at 210-211.

<sup>217</sup> See *id.*

The Court may not consider itself a moral arbiter, but when grappling with the moral precepts in the common law of a by-gone age, it inevitably treads into custom, tradition and moral thought. Rather than shaping moral thought for the nation and the law, rather than engaging in any sophisticated moral reasoning, the Court may merely be following the prevailing current of American culture, or an anachronistic current of American culture.<sup>218</sup>

Whether it is following society or shaping society, the Court still must work to get the morality right, especially in cases of intimate, family injustice. When it has gotten it wrong, it has perpetuated violence and subordination, and this perpetuation generates generations more of abusers and victims.<sup>219</sup> By conforming to unjust societal expectations or by failing to recognize the harm, the Court becomes complicit in the culture's injustice.<sup>220</sup>

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<sup>218</sup> This is the lesson from legal historian, Professor Kermit Hall, who considers whether the legal system shapes culture or whether the law follows society. He concludes that the legal system changes to reflect the values and assumptions of past generations. See KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 333, 336 (1989). "The legal culture has historically been the product of changes in the general culture, and legal adaptation in both private and public law have been essential to the legitimacy of the legal system . . ." *Id.* Professor Barry Friedman agrees and has written that the Supreme Court has not flowed like a river in the course of American progress but has actively chased public opinion for the sake of its own institutional legitimacy. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 375, 384 (2009). He writes, "Justice O'Connor made much this same point: '[R]eal change, when it comes,' she said, 'stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory – in court or legislature – that is not a careful by-product of an emerging social consensus.'" *Id.*

<sup>219</sup> See, e.g. Mark I. Singer, et al., Cuyahoga County Cmty. Health Research Institute, *The Mental Health Consequences of Children's Exposure to Violence* (1998) (a study of 2,245 children and teenagers finding that recent exposure to violence in the home was a significant factor in predicting a child's violent behavior); STRAUSS, GELLES, AND SMITH, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* 406 – 424 (1990) (observing extensive data to confirm that "violence begets violence" from generation to generation in families). Likewise, the Centers for Disease Control and Prevention list, among others, these risk factors for domestic violence:

- Belief in strict gender roles (e.g. male dominance and aggression in relationships,
- Being a victim of physical or psychological abuse (consistently one of the strongest predictors of perpetration),
- History of experiencing poor parenting as a child,
- History of experiencing physical discipline as a child,
- Dominance and control of the relationship by one party over the other,
- Marital conflict-fights, tension, and other struggles,
- Marital instability-divorces or separations
- Unhealthy family relationships and interactions,
- Weak community sanctions against IPV (e.g., unwillingness of neighbors to intervene in situations where they witness violence),
- Traditional gender norms (e.g., women should stay at home, not enter workforce, and be submissive; men support the family and make the decisions).

See CENTERS FOR DISEASE CONTROL AND PREVENTION, *INTIMATE PARTNER VIOLENCE: RISK AND PROTECTIVE FACTORS* (2008) (<http://www.cdc.gov/ViolencePrevention/intimatepartnerviolence/riskprotectivefactors.html>, downloaded July 12, 2010); see also *DOMESTIC VIOLENCE SOURCEBOOK* at 132-133 (Joyce Brennfleck Shannon, ed., 3d ed. 2009). Also, exposure to physical abuse, sexual abuse and domestic violence in childhood resulted in women being 3.5 times more likely to report being a victim of domestic violence in adulthood. *DOMESTIC VIOLENCE SOURCEBOOK* at 321 (citing "The ACE Study," a collaboration between the Centers for Disease Control and Prevention and Kaiser Permanente Health Appraisal Clinic in San Diego with a sample of 17,000 adults).

<sup>220</sup> In the 1990 study cited above, the authors observed empirical manifestations of patriarchy in the economic, educational, political and legal status of women and found "a linear association between patriarchal family norms

The U.S. Supreme Court cannot get out of the morality business, so it must guard against the battle of precepts that would yield injustice and degradation and should articulate wise moral paths that accommodate principle and the lived-experience of justice. The dangers and promise are manifest, as Professor Cochran, devoted to natural law and Christian ethics, suggests: “Our human tendency is to assume that what we see around us is natural. . . . But natural law also provides one of the few bases for challenging the status quo – observe the witness of Martin Luther King. Natural law points to a higher law, one that can correct existing law.”<sup>221</sup>

Today, the morality and nature of family, marriage and gender is starkly at play in the so-called “culture wars” of American politics, and family structure may be the greatest indicator of political persuasion in our moment.<sup>222</sup> Getting the moral conversation right, candidly and compassionately, rather than by entrenched cultural traditions *qua* traditions, may have a serious effect on the presence and place of domestic violence in our society.<sup>223</sup> As seen in this historical survey, such cultural assumptions, when incompletely or wrongly morally informed, will perpetuate violence and subordination in families.

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and wife beating. States with male-dominant norms have *twice* as much wife beating as states with more egalitarian norms.” Strausse, Gelles and Smith, at 383-399, *supra*. Inasmuch as the culture informed the common law and the common law enforces traditional, male-dominated marriage, the law promotes the societal context that incubates family violence.

<sup>221</sup> Robert Cochran, *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 304 (2006)(citing *Dred Scott* and *Bardwell* as examples of the abuse of natural law moral claims to entrench injustice). Again, Professor Hall agrees by observing the legal system and American law in whole:

Who have been the winners and losers? The answer hardly is clear-cut. The rule of law in American history has made possible widespread economic and political power, and the long-term trend has been toward the greater dissemination of both, as the evolving legal history of blacks and women suggests. . . .

Yet our legal past is studded with injustice. . . . Lawmakers have frequently, as with slavery, pulled on the masks of the law, permitting rather than alleviating injustice.

KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 335-336 (1989).

<sup>222</sup> See NAOMI CAHN AND JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010). Professors Cahn and Carbone observe, “Families are on the front lines of the culture wars. Controversies over abortion, same-sex marriage, teen pregnancy, single-parenthood, and divorce have all challenged our images of the American family . . . . These conflicting perspectives on life’s basic choices affect us all – at the national level, in state courts and legislatures, in drafting local ordinances and in our own families.” *Id.* at 1.

Changes in so basic an institution as the family can be seriously threatening to the existing social order. Standards of sexual morality, designed to restrain deeply rooted carnal instincts, require a coherent system of societal reinforcement to be effective, and the evolution of these standards almost inherently challenges the status quo. . . . For those who have bristled at what they see as antiquated and restrictive moral standards (and for those who are open to the accompanying changes), these developments may provide welcome opportunities for personal experimentation and for the creation of families based on individual choice. For those who fear change, however, or those who see the changes dismantling critical parts of the moral order, the shift in moral standards can be deeply disturbing and lead to calls to reestablish the “right values.”

*Id.* at 60-61.

<sup>223</sup> See NICHOLAS D. KRISTOF AND SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* xiii, xvii, 233-234, 243-250 (2009)(calling the global movement for women’s and girl’s rights “one of the paramount human rights problems of this century).

In the 1800s and early 1900s, the Court got the moral reasoning wrong regarding domestic violence within the framework of traditional, unified marriage. With rare exception, the Court staked itself to the idea that society rested on marriage in which the wife's legal identity was submerged into her husband's leaving her a ward, subject to his sovereign whim. The Court countenanced this subordination as a divinely ordained feature of nature and natural law, but without recognizing that the sources upon which such an argument might rest did not commend the idea. History may have supported the Court with centuries of tradition, but the tradition did not conform to the aspirations of its own moral authority. While the Court took the traditional, common law form for marriage for granted, it barely blanched at the savage, brutal violence it encountered within the home. It mistook the abuse as unfortunate aberration, rather than predictable result of one individual's subordination to another. The Court said that legal subordination of wives and women was a cornerstone of society but made no such declarations about peace and love in the home.

By the late 1900s and the early 2000s, the Court abandoned the once-sacred common law form of traditional marriage and the subordination of women. In *Casey*, Justice O'Connor and the majority rejected and abandoned the common law and declared that a woman did not forfeit her legal identity with marriage, that she remained a full legal person in the light of the law. Justice O'Connor and the majority, however, left nothing in its stead but two individuals in close proximity. She focused on the parade of horrors for the subjected wife and rejected the system that once contained her, but she did not describe any legal form that might sustain the promise and necessity of marriage and parenthood without compromising liberty and safety. The dissenters ignored the question altogether, neither rising to defend the tradition of the common law or explaining why it must change.

At the very least, in *Casey*, Chief Justice Rehnquist acknowledged that the State has an interest in the integrity of marriages and the promotion of equitable communication between spouses. He recognized that marriages exist across a spectrum from healthily functioning and despicably violent, and he implied that the law and society have a great interest in the functioning of marriages. If so, then the Court cannot and should not ignore the immoral incubation of violence in marriages by ignoring or importing the old, bad law.

We can observe the legacy of the immoral common law by comparing two modern cases: *J.E.B. v. Alabama*, in which the court, led by Justice Blackmun, recognized the gross immorality of gender subjugation and rejected the traditional, common law of marriage, and *Town of Castle Rock*, in which the Court fails to acknowledge the social reform of gender inequity and domestic violence.<sup>224</sup>

In 1994, the Court considered the case of *J.E.B. v. Alabama*, which did not involve domestic violence, but which continued the Court's move away from traditional, common law ideas of gender and the relative strengths of men and women. The Court implicitly recognized the gross immorality of gender subjugation in the common law. There, the Court held that striking a juror on the basis of gender violated the Equal Protection Clause of the Fourteenth Amendment, and the majority, led by Justice Blackmun, reversed the Alabama appellate court and held, "Intentional discrimination on the basis of gender by state actors violates the Equal

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<sup>224</sup> *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”<sup>225</sup> Striking at the heart of a moral position grounded in a claim to nature, Justice Blackmun suggests that the common law’s view of women’s roles and purposes is “archaic and overbroad,” certainly not an immutable feature of creation.<sup>226</sup> These gender-based classifications may be “outdated misconceptions concerning the role of females in the home, rather than in the ‘marketplace and world of ideas.’” *Id.* In *J.E.B.*, neither the State of Alabama nor the dissent championed the ancient view of women and family. Rather, Alabama argued that the Fourteenth Amendment’s Equal Protection Clause did not apply to gender, only race, because “‘gender discrimination in this country . . . has never reached the level of discrimination’ against African-Americans.”<sup>227</sup>

*J.E.B.*’s ruling is consistent with the Golden Rule, the metric of love for one’s neighbor; if you would not be stricken from a jury because of your gender, so you should not strike your neighbor for her gender. As in *Casey*, no one rose to defend the precepts of gender and marriage that once must have been the bulwark for society, but a passing defense of tradition came in a failed attempt at moral equivalence.

In *Town of Castle Rock v. Gonzales*, the Court considered a wife’s civil rights action against her municipality, claiming that the police department’s failure to enforce the civil protection order against her husband amounted to a denial of her due process rights.<sup>228</sup> The majority, led by Justice Scalia, held that the police’s failure, in its discretion, did not violate her due process rights, because the order did not vest her with a benefit or property interest that would make police action obligatory.<sup>229</sup> In dissent, Justice Stevens, challenged the majority’s analysis that did not contemplate the peculiar nature and dynamics of domestic violence.<sup>230</sup> Justice Stevens set the regime of civil protection orders among a wave of new state statutes with the purpose “to counter police resistance to arrests in domestic violence cases by removing or restricting police officer discretion.”<sup>231</sup> Justice Stevens writes that the majority “fails to come to terms with the wave of domestic violence statutes that provides the crucial context” for understanding the civil protection order law” and argues that under the law the police “lacked the discretion to do nothing.”<sup>232</sup>

*Castle Rock* is a good example of the originalist importation of bad moral reasoning, in amoral language, by advancing the old way. By measuring the contemporary domestic violence case in the light of founding era principles, especially those touching marriage and family life, the Court fails its moral obligation. By failing to recognize the implicit immorality in the ancient family law, the Court permits the police to ignore the persistent pleas of a domestic violence victim who already had received the protection of a court through her civil protection order. If the police would have had their own (or their daughter’s own) civil protection orders enforced so

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<sup>225</sup> *J.E.B.*, 511 U.S. at 130.

<sup>226</sup> *Id.* at 134 (citing *Reed v. Reed*, 404 U.S. 71 (1971) and *Schlesinger v. Ballard*, 419 U.S. 498, 506-507 (1975)).

<sup>227</sup> *Id.* at 135 (quoting Brief for the Respondent).

<sup>228</sup> *Town of Castle Rock*, 545 U.S. at 751.

<sup>229</sup> *See id.* at 768-769.

<sup>230</sup> *See id.* at 773.

<sup>231</sup> *Id.* at 781.

<sup>232</sup> *Id.* at 784. This struggle between Justice Scalia and Justice Stevens, between Tradition and contemporary context, plays out more fully in *Randolph*, as described above at n. - - , *et seq.*

as to avoid future physical violence, so they should have to enforce the plaintiff's in Castle Rock, Colorado. If a husband would not have his wife beat him physically and would seek an protective order on his own, so the order she receives against him should be enforced by the state who issued it. The Court permitted an immoral result by reference to the law of an era undeniably stained by the sin of gender subjugation.

#### **IV. Conclusion**

American courts must be humble, honest and critical of moral claims, old and new, and the arguments that depend on them. We should resist moral appeals which may well be appeals to mutable culture, inequitable tradition or mere public opinion. Such mistakes often entrench historic injustice rather than promote perceived morality. Courts cannot escape moral reasoning and motivation, so judges, courts, lawyers and lawmakers ought to be candid about their assumptions and moral preferences and should stake claims and outcomes on sounder footing than questionable appeals to nature, or the willful ignorance that such a thing exists.

The Supreme Court's strident moral observations and assumptions in its early domestic violence cases dwelled within a tradition and custom that claimed nature and morality to justify the subordination of women and wives. After the suffrage movement, the Court followed society and gave way to increasing legal and political equity in marriages. By the end of the 20<sup>th</sup> century, the Court expressly rejected the common law enshrinement of traditional, customary marital unity, but the Court left no moral foundation for marriages and family besides the contractual and moral autonomy of individuals.

Today, reforms to expand liberty and equity for women and girls may affront traditional societies, customary religious tenets and their articulations in law. Contemporary talk of rights, status and liberalism alone may not be the greater tool for deliverance. The more fruitful means may be a forthright moral challenge to the immoral tradition and a clarified understanding of the moral underpinnings of the status quo itself. The Anglo-American common law of marital unity bolstered a customary society that was itself built on faulty moral reasoning, and the common law, which claimed an inheritance from natural law or even divine law, corrupted the very authorities it supposed to protect. The result was legal toleration of chastisement, wife beating and domestic violence, and the coercive, legal subjection of women and girls. This legal toleration, however, was antithetical to the deeper, older and more profound precepts of love, dignity and equality.

If we seek a moral precept to confront the corrosive reasoning of traditional marriage that would sublimate and dissolve a woman's identity and status in the law, we should consider something as basic, natural, reasonable and profound as the Golden Rule. The truth of the precept resounds in religion, natural law, Enlightenment traditions, and liberalism, and it may be a most powerful moral tool to confront the danger of male domination that sounds in tradition and custom. It may also deliver us from the contemporary deference to radical individual autonomy, a path that answers no questions well.

As we continually look back, especially to the American founding era, to inform our understanding of the common law and the Constitution, we should strive to consider the whole

context of the common law we might import into our age. In the cases discussed here, the common law rested on a tradition that was immoral, at least inasmuch as it promoted a structure of family that ignored, sheltered and encouraged domestic abuse. We must be alert to the danger to our own moral credibility if we accept such immoral precepts, however surely they rest on the tradition and custom of their day.

We must also beware of the poverty of harsh individualism that would alienate people from the bedrock of society, that is, generous, charitable communities. People are not autonomous in fact, and love is not love without a reference and relationship to self and others. If the Court is going to rest on moral considerations, as it must, deference to individual moral discernment will not suffice. The law ought to hang on a rigorous, manifest and concrete ethic of love, doing to others as we would have done to ourselves.

The Golden Rule is the means to balance the moral order of tradition and the progressive hopes of human dignity. In its history, the Court has promoted tradition and cultural status quo at the sure risk of violence against subjugated wives and women. Since the Court has now rejected the ancient common law of marriage, it should not replace it merely with radical autonomy of individuals, but with a metric of love among people in intimate relationships.