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OF MARRIAGE AND MONKS, COMMUNITY AND DIALOGUE

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INTRODUCTION

What is marriage? In what image should we, through our legal and religious institutions, create it? In answer, the Plato in each of us is ready with an ideal type, the Aristotle in each of us with a universal definition. But the ancient and enduring impulses to reify marriage are best repressed. For there are no Platonic forms, and universal definitions have yielded to the fact that the ways by which we order our lives should change as our insights multiply and survive the test of experience. John Witte understands this. In From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition, Professor Witte has explicated five clusters of things that have been said in the West about what marriage is. But with his five “models” of marriage Professor Witte has not attempted to identify five failed-candidates for Platonic type or Aristotelian universal definition. He has, in his own words borrowed from H. Richard Niebuhr, “stopped the endless Western dialogue on marriage ‘at certain points.’”² From Sacrament to Contract not only reports the range of Christian and post-Christian pronouncements about marriage; it also probes beneath those words to expose the shifting “balances”³ struck among the possible “goods and goals”⁴ of marriage. In the range of things said about marriage, Professor Witte finds a dialogue going forward. In people’s and their legal and religious institutions’ responsively advancing competing

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¹ Associate Professor of Law, Arizona State University.
² John Witte, Jr., From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition 3 (1997).
³ Id. at 12.
⁴ Id. at 218.
conceptions of what marriage is and ought to be, Professor Witte discerns a recognition that marriage and family have "multiple forms ... that ... can change over time and across cultures," in service of "multiple goods and goals" understood to be "indispensable to the integrity of the individual and the preservation of the social order."\(^5\)

At one level, *From Sacrament to Contract* is a report of five richly developed conceptual constructs: marriage as sacrament in the Catholic tradition, as social estate in the Lutheran reformation, as covenant in the Calvinist tradition, as commonwealth in the Anglican tradition, and as contract in the inheritance of the Enlightenment. Recognizing that the Catholic and Enlightenment understandings of marriage have been well-treated elsewhere, Witte offers more succinct analytic expositions of them. His treatment of the Catholic construct is satisfying to this Catholic reader. Soundly rooted in the diverse biblical sources and the spasmodic emergence of sacramental theology, Witte's account nicely educes the Catholic sacramental model from the progressive creation and entrenchment of the Church's law and jurisdiction. Against that background Witte masterfully summarizes the legislative act, the decree *Tamesi* of the Council of Trent (1545-1563), that gave the Catholic understanding of marriage the canonical form that, to many appearances, prevailed unaltered until reformed by the Second Vatican Council (1962-1965). The strength of Witte's argument for the Enlightenment model is its clear identification of the specific strands of several hundred years of philosophizing that, when finally given legal effect over the domain of marriage in the late twentieth century, produced an institution of individualism rather than of enlightened community. Witte's erudite exposition of the Lutheran, Calvinist, and Anglican models of marriage, finally, does a great service, not only because their sources have hitherto received less general-scholarly treatment, but especially because Witte works up each of these models and their variations from original archival research on a range of sources, both theological and legal. Witte's wisdom throughout is to see in each of his five models not the exclusion of traces of the other four, but an emphasis worth thematizing and analyzing—each a moment in dialogue.

Dialogue can be uninformed, unintelligent, forgetful. If not babble but dialogue is to occur, those who would speak must know what has been said in order to understand the meaning with which our words and practices have been invested. Witte has done a great service by producing what is in effect a

\(^5\) *Id.*
comparative grammar of five Western languages of marriage, languages most of us unwittingly speak as though they were not five but one, with the result that our discourse frequently amounts to a dissonant jumble of unintegrated, often inconsistent fragments—sacrament, contract, grace, nature, consent, jurisdiction, indissolubility, annulment, covenant, commonwealth, rights, individuals, union. Learning leavened with insight, Witte’s book equips the reader to speak the five different languages of marriage and their dialects; to translate where possible and transliterate where necessary; and to say something intelligent about what has been said about marriage as an institution shaped, until the other day, by the interaction of legal and religious doctrines and institutions.

But Witte has done more than equip his readers to continue “the endless Western dialogue” on marriage, in the sense of being able to understand something of what has been said and politely to say it again. The dialogue Witte sees is not mere chatter, small-talk about important matters, one utterance after another. Nor, for that matter, has Witte shown us even a series of reactive soliloquies. Rather, in capturing moments of the dialogue, Witte has brought to light something of “what has been going forward in the process” of discourse about the goods and goals of marriage and how they are to be achieved. The identification of what has been going forward holds for Witte not only historical but also normative significance. This is because, on Witte’s analysis, the reported dialogue is not merely the locus of the West’s pronouncements on marriage. Rather, the dialogue exemplifies, indeed perhaps exhausts, the very method by which what marriage is and ought to be, is settled. In the dialogic exchange by which putative values are included in or excluded from what we call marriage, Witte finds the West settling, a little bit at a time, the ways in which human life ought to be ordered and which among those ways ought to be called marriage.

Professor Witte’s wonderful book responds to what he argues is a crisis—the disintegration and marginalization of the West’s store of wisdom about marriage and family, indeed the virtual cessation, except at the margins, of a genuine dialogue about marriage’s and family’s goods and goals and the means of their realization. Arguing, as has Mary Ann Glendon, against the thunderous rhetoric of individualism and individual rights that has squelched the subtle questions and answers of centuries of dialogue, Professor Witte lays out in splendid detail the range of values that were going forward in the

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institution of marriage until Anglo-American law reduced marriage to a virtually bare instance of contract, no longer in service of community and a shared sense of human goods. Witte's work is a summons to lawyers and theologians alike to begin again the painstaking work of devising doctrines and institutions that order human lives toward genuine human goods.

In this Review Essay I explore the working of the dialogic method by which the forms of marriage and family have, on Witte's analysis, been worked out over the centuries and how that method conditions its own results. I argue that a necessary condition of the dialogue that we need to have today about communities such as marriage and family is community itself, a group constituted through shared meaning—enough shared meaning to understand each others' questions, quite apart from whether we agree as to their answers. Suggesting that questions about how marriage and family ought to be shared are not sui generis—at least not unless marriage and family are exclusively theological constructs, a position never taken in the West—I explore an example of how a community other than marriage and the family constitutes itself by dialogue about its goods and goals and how to achieve them, and how it can deconstitute itself through obeisance to notions it does not understand. I conclude, as Professor Witte does, that if marriage is to be revivified as a promoter of genuine human goods, we must take up what was going forward in the West until the other day and ask, for ourselves, whether it was worthwhile and what might be more worthwhile.

I. FROM THE FLUX

Everyone has some experience of marriage, as either a participant or an observer. For that reason, the average educated person about to read a book on theories of marriage will expect to find in it something more familiar than if he were picking up a book on, say, virginal consecration (a way of life that not only received ample study in earlier times, but that a few still choose). That expectation will not be utterly disappointed; most theoretical treatments of marriage address the familiar realities of commitment, intimacy, sex, and the bearing and rearing of children. Nevertheless, the initiate is in for a surprise. For what one finds when one starts reading the traditional experts on marriage is that they appear to have two verbal gears with very varied capabilities that, jointly and severally, generate much language not easy to square with either our common experience or unreflective understanding of marriage.
First there is the grand gear. The traditional experts identify the nature, cause, and purposes of the holy estate of matrimony, and doing so they employ language that is, in the judgment of even sympathetic experts, "murky" or "magniloquen[t]." For example, it was John Calvin's position, as Witte explains, that God participates in the maintenance of the covenant that links man and woman in marriage. God does so, according to Calvin, not only through the one-time action of man and woman covenaining, but "also through the continuous revelation of his moral law." What, one might ask, is this "moral law" that helps make the marriage covenant? Witte reports Calvin's answer: the moral law is "the voice of nature," "the law of nature," "the natural order," "the inner mind," "the rule of equity," "the natural sense," "the sense of divine judgment," "the testimony of the heart," and "the inner voice." Witte, sensitive to the unclarity of the normative implications of these intimations, observes that they are "terms and concepts that [Calvin] did not adequately sift or synthesize." Such opacity is not the province only of the past, however. Not only novices, but those versed in the range of Western normative theories (including even Scholasticism), should wonder how to specify the relation between the two clauses of the following segment of the current Catholic legislation governing marriage: "The essential properties of marriage are unity and indissolubility; in Christian marriage they acquire a distinctive firmness by reason of the sacrament."

In addition to the grand gear, there is the ground-level gear. In sharp contrast to the lofty vagueness of pronouncements about the nature, cause, and purposes of marriage is the cornucopia of rules contrived to give effect to those lofty goals—rules that govern who can marry, when they can marry, how they

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7. JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 590-91 n.23 (1987).
9. Witte, supra note 2, at 96.
10. Id.
11. Id.
12. Even a sympathetic parsing of Calvin's opening distinctions and a generous appreciation for his sixteenth-century rhetorical style cannot explain away these and other anomalies in his presentation. Such anomalies were inevitable and not fatal. Given the loose literary forums and forums in which Calvin worked, it was inevitable that loose ends and loose logic would remain, undetected.

can marry, and, once married, what behaviors they are to engage in or must avoid. The rules superabound. For example, by my count over eight percent of current Catholic statutory law—146 out of the 1752 canons that comprise the Code of Canon Law—deals with marriage specifically. The rules, not just of Catholics but of Lutherans, Calvinists, and Anglicans as well, range from the scriptural one about whether a spouse's adultery supplies a ground for ending a marriage to those governing whether there must be witnesses and at what remove cousins may marry each other. Mediaeval moralists worried about whether married couples were permitted to deviate from the missionary position, and moralists, mediaeval and modern, opine as to whether "the marriage act" may licitly include an intent not to conceive offspring. No detail has been too small to escape legislation, or at least the judgment of competent moralists whose pronouncements sounded in terms of whether conduct was correct or sinful, mortally or venially. The mentality prevailing since the late sixteenth century, for Catholics at least, is that of the Spanish Jesuit Tomás Sánchez, whose influential treatise on marriage approached its subject as one might approach "a complicated tax code." And if the mentality prevailing for Protestants and Anglicans in the same period reflects a repudiation of the comprehensiveness of the Catholic regulatory approach, Professor Witte has shown that the repudiation was only partial.

The initiate may well wonder what is happening in the movement between the two gears, the rhetoric and the rules; and the tax code analogy may help to clarify that relation by contrast. At the top of the tax apparatus are the rules enacted by the legislature that lay out in a broad way who and what are to be taxed and at what rate; further down come the ever more specific rules that those implementing the legislature's enactments devise in putative conformity with either the legislature's enactment or the legislature's intention (or with both). At the top of the marriage apparatus, likewise, are statements about its nature, cause, and purpose; further down come the ever more specific rules that condition the existence vel non of a marriage and regulate relevant behavior, those ever finer rules being putative attempts to give concrete effect to the received notions about what marriage is. The analogy therefore is strong. In each case general precepts are worked out in detailed regulations that themselves determine in fact whether someone is to pay or not, or is married or not;

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13 BRUNDAGE, supra note 7, at 565.

14 Having renounced the goods the canonists' rules were in service of in the first place, the contemporary Anglo-American law of marriage has no occasion to frighten the canonists' detailed regulation of marriage.
and in each case there can always be fresh and further recourse to the starting points.

But there is an important disanalogy, as well. Whereas the starting points of the tax apparatus are received fully wrought from the legislature, the starting points of marriage are themselves worked up—by some still undisclosed process—by popes and bishops, priests and ministers, judges and bureaucrats, theologians and philosophers. True, churches and politics enact statutes about marriage, but those enactments are not generally thought to create the institution by *ipse dixit* but, rather, to be contributions to the larger effort to discover how marriage ought to be shaped. The working of that mysterious process of discovery is the focus of Professor Witte's book.

Historically, Christians began that process within an environment that identified marriage with an institutional arrangement very different from the one that would become canonical by the late sixteenth century. During the long period of Roman history, it seems, marriage evolved into a social institution that was almost identical with the contract of the parties, subject to little extrinsic limitation at all. Christians at first would not have had a distinctive experience of marriage; indeed, even the Christian emperors of Rome “made little effort to regulate family behavior.” According to Professor Glendon, “everywhere in Europe in the first half of the Middle Ages [marriage was regarded] as a personal and purely secular matter.” John Noonan’s research led him to conclude that even during the period of the Christian Roman emperors, “Christians in good faith could believe that marriage was dissolable or indissoluble.”

Already in the earliest centuries, however, the Christian teachers, if not the Christian rulers, had things to say about marriage, including that it was indissoluble. But the emergence of the notion that marriage cannot be dissolved was gradual, and its dominance took the better part of a millennium to achieve. That process, moreover, occurred not in isolation, but within the

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15 Cf. Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (“[H]e who lives by the *ipse dixit* dies by the *ipse dixit*.”).
16 See Glendon, supra note 6, at 19-23.
17 Id. at 22.
18 Id. at 24.
broader context of the emergence of Christian communities. Jesus of Nazareth had a few things to say about marriage, as had St. Paul. As the young Christian communities coalesced, as the scriptures were canonized, as ecclesial magisterium emerged, the fathers of the Church, ecumenical councils, and local synods began to articulate a Christian understanding of sex, marriage, and family. Professor Witte finds in these early sources attempts to understand marriage as an association that is contractual, spiritual, social, and natural, but he detects in these sources no systematic theology of marriage.

Witte again finds these four perspectives again represented in the understanding of marriage developed by the leading Latin father of the Church, Augustine of Hippo (354-430), but with Augustine and his successors Witte finds a systematic theology of marriage beginning to emerge. Asking ever new questions about what the inherited Christian revelation meant for the family and married life of Christians, from within a culture that treated marriage much as an ordinary contract, Augustine and the other teachers of the Church began to forge a new way for Christians in marriage. They did so not by way of an application of a static stash of answers from scriptures, tradition, or treatises; they were asking new questions—questions to which the inherited sources were not facially responsive. They did so, instead, as they were working out for the first time an understanding of nature and the intrusion into nature of that supernature called “grace.”

The process was gradual, beginning with the subjection of marriage to bare “nature.” Within a culture that left marriage to be shaped by those contracting it, the Church began to supply a shape for marriage. Nature, what John Noonan has identified as one of Catholic moral theory’s favorite metaphors for putting something beyond human control, was invoked by the early Christian teachers as providing norms for marriage. Marriage was said to be a natural institution “subject to the law of nature, communicated in reason and conscience, and often confirmed in the Bible.” Marriage had, as Augustine understood it, three natural “goods” or purposes, and they traveled together:

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20 According to Professor Meeks, for Christians of the first two centuries, the formation of morality was itself the formation of the Christian community. See generally WAYNE A. MEIKS, THE ORIGINS OF CHRISTIAN MORALITY: THE FIRST-TWO CENTURIES (1993).
21 WITTE, supra note 2, at 20-21.
22 See GLENDON, supra note 6, at 22.
24 WITTE, supra note 2, at 25.
procreation, chastity, and permanent union. More revealingly, in Augustine’s phrase quoted by Witte, nature had made marriage “a duty for the sound and a remedy for the sick.” In time the implications of marriage’s natural status, as both duty and remedy, were elaborated, as Professor Witte explains:

This natural law, medieval writers taught, communicated God’s will that fit persons marry when they reach the age of puberty, that they conceive children and nurture and educate them, that they remain naturally bonded to their blood and kin, serving them in times of need, frailty, and old age. It prescribed heterosexual, lifelong unions between a couple, featuring mutual support and faithfulness. It required love for one’s spouse and children. It proscribed bigamy, incest, bestiality, buggery, polygamy, sodomy, and other unnatural relations. It prohibited contraception, abortion, infanticide, and other unnatural acts. The same lists of sexual sins set out by St. Paul and the Church Fathers reappeared with endless glosses and commentaries in the sources of the twelfth through the fifteenth centuries.

Marriage had become, by Christian understanding, an institution with discovered natural purposes, rules for which could be worked out in detail.

The process should not escape notice. Though “Jesus of Nazareth [had] said little about sex,” glimpsing the power of sex and the connection of sex with human perceptions of the divine, the Church began to regulate sex: “Nature and the natural became the norms that governed marital sex, which was held to be authorized primarily for the conception and nurturing of offspring and secondarily for the avoidance of fornication.” Augustine, nature’s interpreter, set the tone for the millennium. Connecting sex with the Fall, Augustine identified marriage as its limit and procreation as its purpose. Augustine saw little good in marriage, except that it channelled and legitimated sex—allowing a good use of a bad thing—for the purpose of procreation.

25 Id. at 21.
26 Id. at 24.
27 Id. at 25.
28 BRUNDAGE, supra note 7, at 576.
29 “[M]edieval canonists and theologians, the principal architects of sexual doctrine, were conscious that sex is in some mysterious way connected with the wellsprings of salvation and the bliss of heaven, that it is both wonderful and terrible.” Id. at 585.
30 Id. at 577.
31 On the magnitude of Augustine’s generally baneful impact on Western theology, see JOHN MAHONEY, THE MAKING OF MORAL THEOLOGY 37-71 (1989).
32 See BRUNDAGE, supra note 7, at 580. See generally Augustine, The Good of Marriage (De bono
If the nature imagery succeeded in creating the impression that marriage was not entirely of human creation, at least it was clear, moreover, that an instance of marriage did not spring into existence without the contracting action of two parties. “Marriage was not,” Witte observes of the Catholic view, “simply a natural institution subject to the laws of nature. It was also a contractual relation subject to general rules of contract.” 33 Witte’s report of this aspect of the Catholic view is perfectly balanced. On the one hand, marriage was constituted by a contract; on the other, the terms of that contract were not entirely of the parties’ creation but subject “to the general moral principles of contract that prevailed in medieval canon and civil law.” 34 Among these principles were those that contracts should be free and that consensual agreements, absent fraud or mistake or a condition that would make enforcement unreasonable or unfair, should be enforced at law. As to the latter “general principle,” Witte observes that it “also applied to marriage contracts. Both husband and wife had an equal right to sue in court for enforcement even of a naked promise of marriage, for discharge of an essential and licit condition to marriage, or for vindication of their conjugal rights to the body of their spouse.” 35 If, as we shall see, the Enlightenment reduced marriage to a contract (largely stripped of the mediaeval strictures governing the conditions of fair exchange), at least the contractual aspect was there from the Christian beginnings, though in service of Augustine’s three natural goods of marriage.

There was still a third, and this the unifying, strand in the Catholic understanding of marriage. “Marriage was not only a natural institution subject to natural law and a contractual institution governed by principles of contract. Marriage was also raised by Christ to the dignity of a sacrament . . . .” 36 The idea that marriage between the baptized is a sacrament has by now been domesticated, but it was never simple or univocal. For St.

33 Witte, supra note 2, at 25.
34 Id. at 26. On the general principles of mediaeval contract law, see James Gordley, The Philosophical Origins of Modern Contract Doctrine (1991), as applied to marriage, see id. at 6.
35 Witte, supra note 2, at 26. Witte’s work here is a particularly timely corrective to recent analysis such as the following:

Marriage has been seen as a consensual relationship for quite some time, of course. Indeed, more than three hundred years ago John Locke characterized marriage as a “voluntary compact between man and woman.” For many years, however, religious belief in the sanctity of marriage and marriage’s close association with parenthood obscured this feature.

36 Witte, supra note 2, at 26.
Augustine, the idea was important but it did little intellectual work. Augustine taught that marriage between the baptized was a sacrament and indissoluble, the third "good" of marriage. But "for Augustine, the term sacrament meant only 'symbolic stability.' Augustine called marriage a Christian sacrament because it was permanent." For Augustine, marriage's permanence followed from the purposes of the union, which were chastity and procreation. As Professor Witte explains:

'[Augustine's] main goal was to distinguish Christian marriage from prevailing pagan marriages and from the attacks on the institution by Gnostic, Manichean, and other heresies. He sought to show that Christian marriage was a stable and permanent union. It allowed procreation with one's spouse even if continence was spiritually preferable. It demanded fidelity to one's spouse even if procreation was naturally impossible.'

In stark contrast to Augustine who called marriage a sacrament because it was permanent, "[I]ater Catholic theologians would call marriage permanent because it was a Christian sacrament." When properly contracted between two Christians, marriage functioned, as did the other six sacraments of the Church, to open the flow of divine grace. Using the metaphor of the channel to describe the action of divinity in creation, it seemed to follow almost automatically that once marriage was graciously present, it could not be eradicated by any human action. "Once this channel of sacramental grace was properly opened, it could no longer be closed. A marriage properly contracted between Christians, in accordance with the laws of nature, was thus an indissoluble union, a permanently open channel of grace." Witte captures the result: "[T]he sacramental quality of Christian marriage helped to elevate the marriage contract into more than just a bargained-for exchange between two parties. At minimum, it rendered marriage an 'adhesion contract' that was indissoluble ...."

The emergent Catholic rule of marriage was onerous, and as the Christian teachers developed it, the ecclesiastical magisterium slowly worked out a way to assure that it would be given effect. At first, ecclesiastical control was exercised primarily through the sacrament of penance, in the relation of the

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37 Id. at 22.
38 Id.
39 Id. (footnote omitted).
40 Id. at 28.
41 Id. at 29.
penitent to the priest. But in time the Church developed a legal system, and in that context it could be said that the Church had jurisdiction, and possibly exclusive jurisdiction, over marriage: marriage was a sacrament and the Church claimed jurisdiction over what pertained to man’s soul, salvation, and sanctification. That jurisdiction became quite secure, and the Catholic understanding of marriage was solidified, by the early thirteenth century, as the Church’s legal system hit its stride. As Professor Witte explains:

One reason that the Catholic sacramental model had such an enduring influence in the West was that it was both a theological and a legal model. Since the late eleventh century, there was a constant cross-fertilization between the theology and law of marriage in the Roman Catholic Church. It was the church’s new legal and political prominence in the West that rendered this alliance of theology and law so powerful. In the Western world of 1200-1500, the church was not merely a voluntary association of like-minded believers gathered for worship. Its canon law was not simply an internal code of spiritual discipline to guide the faithful. The church was the one universal sovereign of the West that governed all of Christendom. The canon law was the one universal law of the West.

Witte soundly concedes that behind the sacramentalizing of marriage that brought it within the ecclesiastical may have been some venial motives, but for the result he has deep respect:

Whatever the inspiration of the twelfth- and thirteenth-century writers [on marriage] might have been, ... their theological construction of a sacramental model of marriage was a work of genius. It integrated nearly a millennium of inherited theological reflections on marriage and anticipated many of the hardest questions that would confront the church in subsequent centuries. The thirteenth-century sacramental model of marriage lies at the heart of the Catholic theology still today—amply amended and emended over the centuries but unchanged in its fundamental form.

Witte is certainly correct that from the crystallization of the sacramental model of marriage in the thirteenth century, through its canonization in the
decree *Tametsi* at the Council of Trent, to its representation in the Code of
Canon Law promulgated in 1983, the sacramental model has appeared largely
unaltered. This should not be surprising in the case of a magisterium that
claims its moral doctrine to be *semper et ubique eadem*. But the shifts in
balance that are the subject of Witte's book occur not only in the progression
from one model to the next, but even within the models—including the
Catholic model. Witte acknowledges this with his "amply amended and
emended" language.

Professor Witte's respectful understatement perhaps masks the magnitude
of the development. A consequence of what was said by the Second Vatican
Council in *Gaudium et spes* was an entirely new canonical formulation of the
basic nature and ends of marriage. Whereas the 1917 Code of Canon Law had
prioritized the bearing and rearing of offspring to the mutual nurturance of the
spouses, the 1983 Code*66 abandoned that construct in service of a fresh theol-
yogy of married love foreign to Augustine and Trent alike.*67 Perhaps of more
significance than any legislative change, however, is the almost silent, incre-
mental growth worked in Catholic practice, and hence Catholic doctrine and
law, by Church tribunals deciding marriage cases. As John Noonan's path-
breaking research has shown, "[e]xercising their freedom to shape a central
human institution, the makers of the system," the ecclesiastical jurists of the
Roman Curia, "have been co-makers with the Lord of institutions."*68 Though
"[t]oo bound to traditional categories to [take] credit for its creations," the Cu-
ria of the Catholic Church has, through the men who have staffed it through
the centuries, striven to take the inherited ideal and make it fit the realities of

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66 1917 CODE c.1013, § 1 ("Matri monii finis primarius est procreatio atque educatio proles: secundarius
mutuum adiutorium et remedium concupiscientiae."); 1983 CODE c.1055, § 1 ("Matri moniale foedus, quo vir
et mulier inter se tollit vitae consortium constitutum, inde ab natura ad bonum coniugum atque ad proles
generationem et educationem ordinatum, a Christo Domino ad sacramentum dignitatem inter baptizatos evec-
tum est.").

67 See Vatican Council II, *Pastoral Constitution on the Church in the Modern World (Gaudium et spes)*
§ 47-52, in VATICAN COUNCIL II: THE CONCILIAR AND POSTCONCILIAR DOCUMENTS 949-56 (Austin Flan-
nery ed., 1980). Which is not to say that even the Catholic establishment in the Middle Ages lacked appreci-
ation of the marital love of spouses—only that it did not receive expression in Church legislation and
moral doctrine. See, e.g., JEAN LECLERCQ, MONKS AND LOVE IN TWELFTH-CENTURY FRANCE (1979); JEAN
LECLERCQ, MONKS ON MARRIAGE (1982).

William May points out how Catholic natural law theorists, such as Germain Grisez, have had to revise
their understanding of marriage in light of the *development* of Catholic moral doctrine on marriage away
from the Augustinian idea that marriage is only an instrumental good in the service of continence and pro-
creation to one that sees the marriage bond as itself a good. William May, *Germain Grisez on Moral Princ-
iples and Moral Norms: Natural and Christian*, in NATURAL LAW AND MORAL INQUIRY: ETHICS, META-

68 NOONAN, supra note 8, at xviii. See also BRUNDAGE, supra note 7, at 573.
changing human life, thus preserving the ideal that marriage is indissoluble while quietly creating cases where what the Church does is certainly to dissolve.49

Though Witte’s study does include detailed descriptions of a limited number of “cases,” what he has successfully attempted is a “history of magisterial ideas.”50 Certainly the magisterial idea the Catholics have brought to marriage is its indissolubility.51 But if the idea is magisterial, it has emerged as such only through the struggle of the Catholic magistri, and their starting point never has been a fully-wrought archetype of marriage, as John Noonan emphasizes:

The symbolism of marriage derived from Saint Paul takes the relation of Christ to the Church as the pattern of human marriage and reciprocally invests human marriage with symbolic value as the exemplification of the ecclesial union. To endow fragile human relations with this significance, to maintain that the pattern once laid stands imperishably above the flood, has been a bold enterprise. Preservation of the ideal of indissolubility, whatever the pain to individuals, has been the great conscious enterprise of the Curia. Coupled with a universal vision which in aspiration rises above race and class to reach all men, this undertaking has not lacked grandness.52

The grandness emerges from the insistence that “[f]rom the flux of individual actions” a form of commitment can be identified that “will stand secure above the flow.”53 That insistence is not merely grand but plausibly worthy because “[t]he thrust of the law, as it has developed, has been to mold marriage as an inner commitment to long-range goals, consciously apprehended and consciously accepted in the instant of consent.”54 What those goals ought to be was not settled in an instant. The settling process continues century after

49 Noonan explains:

The most substantial theological and legal accomplishment of the curial system has occurred in the effort to fit this grand design to the multitude of human desires. The result has been the creation of a variety of types of marriage distinguished by their degree of dissolubility, manner of dissolubility, sacramental character, symbolic role, and procreative possibilities. Without setting out to do so from the start, the Curia has designed classes of marriage and provided the basis for the further formation of classes more deliberately fitted to the need of the community.

NOONAN, supra note 8, at xvii-xviii.

50 Witte, supra note 2, at 1.
51 See NOONAN, supra note 8, at xvii.
52 Id.
53 Id. at xv.
54 Id.
century—as Noonan puts it—by people's asking new questions, in the face of new experience, about which goals are worthy and how, and at what price, they are to be achieved. “For over eight centuries,” Noonan observes:

[The Church canonists have] asked the questions necessary to develop marriage as an institution and a symbol. . . . If the need for these questions was not at once grasped, if experience was necessary to develop even provisional answers, if the costs imposed on individuals in developing the answers were large, no questions without experience and no answers without pain were available. . . . [T]he Curia asked the questions and provided answers which, if neither final nor infallible, were often shrewd, imaginative, instructive, and, if sometimes harsh, unrealistic or oversubtle, were sometimes soberly convincing.55

The long range goals to which the Tridentine Catholic model gave men and women access were, in order of priority, the bearing and rearing of children, the remediation of concupiscence, and mutual aid; the union itself, though indissoluble because sacramental, seems to be of only instrumental value. The long range goals to which the Vatican II Catholic model gives Catholic men and women access are a lifelong covenant of the whole of life and the bearing and rearing of children;56 the union is still understood to be indissoluble because sacramental, but no longer is it understood to be exclusively instrumental. The bond itself is now believed to be among the discovered purposes of marriage. “From the flux”57 emerges “an ontological reality,”58 on consent of the parties under conditions, and in service of goods, discovered by the Church. In certain cases, some or all of those goods are not achieved even within the context of a canonically valid marriage, with sometimes grave hardship to the individuals. By conceptualizing marriage between the baptized as a deployment of a dollop of divine grace, a “sacrament,” the Catholic model superimposed upon the contractual action of the parties something—an “ontological reality”—that could not be willed away by the parties. The synthesis of natural and contractual perspectives in the sacramental model was, as Witte judges, brilliant, if only it could be believed.

55 Id. st xvii.
56 See supra note 46.
57 See supra text accompanying note 53.
58 The Code of Canon Law: A Text and Commentary 742 (1985) (commenting on c.1056). To be sure, Trent too imputed “ontological reality” to the marriage bond; but it took until Vatican II for that reality to emerge as among the goods or purposes of marriage.
II. WHAT WAS GOING FORWARD

Disbelief has been common. The Protestant reformers of the sixteenth century were incredulous that marriage was a sacrament. Among the major reformers not a single one believed this Catholic doctrine. The reformers’ rejection of the sacramentality of marriage was, moreover, not quiet but resounding. As Professor Witte observes: “Issues of marriage doctrine and law ... implicated and epitomized some of the cardinal theological issues of the Protestant Reformation.” The working out of those issues, about the basic Augustinian ideas of nature and grace, led both to the denial of sacramental status to marriage and to an increase in the prestige of marriage. “Protestant divines,” as Professor Brundage notes, “flatly and unequivocally rejected the sacramentality of marriage, but paradoxically held matrimony in higher esteem than their Catholic counterparts.” In the reformers’ hands marriage was reshaped into an institution of primary human importance.

The reasons for his development were not narrowly theological. As Professor Witte observes: “[T]he most startling feature of the sacrament [of marriage] was that it transformed sexual intercourse from an otherwise sinful act of lust into a spiritual act of great symbolic value.” But if on the Catholic view marriage legitimated the sex act and, more than legitimating it, endowed it with spiritual significance, still marriage suffered from its association with sex. As one scholar put it not long ago, “[m]edieval celibate clergymen accepted that marriage was of divine institution, but many of them thought it pretty rum—on the most optimistic view a second best.” When the Church called marriage a sacrament, it was, in the view of the reformers, less to affirm that it was a good than to bring sex under the control of the Church. Luther in particular even found something disingenuous in the Church’s treatment of marriage as a sacrament. The Catholic Church called marriage a sacrament and thus was committed to the view that it was a sign instituted by Christ that

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59 See BRUNDAGE, supra note 7, at 574-75.
60 WITTE, supra note 2, at 42.
61 BRUNDAGE, supra note 7, at 575.
62 WITTE, supra note 2, at 27.
64 See WITTE, supra note 2, at 42. See, e.g., JAROSLAV PELIKAN, THE CHRISTIAN TRADITION: A HISTORY OF THE DEVELOPMENT OF DOCTRINE (VOL. 4, REFORMATION OF CHURCH AND DOGMA (1300-1700)) 295 (1984). Professor Brundage thinks that the Reformers got the emphasis wrong: “We are more likely dealing with an unintended result of the Church’s urge to protect the sanctity of sex, rather than with policy consciously created to enrich the ecclesiastical establishment.” BRUNDAGE, supra note 7, at 587.
makes truly present divine grace; but the Church had, on Luther’s view which is well laid out by Witte, mocked marriage by treating it as a second-class sacrament, one that under canon law always was subordinated to celibacy and chastity, priesthood and monasticism.65 Professor Brundage captures the point of Luther’s gripe: “Although Roman Catholic doctrine insisted that marriage was a sacrament, it was a marginal sacrament because of its links with the unholy combination of sex and pleasure.”66

Luther and all other leading reformers not only denied that marriage was a sacrament but affirmed, in a way that the pre-Vatican II Catholic tradition simply did not, that marriage is a “great good.”67 No longer a second-best to the sacrament of holy orders and the monastic ideal, marriage was, on Luther’s view, a social estate, created by God, by which all persons would create society and lead moral lives.68 As Witte explains: “The social estate of marriage was . . . . as indispensable an agent in God’s redemption plan as the church had been for Roman Catholics. It no longer stood within the orders of the church but alongside it.”69 In that parallel position, reached on theological grounds, marriage was to be the care of the civil magistrate, whose divine mandate was to lead men and women, so far as possible, to virtue in this earthly kingdom. Professor Witte has described, in fascinating detail, the collaboration in Germany of theologians and jurists to divest the canon law courts of marriage jurisdiction and to create and implement, “over time and across the 350 odd politics that comprised Germany,”70 a new law of marriage.

Those laws were not uniform, because they reflected diverse theological views and diverse plans for achieving the variously reconceived goods of marriage. But from the Lutheran reformers’ shared theological understanding that marriage is a social institution with the first responsibility “to teach all persons, particularly children, Christian values, morals, and mores,”71 a new law of marriage emerged, marked by three main differences from the Catholic model (in addition, of course, to the pivotal change of its no longer being a sacrament subject to Church jurisdiction). First, the reformers simplified the canonists’ complex doctrine of consent, thereby making marriage easier to contract; they

65 See Witte, supra note 2, at 47-48, 50, 57, 60, 63-64, 70.
66 BRUNDAGE, supra note 7, at 574.
67 Id. at 555.
68 See Witte, supra note 2, at 48-49.
69 Id. at 49.
70 Id. at 56.
71 Id. at 49.
also, with a view toward emphasizing the social aspect of marriage and reducing the "problem" of clandestine marriages, required other people's participation in the formation of marriage. Second, the reformers substantially reduced the number of canonical impediments to a valid marriage, again making marriage easier to contract.\textsuperscript{72}

Closely tied to their efforts to free the way to enter marriage, finally, were the reformers' efforts to free the way to end one marriage, on a showing of cause, and to enter another. Though it had been mitigated by the law of annulment,\textsuperscript{73} the Catholic Church's formal insistence on the indissolubility of marriage was unacceptable to Luther and likeminded reformers. According to Professor Witte, the Lutheran reformers rejected the traditional doctrine "with arguments from scripture, history, and utility."\textsuperscript{74} Catholic teaching and law held that divorce meant only juridical separation from bed and board.\textsuperscript{75} The Lutheran reformers taught, with reliance on both testaments and early tradition, that it meant the termination, for cause, of one valid marriage with the right to contract another. Though they conceded that Christ had made indissolubility the ideal, they insisted that the ideal was not for this earthly kingdom but, instead, for the kingdom of glory. The responsibility of the civil magistrate was to legislate for people mired in sin. In the eyes of the Lutheran reformers, according to Professor Witte, "[t]he law of divorce and remarriage, like other positive laws, must... be inspired by the moral norms of scripture as well as by pragmatic concerns of utility and good governance."\textsuperscript{76} Freed from obeisance to the "ontological reality" caused by its sacramentality, the reformers were at liberty to work out a model of marriage aimed at securing the social goods of marriage for individuals and the community. The distinctive "two-kings" Lutheran theology ramified into a new doctrine and law of marriage:

By conjoining ... arguments from scripture, utility, and history, the reformers concluded that (1) divorce in the modern sense had been instituted by Moses and Christ; (2) the expansion of divorce was a result of sin and a remedy against greater sin; and (3) God had revealed the expanded grounds for divorce in history. They specified

\textsuperscript{72} Id. at 56-65.
\textsuperscript{73} But see id. at 35.
\textsuperscript{74} Id. at 65.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 67.
the proper grounds for divorce and the procedures that estranged couples had to follow.\textsuperscript{77}

People whose married lives had failed were not to be deprived of the opportunity for another try. Back of all this new law, and beneath all the new theology that shaped it, lay Luther's unAugustinian and unmonastic view that sex is "essential to human health."\textsuperscript{78}

Shorn of the unifying bond of undissolvable divine grace, marriage had become an institution shaped to help persons achieve, as much as possible, divinely ordained and sanctioned purposes. On the failure of the purposes, or at least some of them, there was nothing that stood in the way of the magistrate's terminating the marriage. This was a real, substantial change from the Catholic model. But, as Professor Witte emphasizes, the change went forward within the context of the received doctrine and law.\textsuperscript{79} Witte concludes that for all the real and substantial changes it worked, the Lutheran model was not so much a break from the Catholic model as it was development and reorientation. Like the Catholic model that it reformed, the Lutheran model insisted that marriage be an institution that was religious, growing out of a theological perspective (though not subject to church jurisdiction); social, part of and tributary to broader community life; contractual, formed by the promissory action of the parties; and natural, an institution subject to the laws of reason.

The reformation of marriage law in Lutheran Germany was not so radical as the early reformers had envisioned, and as some historians have assumed. The Lutheran reformers worked within the Western tradition of marriage. Their new theology of marriage, though filled

\textsuperscript{77} Id. at 68.
\textsuperscript{78} BRUNDADE, supra note 7, at 555.
\textsuperscript{79} For example, Professor Witte states:

[T]he Lutheran reformers appropriated a great deal of the canon law in their formation of the civil law of marriage. Canon law doctrines that grounded marriage in the mutual consent of the parties continued with only minor changes. Canon law prohibitions against unnatural relations and against infringement of natural marital functions remained in effect. Canon law impediments that protected free consent, that implemented scriptural prohibitions against marriage of relatives, and that governed the couple's physical relations were largely retained. Such canon laws were as consistent with Roman Catholic as with Lutheran concepts of marriage, and they continued largely uninterrupted.

Moreover, Lutheran jurists and judges turned readily to canon law texts and authorities in formulating their doctrines of marriage law. . . . Learned treatises on marriage law, prepared by Lutheran jurists, often made greater use of canon law and Roman law authorities than the new Protestant texts.

\textit{Witte, supra} note 2, at 71-72.
with bold revisions, preserved a good deal of the teaching of the Roman Catholic tradition. Their new civil law of marriage was heavily indebted to the canon law that it replaced. What the Lutheran reformers offered was a new social model for marriage, which stood alongside the traditional sacramental model and within the Western tradition.\textsuperscript{80}

What was going forward, as it had been since the time of the Church fathers, was the subjection of sex, intimacy, and reproduction to a behavioral norm worked out by the believing community and given legal effect for the good of both individuals and the community.

In his analysis of the models of marriage that emerged in the Calvinist reform, Witte finds the same process going forward—"reciprocating shifts"\textsuperscript{81} among the goods to be achieved through the theological models and legal structures of marriage. John Calvin and his followers accepted much of the Lutheran reform of the Catholic sacramental model of marriage, but resacralized it by "superimposing"\textsuperscript{82} on it the distinctively Reformed notion of covenant. Marriage was, on the Calvinist model, a covenental association of the whole community, with minister, magistrate, and parties all contributing to the formation of a covenant to which God himself was also a party. God had ordained the structure and purposes of marriage and the structure for achieving them: It was to be a "lifelong union" of man and woman, ordained to "the interlocking purposes of mutual love and support of husband and wife, mutual procreation and nurture of children, and mutual protection of both parties from sexual sin."\textsuperscript{83} Against the Lutheran pessimism about the achievability of these ideals, Calvinists insisted on more, at least for Christian believers. God's law governing the marriage covenant "set out two tracks of marital norms,"\textsuperscript{84} civil norms common to all persons, and spiritual norms exclusively for Christians. The first was a morality of duty, the second of aspiration; the first was the responsibility of the magistrate, the second of the minister.\textsuperscript{85} On the strength of this model, "[t]he laws of marital formation, maintenance, and dissolution were tightened to ensure that only fit parties entered into this covenant, that only right conduct attended the household, that only innocent spouses could

\textsuperscript{80} Id. at 73.
\textsuperscript{81} Id. at 12.
\textsuperscript{82} Id. at 8.
\textsuperscript{83} Id. at 7.
\textsuperscript{84} Id. at 98.
\textsuperscript{85} See id. at 7, 98.
dissolve the covenant." Like Luther, Calvin considered sex a good of marriage, not limited to procreation; Calvin even encouraged married couples to maintain a healthy sex life after childbearing years. 

Out of the shadow of suspicion occasioned by its association with sex, marriage became the beneficiary of concentrated and coordinated civil and ecclesiastical activity in Calvin's Geneva. Calvin conspicuously insisted that the Reformed Church was not to exercise canon-law-like jurisdiction over marriage cases; in Geneva and surrounding rural polities the magistrate, not the Church, decided marriage cases. And it did so under a new marriage law, the Marriage Ordinance of Geneva (1545) drafted by Calvin and others, that was "intensely legalistic" and "almost silent on any sources of law beyond the command of the sovereign." Nonetheless, the civil magistrate did not go it alone in regulating marriage and family.

Marriage was an earthly order and obligation for all persons, said Calvin echoing Luther. But it also had vital spiritual sources and sanctions for Christians. Marriage required the coercive power of the state to preserve its integrity. But it also required the spiritual counsel of the church to demonstrate its necessity.

To that end, the Marriage Ordinance provided that matrimonial causes were first to receive attention in the Geneva "consistory."

The Geneva consistory came to serve as something of a hearings court of first instance and a mediator of last resort in cases of sex, marriage, and family life (among many other subjects). The consistory met once per week for several hours. Parties could petition the consistory voluntarily or be subpoenaed to appear—often on the recommendation of a local pastor or magistrate. . . . The consistory process was designed to be less formal and more flexible than that of a courtroom, although it was doubtless equally unnerving to parties and witnesses, who generally appeared without legal

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86 Id. at 8.
87 See id. at 107. Brundage observes:

Whereas Luther grounded his teachings about divorce and remarriage on elemental feelings about sex, and rejected Catholic views on the matter with fiery defiance, Calvin was cooler and more reasoned in the exposition of his divorce doctrine. Calvin, like Luther, would allow divorce under certain circumstances, but for him the right to remarry following divorce was not so much a matter of sexual need as of freedom of conscience.

BRUNDAGE, supra note 7, at 559.
88 WITTE, supra note 2, at 92.
89 Id. at 111.
counsel and without any guarantee of procedural rights. The Ecclesiastical Ordinance explicitly barred the consistory from exercising any jurisdiction over marriage—any power to make and enforce civil or criminal laws. The consistory could administer only spiritual sanctions of admonition, catechization, or public confession to conduct its affairs—a spiritual arsenal supplemented after a long fight, with the power of excommunication. Cases or issues that required legal action or orders were referred to the Council for disposition.90

In his detailed study of the consistory’s workings, based on fresh archival research and new to the literature of marriage law, Witte has shown a paradigm instance of law, religion, and community in interactive balance.91

From the marriage law of Calvin’s Geneva, Professor Witte turns to England, where he finds the communal emphasis of the Calvinist model carried forward and extended in the wide range of Anglican theology and practice, resulting in his next model, the commonwealth model. In the emergence of this model during the sixteenth and seventeenth centuries, Witte identifies the continuation and reconfiguration of the aspects of marriage attested to in earlier Protestant and Catholic sources.92

This model embraced the sacramental, social, and covenental models but went beyond them. Marriage was at once a gracious symbol of the divine, a social unit of the earthly kingdom, and a solemn covenant with one’s spouse. But the essential cause, condition, and calling of the family was that it served and symbolized the common

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90 Id. at 81-82.
91 See id. at 82.
92 See, e.g., id. at 173.

Witte sees in the Anglican model of marriage evidence of what common lawyers see as the genius of common law, its flexibility and capacity for incremental, reasoned change:

Today, it is The Book of Common Prayer, with its timeless language, liturgy, and lectionary, that seems to hold worldwide Anglicanism together. Historically, English law played a critical role as well. The law set the outer boundaries and defined the middle line of this theological via media. This was one virtue of establishing Anglicanism by law. Establishment laws defined the core theological doctrines of marriage, from which no dissent was tolerated. But these establishment laws also left the penumbral doctrines and practices of marriage, family, and sexuality open to wide speculation, experimentation, and variation. Invariably, what had been penumbral, even heretical, doctrines in an earlier generation were established as core doctrines in a later generation. It was this inherent fluidity and flexibility of the Anglican theology and law of marriage—grounded as it was in an emerging English epistemology of probability and reasonableness—that eventually gave the Anglican tradition a uniquely eclectic and dynamic quality.

Id. at 133.
good of the couple, the children, the church, and the state all at once. Marriage was appointed by God as a "little commonwealth" to foster the mutual love, service, and security of husband and wife, parent and child. It was likewise appointed by God as a "seceded and seminary" of the broader commonwealth to teach church, state, and society essential Christian and political norms and habits. 93

For three hundred years, from the mid-sixteenth until the mid-nineteenth century, Anglican church courts exercised plenary jurisdiction, analogous to that of Rome's canon law courts, over marriage matters, including sexual transgressions. 94 Conspicuously, the Catholic inheritance shaped the Anglican doctrine of divorce:

In Catholic sacramental theology, marriage was presumed permanent because God had chosen this instrument to dispense his grace on the Church. In Anglican commonwealth theology, marriage was presumed permanent because God had chosen this institution to convey his law for the Commonwealth. In Catholic theology, even broken marriage had to be maintained lest a channel of God's grace be prematurely closed to the Church. In Anglican theology, even a broken marriage had to be retained, lest a source of God's law and order be permanently lost on the Commonwealth. Catholic divorce doctrine tended to be more sacramental and otherworldly in inspiration; Anglican divorce doctrine tended to be more social and utilitarian.

The evidence from which Witte constructs his models, particularly the Calvinist and Anglican versions, is staggering, and I risk doing it injustice by summarizing it as I have. But sufficient to my present purpose is the exemplification of Witte's case for the going forward, in these shifting models of marriage, of a dialogic exchange within and to some extent among religious communities, about the purposes of marriage and family and the means of their

93 Id. at 8-9.
94 See id. at 164.

The canon law of marriage, it is worth remembering, was also the law of England for a very long time. Ecclesiastical jurisdiction over marriage disputes survived the Reformation. Some alterations in the law were made at that time. And others followed. But there were no sweeping alterations in the substance of the law; there was no real disruption. Only in 1857 was marriage jurisdiction withdrawn from the Church. Even then the secular courts administered much the same law, until the new popular attitude towards divorce of the present century brought about more fundamental legal changes.

95 Witte, supra note 2, at 175-76.
realization. From Augustine until John Locke, the West settled the purpose of marriage as it settled all the purposes of human life, through community inquiry followed by the imposition of religious and legal norms.

III. WHAT WAS NOT GOING FORWARD

That process began to fail, on Witte’s account, sometime in the eighteenth century, as the Anglican commonwealth was revolutionized under emergent notions of democracy. At first the commonwealth model of marriage had effectively legitimated the hierarchical relations mirrored in the larger society. But as the polity was transformed to reflect emergent liberal principles of equality and individual freedom, so was marriage in England.

As the political concept of the English commonwealth was revolutionized and democratized during the seventeenth century, so was the theological concept of the family commonwealth. The traditional hierarchies of husband over wife, parent over child, and church over family were challenged with a revolutionary new principle of personal and institutional equality. The biblical duties of husband and wife and of parent and child were recast as the natural and contractual rights of each household member vis-à-vis the other. The traditional idea of a hierarchical natural order of marriage, society, and state was challenged with a new idea of marriages, societies, and states that were voluntarily contracted by free individuals in the state of nature. Just as the English commonwealth could be rent asunder by force of arms when it abused the natural rights of the people, so the family commonwealth could be put asunder by suits at law when it abused the marital rights of either spouse.

In these beginnings of the transformation of the commonwealth model Witte discerns a noble effort to introduce equities consistent with a developing understanding of the fundamental equality of persons. Witte’s account splendidly highlights John Locke’s contribution to liberalizing the commonwealth model in a way that anticipated, and assisted, those who would come after in search of a more radical reform of marriage.

96 For Witte’s discussion of Locke, see id. at 186-93. See also infra text accompanying note 98.
97 Id. at 132.
98 See id. at 186-93.

A pious Christian could accept the literal truths of the Bible for private life, yet advocate the liberal reforms of the social contract for public law. To accept Locke’s method was to accept the
The early incremental changes within the traditional Anglican model soon yielded to calls for more substantial change, producing what Professor Witte identifies as the “Enlightenment contractarian model.” In a book the scope of which includes discussion of religious reformers whom Witte often finds “thundering,” Witte’s delicate firmness here is conspicuous. As in his earlier treatment of the democratization of the commonwealth model, Witte identifies what was praiseworthy in the Enlightenment reformers’ creation of a new model of marriage. The first wave of reform of Anglo-American marriage law, catalyzed by the Enlightenment contractarian model, sought to improve the Western-legal tradition of marriage more than to abandon it. The primary goal of these Enlightenment reformers was to purge the traditional household and community of its excessive paternalism, patriarchy, and prudishness, and thus to render the ideal structure and purpose of marriage a reality for all. The changes inaugurated in this first wave of reform have been almost universally condoned in the West as salutary. Indeed, with the exception of the law of divorce and remarriage, almost all of these legal changes in Anglo-American common law—and comparable changes in Continental civil law—have now been incorporated into the theological platforms and social policies of Anglican, Protestant, and Catholic communities.

This first wave of reform, which Witte sees going forward from the 1830s to the early twentieth-century, was continuous with the form of all earlier reforms Witte studies—a careful reworking of the inherited purposes of marriage, law and religion reciprocally influencing each other.

From this first wave of reform emphasizing the contractual aspect of marriage, Professor Witte distinguishes a second—a wave more of destruction than of reform. That second wave also focussed on the contractual aspect of marriage, but now to the (virtual) exclusion of its other aspects. Witte’s final model might have been divided into two, the Enlightenment contract model and the Individualist contract model. For, as the whole of Witte’s work powerfully brings out, the contractual aspect of marriage had been there from

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Id. at 192.
59 Id. at 198.
100 See, e.g., id. at 47, 111, 161, 199.
101 Id. at 208 (footnotes omitted).
the Roman and Christian beginnings. It was specifically the forces of individualism, not the Enlightenment in general,\textsuperscript{102} that wrenched the contractual element from the quadripartite amalgam and made it stand alone, the bare contract shorn of the range of the religious, social, and natural ends it had for more than a millennium been made to serve.

The same Enlightenment ideals of individualism, freedom, equality, and privacy, which had earlier driven reforms of traditional marriage law, are now being increasingly used to reject traditional marriage laws altogether. The early Enlightenment idea of marriage as a permanent contractual union designed for the sake of mutual love, procreation, and protection is slowly giving way to a new reality of marriage as a “terminal sexual contract” designed for the gratification of the individual parties.\textsuperscript{103}

Our experience of contemporary marriage reality makes much exposition of this model unnecessary. People’s contractual freedom is limited in divorce cases involving minor children, as a kind of grudging concession to an unintended third-party beneficiary interest.\textsuperscript{104} But the creation of those interests and others, the achievement of identifiable human purposes such as faithful mutual nurturance or the rearing of children, are emphatically no longer part of the model. People once again can, as at Rome before the coming of Christianity, pretty much “regulate marriages for themselves.”\textsuperscript{105}

The reciprocal interaction between religion and law has largely ceased, and, moreover, the legal institution of marriage has been purged of most of the marks made by religion over the last millennium and a half. What was going forward has been arrested and excised. For those who think that law, including the law of marriage, should serve recognizable human values, this indictment is sufficient. “The elementary deconstructions and dismissals of a mil-

\textsuperscript{102} As Witte himself shows, under the umbrella of the Enlightenment are included thinkers as diverse as John Locke and John Stuart Mill, the former a “devout Christian” and a “devoted libertarian,” the latter a simple libertarian. \textit{Id.} at 191, 198. On the misleadingness of hazy reference to “the Enlightenment,” see John T. Noonan, Jr., \textit{The Lustre of Our Country: The American Experience of Religious Freedom}\textsuperscript{85, 357, 372 (1998)}.

\textsuperscript{103} \textit{Id.} at 209 (footnote omitted).

\textsuperscript{104} See \textit{id.} at 213-14. See also Milton C. Regan, Jr., \textit{Family Law and the Pursuit of Intimacy}\textsuperscript{36-39 (1993)}.

\textsuperscript{105} Helmholz, \textit{Marriage Litigation}, supra note 94, at 5. See also Carl E. Schneider, \textit{Moral Discourse and the Transformation of American Family Law}, 83 Mich. L. Rev. 1803, 1807-08 (1985) (“These forces have occasioned a crucial change: a diminution of the law’s discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated.”).
A millennium-long tradition of marriage and family law and life seem altogether too glib to be taken so seriously. Yet the legal revolution marches on.\textsuperscript{106} The result is another indictment, the indictment from the consequences of purge.

Underneath the mantle of equality [and freedom] that has been draped over the ongoing family, the state of nature flourishes, Mary Ann Glendon writes ominously. In this state of nature, contractual freedom and sexual privacy reign supreme, with no real role for the state, church, or broader civil society to play. In this state of nature, married life has become increasingly "brutish, nasty, and short," with women and children bearing the primary costs. In 1970, 13 percent of all households were headed by single mothers; today, the number stands at more than 30 percent, with more than half of these single-mother households below the poverty line. In the 1990s, a quarter of all children conceived are aborted. A third of all children are born to single mothers. One half of all marriages end in divorce. The number of "no parent" households doubles each year. The number of "lost children" in America—born in poverty and in broken households, and more likely than not to drop out of school, out of step, and then out of society altogether—now stands at a staggering fifteen million. The greater the repeal of state regulation of marriage for the sake of marital freedom and sexual privacy, the greater the threat to the true freedom realized for women and children in the first phase of the Enlightenment transformation of marriage.\textsuperscript{107}

### IV. Dialogue

If John Witte worries that current family law contributes to a "sad and serious crisis of marriage in civil society,"\textsuperscript{108} he does not advocate the return to any of the pre-Enlightenment models he so deftly expounds and analyzes. Nor, however, does he think that what he has brought forward from the past

\textsuperscript{106} Witte, supra note 2, at 215.

\textsuperscript{107} Id. at 214-15 (footnotes omitted).

In fact, the family laws that have emerged over the past two decades in the United States and Western Europe are often as much at variance with prevailing social attitudes and practices as were the traditional systems they replaced. Most glaringly, the legal imagery of separateness and independence contrasts everywhere with the way most functioning families operate and with the circumstances of mothers and young children in both intact and broken homes. Yet the law holds self-sufficiency up as an ideal, suggesting that dependency is somehow degrading, and implicitly denying the importance of human intersubjectivity.

\textsuperscript{108} Witte, supra note 2, at 15 (quoting Jean Beth Eilettain).

\textsuperscript{Glendon, supra note 6, at 296-97.}
are merely "idle antiquaria or dispensable memorabilia." The "ancient sources" that Witte has mined hold what he believes to be "the theological genetic code that defined the contemporary family for what it is—and what it can be." But what are we to do with a theological "genetic code"? Metaphors can either block or facilitate thought.

A strength of the "genetic code" metaphor, in the context of Witte's argument, is the reminder that the leading voices of the Western tradition about marriage specified a limited number of goods to be achieved by marriage and, therewith, a proportionally limited number of permutations for realizing those goods. A concomitant liability of the metaphor is the suggestion that the purposes and forms of marriage were simply given to begin with, and are to evolve by random mutation and natural selection. What Witte shows to be the "uncanny ability of the Western legal tradition to strike new balances between order and liberty, orthodoxy and innovation with respect to our enduring and evolving sexual and familial norms and habits" is not autonomic—either in determining the goods of marriage or the means of their achievement. Stripped of its depersonification, that ability reduces to a record of persons identifying those goods and striking the new balances among them. God may reveal something about how marriage is to be structured; but God makes this revelation to persons, who for their part must interpret and understand that revelation.

Another strength of the metaphor is its suggestion that what intelligibility there is on the topic is there to be read—that by now we know what there is to understand. There is much to be read, and Professor Witte, by reading most of it and faithfully digesting it in From Sacrament to Contract, has reduced the burden on the rest of us. But a necessary weakness of the metaphor is its intimation that we have cracked the code—that the inherited wisdom of the West is out there, waiting to be consumed. To some extent we have cracked the code, again thanks to Professor Witte; as I observed at the outset, Witte has provided us with a comparative grammar and a host of translations of the many Western dialects of marriage. But as I also noted at the beginning, sometimes what Professor Witte has produced does not, because it cannot, rise above the level of a transliteration. Sometimes translation seems impossible, as when theological language assays to communicate what has no secular equivalent.

109 Id. at 15.
110 Id.
111 Id.
In the face of an assertion that, for example, marriage is a sacrament and therefore indissoluble, or that God is a third party in every marriage covenant between the baptized, the unbeliever would properly confess incomprehension.

Whatever else one might think of such a confession, it at least potentially presents an obstacle to Professor Witte’s project of creating a genuine dialogue about marriage. Incomprehension prevents agreement. But does a lack of agreement prevent dialogue? That depends in part on what one takes to be the conditions and purpose of dialogue. Again, metaphor can either block or facilitate thought, and the metaphor of the dialogue—if metaphor it be—is no exception.

Dialogue has emerged, like “conversation,” as a favorite of some philosophers and theologians for describing the process by which we humans decide what we think, both about what is and about what we ought to do. For these thinkers, as diverse as David Tracy and Jürgen Habermas, the dialogic process is not merely parties’ exchanging information that is already conclusive, but the essential means of their actually working out together what cognitive commitments to make, metaphysically and morally. For thinkers that typify the “dialogic” tradition, dialogue is not mere metaphor, but a convenient shorthand for the process of individuals’ responsively asking and answering questions together. A necessary condition of the success of the process is an openness to following questions where they lead and to living with what answers emerge from genuine dialogue.

Professor Witte’s and others’ embrace of “dialogue” and its necessary conditions amounts, it should not escape notice, to nothing less than a strike at the root of liberalism and its pretensions to universality. Liberalism emerged as a response to religious disagreement, a prudential refusal to follow the discourse of religious communities where it might lead. Liberalism then matured or mutated from a prudential into a principled ban on religious contributions to public life. For the unpredictable product of ongoing dialogue the apostles of liberalism substitute the allegedly universal ideals of liberty and equality. Liberalism then and now teaches us all that believers and their theologians are to keep their religious contributions to themselves. In his magisterial study of moral discourse, Princeton Professor Jeffrey Stout has captured the result:

To gain a hearing in our culture, theology has often assumed a voice not its own and found itself merely repeating the bromides of secular intellectuals in transparently figurative speech. Theologians with
something distinctive to say are apt to be talking to themselves—or, at best, to a few other theologians with similar breeding.\textsuperscript{112}

Ever vigilant, the liberal censors are poised to interdict the operation of theological premises in the public square.

Professor Witte’s work on marriage represents a refusal to let the theologians either talk only to their congregations or dissolve what is distinctive in their message into the allegedly neutral—but very partisan—bromides of liberalism. Witte has shouldeled the burden of bringing religion back into the dialogue—or, rather, beginning again a dialogue—about how to order our lives. But the question is, even if the theologians can break through the barrier of liberal censorship and be heard, can they be understood? The theological inheritance, even if it is repeated, can be of no effect unless it is comprehended. Authentic dialogue, dialogue that advances understanding, cannot occur punctuated by incomprehension. For those who believe that the theological traditions of the West have something important to contribute to the shaping of marriage and family, the question is, what to do in the face of unbelievers’ perfectly understandable incapacity to understand theological premises and thus take them as reasons for action?

Professor Witte does not offer an exhaustive answer to this question, nor does this reviewer. But Professor Witte does provide a start, worthy of explanation and some extension. As Professor Witte well appreciates, merely reciting the premises of the theologians, nor even translating those premises, will generate true dialogue. For genuine—not merely metaphoric—dialogue to occur, people must be asking and answering questions together. Moreover, for interlocutors to raise and answer questions together, they must of course be able to understand each other. These are conditions of "dialogue" that is not mere seriatim soliloquies.

Dialogue, however, does not require (emergent) agreement—and this is the crucial point. What dialogue requires is questions and answers that interlocutors share and thus find comprehensible. Dialogue does not require answers to which everyone in the dialogue can agree. Dialogue starts and goes forward through shared questions and a willingness to live with incomplete and sometimes inconsistent answers, all in the belief that fidelity to the dialogic process, shared questions and honest answers, represents our best—because it is our

\textsuperscript{112} Jeffrey Stout, \textit{Ethics After Babel: The Languages of Morals and Their Discontents} 163 (1988).
only—hope for advancing understanding about what are valuable ways to live. The trick, really, is creating and maintaining openness.

In the case of marriage and sex, specifically, the challenge is acute. The tradition must take its share of the blame. From Augustine till the other day, the Catholic magisterium has tended to rigidify when the subject is sex. Catholic moral teaching about sex and marriage, as well as the canon law of marriage, have tended to be brittle, even if in practice moral casuists and ecclesiastical judges found their way from rules of "stupefying complexity"\(^\text{113}\) back to asking ever new questions of experience and thereby advancing novel insights in their fresh answers.\(^\text{114}\) That rigidity, which still blocks acknowledgment of the dialogic process through which Catholic moral and legal doctrine goes forward, drives dialogue underground.

Current American practice is even more rigid, however. Effectively denying or ignoring the depth and complexity that the marriage union touches, in favor of a simple contractual perspective that enthrones the right of the individual to create or decree, at will, a marriage, current American law is purposely out of touch with the store of Western wisdom about the good purposes of married and family life. It insists that legal treatment of marriage proceed in terms almost entirely of universal rights to "equality, privacy, and freedom"—a vocabulary that is, as Professor Witte observes understated, simply too "lean"\(^\text{115}\) to capture what was going forward in the tradition of marriage and family.

But not only have Americans come, because it is liberalism's vernacular, to resolve most of our social issues with the simple analytic tool that is "rights." We have, as Professor Glendon observes, increasingly conceived of rights as the lone possession of the individual. Professor Glendon exemplifies the point by contrasting two Supreme Court pronouncements on what marriage is. In the first, the Court explained: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."\(^\text{116}\) Just

\(^{113}\) Brundage, supra note 7, at 565.

\(^{114}\) See generally John T. Noonan, Jr., Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 476-554 (enlarged ed. 1986).

\(^{115}\) Witte, supra note 2, at 215. See also Schneider, supra note 105, at 1835-39.

seven years later the Court resolved what rights the family had into those of individuals: "[T]he married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."117 Professor Glendon then adds that Professor Laurence Tribe in his study of the Court's treatment of the parent-child relationship, concluded that there, too, "what at first appear to be 'family rights' emerge as rights of individuals only."118

What we may need, then, if we are to engage in a dialogue that can include meaningful exchange about the range of the goods and goals of marriage, is a shared vocabulary much richer than the regnant rights talk—a vocabulary adequate not only to individuals but to their bonds, their communities. To put the point this way, however, invites the very misstep most to be avoided. We need a new vocabulary if we are to engage in meaningful dialogue about community. But even more than that, we need dialogue itself. The reasons are twofold. First, actual dialogue—people asking and answering questions together—is the only way that linguistic meaning is created; neither supine language nor a vocabulary imposed ab extra is a substitute for dialogue. A language that is nobody's expresses no meaning.

The second reason is related to the first. Creating language to answer questions people share is the very process by which people constitute themselves as more than brute animals, as sharers of meaning. Professor Glendon's work, particularly on marriage and family law, has called our attention to legal theorists' increased interest in the process of "socially embodied argument."119 A living tradition, she notes, is engaged in, and is

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118 GLENDON, supra note 116, at 123.

Legal systems on the French and German model have imagined the human person as a free, self-determining individual, but also as a being defined in part through his relations with others. The individual is envisioned, more than in our legal system, as situated within family and community; rights are viewed as inseparable from corresponding responsibilities; and liberty and equality are seen as coordinate with fraternity... In American constitutional law... the expressed rights to individual liberty and equal treatment are dominant....


[Family law has been swept along by the strong currents that presently predominate in Western legal systems. The new family laws, like the new lamp Alladin was given in exchange for his old one, harbor a genie in their recesses. Their animating spirit promises liberty, equality and progress without end. But all too often its gifts have had a way of turning to ashes.]

GLENDON, supra note 6, at 297.
119 GLENDON, ABORTION AND DIVORCE, supra note 118, at 140 (quoting Alasdair MacIntyre).
simultaneously partially constituted by, a dialogue about which goods are to give that particular tradition its point and purpose. 

"This increased attention to social dialogue," Professor Glendon observes, "fits well with the Aristotelian insight that by our doing and our ways of knowing we make ourselves what we are." In every generation, members of a tradition can bring to bear on the members' new questions whatever intelligence and creativity they can muster. For this, there is no substitute. There is, moreover, no guarantee of success. People can be inattentive and unintelligent and unreasonable. They can ignore their experience or refuse to consider new purposes in light of the inherited wisdom to which they still pay lip-service. They can subordinate this wisdom to concepts that they do not understand, let alone believe in.

V. A FAILURE OF DIALOGUE AND COMMUNITY

Better to understand the importance of incarnating the answers to human questions, a very incarnate example may help. The example has to do with how a certain kind of community, analogous to the family that comes out of marriage, succeeds and fails in discerning its purposes and how they are to be achieved. Recent scholarship has emphasized that marriage is just one among many family structures, and Witte's work is no exception: "The Western tradition has recognized that the family has multiple forms.... The celebrated nuclear family of husband and wife, of daughter and son, is only one model that the Western tradition has cherished...." As an example of another form of ordering, Witte mentions "the spiritual household of brothers and sisters joined in the cloister."

120 See id. See also James Boyd White, Talking About Religion in the Language of the Law: Impossible But Necessary, 81 MARQ. L. REV. 177, 186-87 (1998) (arguing that community is formed by practice not by propositions).
121 GLENDON, ABORTION AND DIVORCE, supra note 118, at 140.
122 See id. at 141-42.
123 WITTE, supra note 2, at 218.
124 Id.

Although, intuitively, based on our individual observations and experiences, we modern women and men may tend to think of marriage as preceding the family, it is the family which is the primary institution. Some form of the family, as a discrete group within the horde, can be found in all human, and many animal, societies.

GLENDON, supra note 6, at 5 (footnote omitted).
 Mostly, monks and their monasteries seem different from the rest of us and our marriage-centered families. Monks are men who give up life with their mother and father, brother and sister, who give up the prospect of a spouse, and go apart to serve God in comparative solitude, usually as part of a community. But going apart to form a family different both from marriage and the civil polity, they must make choices analogous to the ones non-monks make about what goods are worth achieving and how their life is to be structured to achieve those goods. Monks must decide who owns what in the community, who rules the community, how material needs are supplied, how the sick are tended, who may join the community. Monks make those choices, however, in two ways that are importantly different. First, they choose their ends and the means of their achievement totally unburdened by the idea that there is one right way to be monastic, if only the archetype—monasticism as it is in the eye of God—could be discovered.\textsuperscript{125} Monks work out the purposes and devices of monastic life with total freedom to discern true human goods and flexibility to mold a life geared to their achievement. Though always seeking to live according to revelation and reason, monastics have rarely if ever supposed that there is one form of monastic life, some “ontological reality” to be discovered. Second, their search goes forward within and through a community that lives a tradition of meaning. There are monastic ways of talking and behaving whose significance may elude outside detection. What matters most to the monk may appear meaningless to the onlooker. Monastic life goes forward with little need to justify its existence and norms to those outside.\textsuperscript{126}

But still, monks can make the mistakes about monasticism’s purposes and the means for achieving them, and they can do so in obeisance to a vocabulary that is no part of the tradition of their community. The monastic experience with dialogue about how to order human life provides an informative contrast to the West’s recent experience in shaping marriage.

Before proceeding to the details of a lived example, some remote background may be helpful. From the earliest times, it appears, some Christians felt called to seek Christ in a radical way that took the form of a break from the world. This spontaneous eruption of Christians out of the polity and into the desert, both literally and figuratively, proved to be lasting, and eventually

\textsuperscript{125} Cf. NOONAN, supra note 8, at xv (“‘true’ marriage—marriage as it might be in the eye of God—is different from its definition by the rules, can its constituents be measured by a legal system?”).

those who dwelt apart settled into two modes of living. The first is hermetrical, the life of the hermit, who seeks as much aloneness with God as possible. That form of life proved inherently unstable, and from it and alongside it emerged the second and dominant form of monastic life, the cenobitic, the life of men in the cenobium or monastic community. Certain cenobitic monasteries sustained hermits at their borders, and some cenobitic communities, such as the Camaldolese (founded by St. Romuald in 1098) and the Carthusians (founded by St. Bruno in 1084), attempted to shape community life to afford each monk a form of solitude more secure than the hermetrical life of the desert allowed. From the first half millennium of Christianity emerged a form of life that has lasted, in a wide array of carefully calibrated forms, to the present.

Each of the monastic orders, as the different canonically-constituted groups are known, lives according to a different ordering, which typically is set out in a written “rule” that answers the run of questions about how the life is to be shaped. The rule, and the order’s customs of its interpretation, decide general and specific questions about life in the monastery. Each order’s modus vivendi is a working out of a slightly different understanding of what monastic life ought to be. Thus, though at a high level of generality all monks share a commitment to poverty, celibacy, obedience, constant conversion (conversionis morum), and stability of place, the different groups work out the contours and implications of these basic commitments, and the unifying one of going apart to be alone with God in a radical way, in deeply different ways that reflect different understandings of what the monk ought to be. Thus, whereas the Benedictine sometimes sees his monastic solitude as compatible with running secondary schools, the Carthusian in pursuit of a different understanding of solitude may hardly speak to a non-Carthusian for his entire monastic life. Some orders engage in much manual labor, others favor intellectual work; some pray before dawn, others break their sleep and pray in the middle of the night; some speak regularly, others sometimes rely on sign-language; some send the monk to his cell frequently, others keep him among the brethren.

Every monastic community, every monastic tradition, has asked and answered these questions through an internal dialogue that has lasted centuries. That process has assumed different forms. Bruno of Cologne fathered, in the Carthusians, a form of monastic life that has never required a “reform”: Religio Cartusianorum numquam reformata quia numquam deformata. But, as certain commentators have pointed out, for a dramatic reform the Carthusians, jealous of the purposes of their life as given to them by Bruno and his successor Guigo, substituted constant reform, ever honing the purposes of the order and
the means of achieving them. The extensive historical record shows the Carthusians engaged in constant dialogue carefully attentive to every aspect of their life and its relationship to their lived traditions. No aspect of the life escaped the attention of the superiors, who were quick to prevent missteps or, in time, to amend the rule. The Carthusian statutes provide that no major change in the Order’s way of life is to be adopted without the vote of two successive general chapters of the Order (which are separated by two years).

Benedict of Nursia (ca. 480-543), the father of Western monasticism, was not so blessed. St. Benedict spawned an institution that periodically decayed. New institutions were founded by men zealous to achieve something they found no longer possible in their monasteries. Tired of a loose observance of Benedict’s rule at the abbey of Molesme, in 1098 St. Robert and some companions left for Citeaux, near Dijon, and instituted there a community committed to monastic life according to a more rigorous interpretation of the Rule of St. Benedict. The new community, whose members came to be known as Cistercians, led an austere life, indeed.

From around the time Robert and companions arrived at Citeaux, the new community adopted an institution not provided for in the Rule of St. Benedict. In addition to the monks of the community who were obligated to live under the Cistercian interpretation of the Rule of Benedict, there were to be laybrothers. These men were neither priests nor destined for the priesthood.

127 For evidence of the myriad ways in which the Carthusians worked out and implemented their purposes, from architecture to diet, see, for example, The Evolution of the Carthusian Statutes from the Constitutions Oligonisi to the Teria Compilatio, in ANALECTA CARthusIANA (James Hogg ed., 1989) espec. Vols. 99 & 23; ARCHDALE A. KING, LITURGIES OF THE RELIGIOUS ORDERS 1-61 (1956); WOLFGANG BRAUNFELD, MONASTERIES OF WESTERN EUROPE: THE ARCHITECTURE OF THE ORDERS 111-24 (1972); DAVID KNOWLES, CHRISTIAN MONASTICISM 122-23, 199 (1969); THOMAS MERTON, THE SILENT LIFE 127-44 (1957). The following judgment of Tudor Edwards is typical in assessing the result, even as it overlooks the countless little ways in which the Carthusian way of life has changed over the centuries to refine and better achieve the Order’s purposes: “The original way of life, in form and in spirit, remains unchanged, and fears that the Carthusians must adapt themselves to the modern world if they are to survive have proved groundless in post-war years . . .” TUDOR EDWARDS, WORLDS APART 23 (1958).

128 By the seventeenth century some Cistercians themselves thought that reform was required, and one was provided by Armand-Jean de Rance at the French abbey of La Trappe. It is this reform that eventually led to the juridical creation of the Trappists, as the Cistercians of the Strict Observance are popularly known. (In what follows I refer to these monks, the Cistercians of the Strict Observance, simply as Cistercians, as they now prefer to be called; but they are to be distinguished from the Cistercians of the Common Observance). Famed for their unmelting silence and rigor, Cistercian monasteries multiplied in the United States following World War II and the attention won the Order by The Seven Storey Mountain, Thomas Merton’s autobiographical tale that culminates in his subordinating himself to the Cistercian rule at the abbey of Gethsemani, near Louisville, Kentucky.
They lived on the monastery property and were obligated to participate in some of the monastery’s communal prayer. But whereas the primary work of a priest-monk in the model of Benedict was the Divine Office chanted in church, a laybrother’s primary work was not liturgical prayer but, instead, the manual labor that sustained the monastery. Typically drawn from the peasant class and thus unschooled in Latin, most of these men would not have been candidates for the life of a priest-monk.

They came to the monastery to seek their salvation by a different means. Juridically a part of the monastic community with their own vowed rights and duties, they lacked a vote in matters of governance, and worked, slept, and prayed apart from the fathers, but with the fathers they formed one functionally integrated community. A twentieth-century Cistercian historian sums up the result: “Citeaux, notwithstanding its desire to hold strictly to St. Benedict’s Rule, did adopt for itself the institution of Lay Brothers and even made a huge success of it.”

Cistercian monks and laybrothers throughout the world had lived together in this fashion for eight and a half centuries when, in 1965, the life of the lay brother was decreed by Vatican decree: “There is to be only one class of religious in the Order. All are monks; monastic formation is given on the same

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129 Thomas Merton in the mid-1940s explained the early history of the institution in these favorable terms:

[In order to help the monks live up to their obligations to pray and meditate upon the Holy Scriptures, Saint Alberic [the second abbot of Citeaux] instituted laybrothers. He was not the first to have done so: the Order of Vallombrosa had preceded him in this respect, and others among the numerous reforms in the twelfth century were doing so. These laybrothers were to become associated in life and death in all the privileges of the monks, without the monastic quality itself, that is, without the obligations of the choir. The greater part of their day was to be devoted to work, but they were, and still are, on a more equal footing with the choir religious than are the laybrethren of any other Order. The Cistercian laybrother is not the servant of the choir monk; he is his fellow-worker. And, often in the field and on the farm, it is the choir monk who takes orders from the laybrother....


130 Vincent Hermans, O.C.S.O., Commentary of Dom Vincent Hermans on the Statute on the Unification of Our Communities As Presented to the Holy See for Approval 215 (1965) (English translation of Dom Vincent Hermans, O.C.S.O., Autour du Statut sur l’Unification des Communautés) (unpublished manuscript, on file with author). My research on the history of the Cistercian laybrother institution, and particularly its passing in the late twentieth century, was greatly assisted by an American Cistercian who participated in the governance of the Order in the relevant period. Now an archivist in the Order, he has graciously shared with me documents from the Order’s archives, including the Commentary of Dom Vincent, on condition that they not be “divulged.”
lines; rights and duties are to be the same." At a Roman stroke a way of living nearly a millenium old was abolished. To be sure, there was some background; the Decree was not utterly unexpected. The Second Vatican Council had been announced in 1959 by Pope John XXIII shortly after his election; there was to be aggiornamento—an updating of the Catholic Church. In 1960, the Abbot General of the Cistercians, Dom Gabriel Sortais, had identified "the Laybrother problem" and sought advice about it through a circular letter to the abbots of the Order, the "Rev. Father Capitulants." By 1962, when the Rev. Father Capitulants met for the General Chapter of the Order, two "solutions" had emerged for consideration. Proponents of the first would leave "the Laybrother vocation" as it was. Proponents of the second solution desired that the "exterior juridical position—"The status of Brother"—should be subject to new adaptations." Advocates of change themselves differed as to the nature and principle of any "adaptations." A first group "would maintain the actual structure as at present, i.e., the division of the community into choir and lay, but would strive to reduce the differences existing between these two classes."

[The second] would suppress this division at the juridical level, but proposed in the body of the unified community a distinction based on functions. Choral functions and the duties that go with them would be reserved especially for those who have the vocation of Choir monks; while material functions would be especially entrusted to those who seek God in a more simple manner, in active labor, to those whom at the moment we call Laybrothers.

The Rev. Father Capitulants, not a brother among them, voted 45 to 19 for the second version of the second option: the life of the lay brother was to be juridically eliminated and "all would be equal." The Decree by which the Vatican approved the proposed change, in the language quoted above, began with these words:

The principal work of monks is to render service to the divine majesty, a service which is humble and still ranks high in the order of values. The work is done inside the monastery's enclosure in a sheltered life entirely given up to worshipping God. It is with a view to encouraging with ever greater zeal the performance of this sacred

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131 Decree of the Sacred Congregation of Religious ¶ 2 (Dec. 27, 1965).
133 Id.
134 Id.
duty, with a view also to fastening ever more closely the bonds of 
brotherly union, that the Abbot General of the Order of Reformed 
Cistercians, supported by the votes of the General Chapter, has 
submitted a humble request that the existence of one single class of 
religious should be restored [sic] in the Order. It is asked that all of 
them should be monks, contributing their united efforts, either 
directly or indirectly, to the celebration of the Divine Office. This 
Sacred Congregation has weighed every aspect of the matter in the 
spirit of the second Ecumenical Vatican Council. Accordingly it is 
glad to grant the favour requested . . . .

The same Vatican decree specifically provided that those who had made 
their profession as laybrothers “are free to remain in the state which they have 
chosen.” That was the law. But the Abbot General who had identified “the 
Laybrother problem” had a different idea. It provided the spirit. “If a 
laybrother expressed the desire to stay in statu quo, this should not be 
consented to and persuasion should be used to convince such a one of the 
wisdom of following the common rule.”

That spirit was given expression in the “Commentary on the Statute on the Unification of Our Communities” by Dom Vincent Hermans, the Father Canonist of the Abbot General’s Council: 
“The Statute has taken into account these legitimate apprehensions [of the 
laybrothers.] When reading it, the Brothers might well bear in mind that it 
affects chiefly the Community of the future . . . . The [Second Vatican] 
Council for its part is reducing or eliminating anything that makes for division 
. . . .”

No laybrother was forced—no one thought a laybrother could be forced—
to “convert” to the new vocation. But pressure was brought to sign the 
Decree of Unification. Some brothers signed; others left the Cistercians, in

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135 Decree of the Sacred Congregation of Religious, supra note 131, at Introduction. The most specifically relevant language of the Second Vatican Council, from which that Council’s “spirit” might have been discerned, occurs in the Council’s Decree on the Appropriate Renewal of the Religious Life (De accommodo 
data renovatione) ¶ 15, 16, reprinted in THE DOCUMENTS OF VATICAN II 477-78 (Walter M. Abbott ed., 
1966):

To strengthen the bond of brotherhood between members of a community, those who are called 
lay brothers, assistants or some other name, should be brought into the heart of its life and activities . . . . According to the norms of the norms of their constitutions, monasteries and 
communities of men which are not exclusively lay in their character can admit both clergy and laity 
on the same basis and with equal rights and duties, excepting those which result from ordination.

136 Decree of the Sacred Congregation of Religious, supra note 131, at ¶ 83.
137 Hermans, supra note 130, at 214.
138 See id. at 219.
droves; still others strove to persevere in their vowed vocation, betrayed by their community.\textsuperscript{139} Those who opted to stay and live as brothers were pressured to live in a new way, and inevitably they did; they were a dying breed. "The Laybrother problem" had been solved. Everyone had been made "equal," which is what Dom Gabriel had sought.\textsuperscript{140}

But what the laybrothers and many onlookers could not understand is why the laybrother form of life had to be eliminated in the name of equality. The imperative to equalize ended up meaning a homogenization of ways of living, and neither equality nor a life the same as the priest-monk was something the laybrothers had an interest in. They had, as a matter of fact, chosen to be laybrothers, and by the mid-twentieth century most of the men choosing the life of the laybrother did so with education sufficient to qualify them for the priest-monk life. Equality, true equality, is something they had believed—without discussion—that they possessed, notwithstanding the functional and juridical differences they had embraced in joining the Order. Assimilation to the mode of life of the choir-monks was not something they had wanted, either in the name of equality or for any other reason. But no one asked them. Dom Hermans had the idea right: "Law comes into existence through a process of evolving; it is not suddenly imposed in advance."\textsuperscript{141} It was the practice that fell short.

Benedictine monastic life had developed, through purposive human agency, into Cistercian monastic life, and Cistercian monastic life had recognized two paths by which a Cistercian could work out his salvation in the monastery. One of those ways, never attacked by those who lived it, nor even intelligently discussed on its own merits, was abolished upon the appearance \textit{ab extra} of the requirement of equality—understood as functional sameness. To be sure, Dom Gabriel and perhaps Dom Hermans would have agreed that true equality could consist with a diversity of functions, but the zeal to implement equality swallowed up all subtlety.\textsuperscript{142} All of the goods that men for

\textsuperscript{140} Sortais, supra note 132, at III.B.
\textsuperscript{141} Hermans, \textit{supra} note 130, at 217.
\textsuperscript{142} The vision of Sortais and Hermans was, in fact, very subtle, and in no way inimical to functional differences. It was the taking over of the equality rhetoric that resulted in the dissolution of the lay brother vocation. The Cistercian archivist referred to in note 150, \textit{supra}, wrote the following to me in the course of my research:

I feel I must go on record and state that as a member of the Abbot General's Council, both under Dom Gabriel Sortais and his successor, Dom Ignace Gillet, when \textit{the Decree on Unification}
centuries had achieved by living the laybrother life were to become unobtainable—not because the laybrothers’ modus vivendi had come to be understood as aimed at what the tradition now recognized as false goods, but because of an impatient and eclipsing need to create uniformity of appearance and function in order to affirm an “equality.” No case was made, however, as to what good would come from the equalizing. Was it a good in itself? A means of achieving Cistercian goods? Someone else’s goods?¹⁴³ Whose goods? Perhaps, as Paul Campos has urged only slightly out of context, some “jurisprudential fasting” was in order.¹⁴⁴

CONCLUSION

The liberal ideal of equality, because of its vaunted universality, operates as an intellectual drug that induces people to do and say strange things. John Rawls, for example, recently reassured his readership that the liberal principle of equality does not require that “[b]ishops and cardinals . . . be elected.”¹⁴⁵ Rawls’s conclusion is correct, I think, from the point of view of someone whose tradition includes bishops and cardinals. But that the point merited making by someone rooting around in others’ tradition suggests that a mistake occurred, a mistake about how normative questions should be answered. Who was in need of Rawls’s reassurance? Presumably only those who had come to believe that equality, in Rawls’s sense, was a value of (undisputed) universal import. But on a version of the principle by which Richard Rorty (citing Thomas Jefferson), for example, adjudges questions about the Trinity and transubstantiation irrelevant to democratic politics,¹⁴⁶ the social precepts of late Western liberal political democracies are rendered irrelevant to how a two-

was drawn up, I felt—as I still feel—that whereas Dom Gabriel had fully intended to safeguard and perpetuate what he considered to be a valid and meaningful form of Cistercian monastic life as led by our lay brothers, while taking away any class distinctions between choir monks and lay brothers, what was done to all intents and purposes abolished that form of life by taking away the lay brothers’ identity as a group and as individuals.


¹⁴³ The Carthusians, not surprisingly, continue to this day to include a way of life for brothers. No longer called laybrothers but monks, their life in the monastery looks much as it has since 1084. In adjusting their modus vivendi following Vatican II, the Carthusians found that the diversity of functions in the monastery was part of their tradition, the purposes of which would be defeated by a homogenization of functions in the name of equality.


thousand-year-old faith community should discern who are the authoritative successors to Jesus Christ in the episcopate and who are the electors of the successor to St. Peter.

If there exist universal normative principles, then dialogue is otiose, and we should get on with the business of implementation. But if normative questions, as about how married or monastic life is to be shaped, are answered through dialogue, then community is necessary. For dialogue, genuine dialogue, occurs through personal interaction, the actual asking and answering of questions among people who share meaning.²⁴⁷

Communities of shared meaning, however, are exactly what we lack at the end of the millennium, the univeralist rhetoric of equality, individual rights, and negative liberty having dissolved the bonds that held us together in our “little platoon[s]” of meaning and function.²⁴⁸ “We seem,” as Professor Witte laments,

[to] be living out the grim prophecy that Freidrich Nietzsche offered a century ago: that in the course of the twentieth century, “the family will be slowly ground into a random collection of individuals,” haphazardly bound together “in the common pursuit of selfish ends”—and in the common rejection of the structures and strictures of family, church, state, and civil society.²⁴⁹

“There are,” Hugo Grotius observed, “many ways of living, some being better than others.”²⁵⁰ Those better ways allow us to achieve the good life, the life of human goods. But what those particular goods are, and how we are to

²⁴⁷ Dialogue offers none of the certainty that is the boast of classic liberalism:

Perhaps just as classic foundationalism can be understood as the quest for self-evident and incorrigible truths that would stem the tide of skepticism in knowledge, so Esopiartist liberalism can be seen as the search for ahistorical, transtemporal, self-evident, or incorrigible moral first principles — principles that could trump bids for political dominance by a particular religion. And just as epistemic foundationalism gains its strength and plausibility from the fear of skepticism, so Esopiantist liberalism gains its strength and plausibility from the fear of religious persecution should a given religion establish cultural hegemony.

KEITH J. PAVLISCHRK, JOHN COURTNEY MURRAY AND THE DILEMMA OF RELIGIOUS TOLERATION 23 (1994). Still, dialogue need not lead to the relativism in which Franklin Gamwell, for example, finds Alasdair MacIntyre and other communitarians locked. See FRANKLIN I. GAMWELL, THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD 61-84, 79-80 (1990). If, as Mary Ann Glendon has urged, we are attentive, intelligent, reasonable, and responsible in our dialogue, we might work out ways of living that allow us to achieve genuine human goods. See GLENDON, ABORTION AND DIVORCE, supra note 118, at 138-42.

²⁴⁸ GLENDON, supra note 6, at 299 (quoting Edmund Burke).

²⁴⁹ WITTE, supra note 2, at 215.

order our lives to achieve them, does not appear automatically. For help in finding the path to those better ways, Alasdair MacIntyre is “waiting for . . . another—doubtless very different—St. Benedict.” 151 Professor Witte is not waiting. Professor Witte would have us start where we are, asking what was going forward in the Western understandings of family and marriage, and, as we begin to talk together about community, to constitute it. That process requires openness and discerning judgment, both of which Professor Witte has exemplified in From Sacrament to Contract. He plans to carry that process forward in a projected sequel, From Contract to Covenant, focusing on what an American theology and law of marriage might look like at the start of the new millennium.

Witte’s is just one voice, however. Where hearers are uninterested, there is monologue, not dialogue. There is no guarantee that Witte will succeed in engendering the necessary dialogue—the sustained and intelligent asking and answering of questions about what human goods are and how life is to be ordered to make their achievement possible. We the people, as Professor Glendon reminds us, can be inattentive, unintelligent, and unreasonable. 152 The choice is ours. One excuse for refusing to join in, however, should not be allowed. We cannot eschew dialogue on the ground that we potential interlocutors cannot agree about everything. Agreement is not a condition of dialogue. 153 Dialogue requires common questions, and good faith attempts to answer them.

But if disagreement does not prevent dialogue, prudence, at least, counsels against giving legal effect to moral judgment that is not the product of broad dialogic agreement. Law that is out of touch ushers in its own disregard. 154

152 See supra text accompanying note 122.
153 See Glendon, Abortion and Divorce, supra note 118, at 139-40.
154 Professor Brundage’s study of sex law led him to this conclusion:

Law is a crude, if indispensable, tool of social policy; but it is also a fragile one. To force it beyond its limits is not only to invite failure to achieve the intended goal, but also to inspire disrespect for the legitimate social functions of law and ultimately for society itself. Sex law presents powerful temptations to force law beyond its limits. Societies do well to resist those temptations.

Brundage, supra note 7, at 595. “Jean Carbonnier coined the word panjurism to describe this legal ethos pervaded by the idea that everything is law, or ‘at least that law has a vocation to be everywhere, to envelop everything, and, like a god, to hold up the entire inhabited world.’” Glendon, supra note 6, at 33.