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**“A History of the Anglican Church—Part XI:
An Essay on the Role of Christian Lawyers and Judges within the Secular
State”©**

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The ideas expressed in this Apostolate Paper are wholly those of the author, and subject to modification as a result of on-going research into this subject matter. This paper is currently being revised and edited, but this version is submitted for the purpose of sharing Christian scholarship with clergy, the legal profession, and the general public.

PREFACE

The organized Christian church of the Twenty-First Century is in crisis and at a crossroad. Christianity as a whole is in flux. And I believe that Christian lawyers and judges are on the frontlines of the conflict and changes which are today challenging both the Christian church and the Christian religion. Christian lawyers and judges have the power to influence and shape the social, economic, political, and legal landscape in a way that will allow Christianity and other faith-based institutions to evangelize the world for the betterment of all human beings. I write this essay, and a series of future essays, in an effort to persuade the American legal profession to rethink and reconsider one of its most critical and important jurisprudential foundations: the Christian religion. To this end, I hereby present the twenty-second essay in this series: “A History of the Anglican Church—Part XI.”

PART XI. Anglican Church: Of Law of Christian Marriage (1300 to 1600s A.D.)



INTRODUCTION¹

The Church of England's influence on the institution of marriage and upon Anglo-American family jurisprudence has been comprehensive, thorough, and profound. Its ecclesiastical courts, which shaped this jurisprudence, reigned unencumbered by secular authority for several centuries. For this reason, this essay touches upon only one aspect of the Church of England's influence upon family jurisprudence; namely, the Catholic theology which shaped the Anglican Church's influence upon marriage and family up through the period 1600.

Although the objective of this essay is not to deprecate unconventional or non-Christian ideals of marriage, such as same-sex marriage or polygamy, I do argue that the foundation of Anglo-American and Western family law jurisprudence is the orthodox or traditional Christian faith. In England, there have traditionally been two forms of marriages: non-sacred *civil marriages* and sacred

¹ This essay is dedicated to A.M.E. Bishop Ronnie E. Brailsford and the Bethel African Methodist Episcopal (A.M.E.) Church of Columbia, South Carolina, where in many ways I was afforded redemption for personal moral failures and past mistakes in 1997. These personal moral failures involved pre-marital sex and sinfulness for which I sought redemption through the church. At about age 30, I began to sense the urgency of organizing my sex life within the boundaries of the Christian canon law of marriage and in a responsible manner that was commensurate to my standing in society as an American lawyer and an officer of the court. Nights out at the strip club and sexual affairs with strippers became utterly embarrassing and loathsome. And besides all of that, as a Christian, I had committed my life to Jesus Christ; and as an African American, I had also committed my life to being a credit to the African American community and to making a meaningful contribution to ameliorating the plight of the African American family and abating the negative heritage of chattel slavery. Loose, immoral sex thus became incompatible with my desire to exemplify the very best in African American leadership. By this time, around the year 1997-98, I also began to make the fundamental link between sin and slavery. I agreed with St. Augustine of Hippo that sin is the foundation of human misery and slavery; and that moral virtue is the foundation of human freedom. "[F]or it is with justice, we believe," wrote St. Augustine in *The City of God*, "that the condition of slavery is the result of sin." This fundamental belief was sown into the central theme of my Christian novel *Bishop Edwards: A Gospel for African American Workers* (2015), first published in 2001, when I was thirty-two years old. To a certain degree, I broke with the established American civil rights establishment, while relying on this fundamental point: *sin, and the effects of sin, had to be rooted out of the victims of slavery in order for these victims to become truly free*. In my mind, it was not enough to press for civil rights and changes in laws and public policy, for so long as the masses of underprivileged African Americans, including myself, were continuously self-indulging and floundering in *sinful living*. By the year 1997, I had realized that there was real friction between African American men and women that was having a very negative impact on African American marriages. This friction was caused by sinful living. During the Fall of 1997, I sought God's forgiveness for my own moral failures and *sinful living*. And so I sought refuge within the Bethel A.M.E. Church in Columbia, South Carolina, which at that time was led by Pastor Ronnie E. Brailsford, who in 2016 was elected a bishop in the A.M.E. Church. On one Sunday in 1997, Pastor Brailsford opened the doors of the church, and I walked up to the front of the pastor's pulpit and the congregation and re-dedicated my life to Christ. This essay is thus largely a testament of my concerns over the plight of African American marriages and families in the United States.

*religious marriages.*² The requirements for the non-sacred civil marriages do not necessarily need to correlate or correspond to the traditional requirements of sacred Christian marriages. But in the United States, the Church has relinquished too much of its legal authority and jurisdiction over the institution of religious marriage to the secular state, and therein lies the deep-seated evil. The United States Constitution never intended this result; the doctrine of separation of church from state never intended this result. For this reason, America's great church denominations should commission private-church-sponsored ecclesiastical courts to administer their own canon laws of sacred religious marriage, leaving the secular civil courts to administer the secular civil marriage contracts. This, it seems, is the only viable way to resolve the current crisis of marriage in the United States.

In law school, I learned that the institution of marriage is a substantive, fundamental right under the United States Constitution, and that it is an international human right under United Nations and regional international protocols. At that time, during the early 1990s, Anglo-American and western jurisprudence had restricted the institution of marriage to civil covenant between one man and one woman. This civil covenant between man and woman was not presented in law school as a Christian or Catholic institution, but rather as a civil contract that had a series of binding covenants which had been extracted out from a number of sources, including both non-Christian and Christian sources.

Within the influential Church of England, which had done much to shape our understanding of Anglo-American marriage, the Greco-Roman natural-law philosophy cross-pollinated the Hebrew Scriptures and the New Testament. Thus, within the Church of England, the institution of marriage not only had its Christian theological foundations, but it also had foundations rooted in Greco-Roman paganism and secular social policy.

As we shall see below, according to Christian tradition, the most important function of the institution of marriage is childbirth and child-rearing. Indeed, the Catechism of the Catholic Church teaches “[t]he matrimonial covenant, by which a

² I have selected the adjectives “non-sacred civil” and “sacred religious” in order to emphasize two distinct types of marriages which I suggest should be more clearly demarcated and incorporated into a bi-furcated church-state court system in the United States.

man and a woman established between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.”³ According to Christian tradition, the institution of marriage was the first institution ordained by God. “The intimate community of life and love which constitutes the married state has been established by the Creator and endowed by him with its own proper laws.... God himself is the author of marriage.”⁴ Indeed, marriage is the nucleus of the social order; from it comes the wellsprings of family, freedom, culture, and civilization. “Holy Scripture affirms that man and woman were created for one another: ‘It is not good that the man should be alone.’ The woman, ‘flesh of his flesh,’ his equal, his nearest in all things, is given to him by God as a ‘helpmate’; she thus represents God from whom comes our help.”⁵ For this reason, the *Book of Genesis* places the institution of marriage at the center of mankind’s social and political structure.⁶

The two most central scriptural texts influencing Jesus from his Hebrew heritage are Genesis 1:27 and Genesis 2:24. The first reads: ‘So God created man in his own image, in the image of God he created him; male and female he created them.’ The second reads: ‘Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.’⁷

And English philosopher John Locke also placed the institution of marriage at the center of Christian social democracy. Locke considered marriage to be the most basic, and perhaps, the most important, element (i.e., “society”) within a nation-state. Likewise, many other western theologians and philosophers, including Plato, Aristotle, St. Augustine, and St. Thomas Aquinas have concluded that the husband-wife-child family unit is the most fundamental and basic element of a healthy community. Although in Plato’s ideal state, the family structure would be modified in order to ensure the nepotism did not perpetuate oligarchy.

³ *Catechism of the Catholic Church* (New York, N.Y.: Doubleday, 1997), p. 446.

⁴ *Ibid.*, p. 447..

⁵ *Ibid.*, pp. 447-448.

⁶ *Ibid.*, p. 448.

⁷ John Witte, Jr., and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008), p. 169-170.

Within the Christian world, the Apostles Peter and Paul summarized the duties and responsibilities of husbands and wives within Christian marriages.⁸ The Apostle Peter, whom the Roman Catholic Church believes was entrusted with the keys to Christ's kingdom, gave the following instructions to married Christian couples:

Likewise, ye wives, be in subjection to your own husbands; that, if any obey not the word, they also may without the word be won by the conversation of the wives; 2 While they behold your chaste conversation coupled with fear. 3 Whose adorning let it not be that outward adorning of plaiting the hair, and of wearing of gold, or of putting on of apparel; 4 But let it be the hidden man of the heart, in that which is not corruptible, even the ornament of a meek and quiet spirit, which is in the sight of God of great price. 5 For after this manner in the old time the holy women also, who trusted in God, adorned themselves, being in subjection unto their own husbands: 6 Even as Sara obeyed Abraham, calling him lord: whose daughters ye are, as long as ye do well, and are not afraid with any amazement. 7 Likewise, ye husbands, dwell with them according to knowledge, giving honour unto the wife, as unto the weaker vessel, and as being heirs together of the grace of life; that your prayers be not hindered.

And the Apostle Paul wrote something very similar to St. Peter, stating in the *Book of Ephesians*, the following:

²⁰ Giving thanks always for all things unto God and the Father in the name of our Lord Jesus Christ; ²¹ Submitting yourselves one to

⁸ Perhaps the most controversial element of the conventional Anglican definition of marriage is the theological differences between male and female. Numerous Christian and biblical references insisted that the women (or the "wife") was the weaker vessel than, and subordinate to, men (or the "husband"). Although both husband and wife were required to love, respect and honor each other, the Christian doctrine placed men (or the "husband") at the head of the household and therefore the head over the woman. To the extent that Christianity was used to subjugate and to suppress women, modern-day feminists have sought to controvert the Christian doctrine. But in the United States, where African American males were systematically and routinely prohibited from serving in leadership roles as husbands within their households, the American feminist challenge to conventional Christianity becomes more complicated where the African American church, which is traditionally conservative, now wrestles with the deterioration of the African American family structure. For this reason, Frederick Douglass sternly warned against comparing the Women's Suffrage Movement to the plight of African Americans, which, as Douglass himself observed, was saturated with arson, lynching, and other forms of outrage.

another in the fear of God. ²² Wives, submit yourselves unto your own husbands, as unto the Lord. ²³ For the husband is the head of the wife, even as Christ is the head of the church: and he is the saviour of the body. ²⁴ Therefore as the church is subject unto Christ, so let the wives be to their own husbands in everything. ²⁵ Husbands, love your wives, even as Christ also loved the church, and gave himself for it; ²⁶ That he might sanctify and cleanse it with the washing of water by the word, ²⁷ That he might present it to himself a glorious church, not having spot, or wrinkle, or any such thing; but that it should be holy and without blemish. ²⁸ So ought men to love their wives as their own bodies. He that loveth his wife loveth himself. ²⁹ For no man ever yet hated his own flesh; but nourisheth and cherisheth it, even as the Lord the church: ³⁰ For we are members of his body, of his flesh, and of his bones. ³¹ For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. ³² This is a great mystery: but I speak concerning Christ and the church. ³³ Nevertheless let every one of you in particular so love his wife even as himself; and the wife see that she reverence her husband.

The importance of the writings of the Apostles Peter and Paul to the institution of Christian marriage is profound. Saints Peter and Paul were both personally commissioned by Jesus Christ to preach the Gospel, so that their letters regarding sex and marriage have been viewed to be unequivocal, binding ecclesiastical law.⁹ This ecclesiastical law was believed to represent God's covenant with his chosen people Israel¹⁰, and Christ's New Covenant with the Church.

Seeing God's covenant with Israel in the image of exclusive and faithful married love, the prophets prepared the Chosen People's

⁹ Perhaps the most controversial element of the conventional Anglican definition of marriage is the theological differences between male and female. Numerous Christian and biblical references insisted that the women (or the "wife") was the weaker vessel than, and subordinate to, men (or the "husband"). Although both husband and wife were required to love, respect and honor each other, the Christian doctrine placed men (or the "husband") at the head of the household and therefore the head over women. To the extent that Christianity was used to subjugate and to suppress women, modern-day civil jurisprudence have sought to controvert the Christian doctrine. But in the United States, where African American males were systematically and routinely prohibited from serving in leadership roles as husbands within their households, the American feminist challenge to conventional Christianity becomes more complicated where the African American church, which is traditionally conservative, now wrestles with the deterioration of the African American family structure. For this reason, Frederick Douglass sternly warned against comparing the Women's Suffrage Movement to the plight of African Americans, which, as Douglass himself observed, was saturated with arson, lynching, and other forms of outrage.

¹⁰ See, e.g., the *Book of Hosea*.

conscience for a deepened understanding of the unity and indissolubility of marriage. The books of Ruth and Tobit bear moving witness to an elevated sense of marriage and to the fidelity and tenderness of spouses. Tradition has always seen in the Song of Solomon a unique expression of human love, insofar as it is a reflection of God's love—a love 'strong as death' that 'many waters cannot quench.'¹¹

The nuptial covenant between God and his people Israel had prepared the way for the new and everlasting covenant in which the Son of God, by becoming incarnate and giving his life, has united to himself in a certain way all mankind saved by him, thus preparing for 'the wedding-feast of the Lamb.'¹²

On the threshold of his public life Jesus performs his first sign—at his mother's request—during a wedding feast. The Church attached great importance to Jesus' presence at the wedding at Cana. She sees in it the confirmation of the goodness of marriage and the proclamation that thenceforth marriage will be an efficacious sign of Christ's presence.¹³

The entire Christian life bears the mark of the spousal love of Christ and the Church. Already Baptism, the entry into the People of God, is a nuptial mystery; it is so to speak the nuptial bath which precedes the wedding feast, the Eucharist. Christian marriage in its turn becomes an efficacious sign, the sacrament of the covenant of Christ and the Church. Since it signifies and communicates grace, marriage between baptized persons is a true sacrament of the New Covenant.¹⁴

The Anglo-American customary practices and traditions regarding the marriage covenant were extracted largely from St. Peter's and St. Paul's letters, together with other passages found in *The Holy Bible*, and were later molded and shaped through the Roman Church of England. In the West, for many centuries,

¹¹ Catechism of the Catholic Church (New York, N.Y.: Doubleday, 1997), p. 449.

¹² Ibid.

¹³ Ibid., pp. 449-450.

¹⁴ Ibid., p. 451.

the Roman Catholic Church monopolized the field of defining and interpreting the institution of marriage through its ecclesiastical courts in England and Western Europe. Its interpretation became the foundation of our knowledge and understanding of the institution of secular, civil marriage in the West.

The Roman Catholic Church defined the institution of marriage as a Christian “sacrament” and injected St Peter’s, St. Paul’s, St. Augustine’s, St. Thomas’ and many other renowned theologians’ Christian ideas on marriage into the civil law of Western Europe. In England, the common law and the ecclesiastical law inherited much of this Roman Catholic tradition. Indeed, the Church of England had been under the tutelage and vassal of Bishop of Rome for several centuries, before it became an independent church under King Henry VIII during the sixteenth century.

After its separation from Rome, the Church of England maintained control over its own ecclesiastical courts which continued to define marriage in Christian theological terms. The Church of England’s influence over the ecclesiastical courts of the British Empire spread its ideals of Christian marriage to colonial America, where it would be introduced to African slaves. The slaves of colonial America and, eventually, of the new United States, early and largely determined that a basic element of their freedom included the right to marry and to found a functional African American family unit. Hence, the Church of England’s influence upon these African slaves came from various directions: the Episcopal Church, the Methodist churches, the Baptist, Presbyterian, Congregational, the Society of Friends, and other forms of Christian churches. Through their Christian friends, the early African American immigrants and slaves learned that the Christian faith contained the theological foundations of American constitutional liberty as well as the moral justifications for the abolition of slavery.

African liberation was not wholly divorced from the application of religious freedom and the principles of the Christian faith. For instance, if only the African slave could practice the Christian faith, or another religion of his choice, then he would become free. The most important element of African American freedom was the family unit, which had been devastated within the institution of slavery. The African American church’s first and most important function was, and is, the preservation of the African American family unit. The Church of England’s

influence over the English common law's definition of marriage was largely embraced wholeheartedly by the first African Baptist and Methodist churches. If only the application of the English common law on Christian marriage could be applied to the African slaves, many of the abolitionists reasoned, the slaves could then attain full and complete freedom through the ecclesiastical, chancery and common law courts. Otherwise, the institution of African slavery could not be abolished or completely eradicated until the English common law on Christian marriage was fully applicable to African Americans in the United States. *In other words, whenever, if ever, the African slaves could avail themselves of the right to marry and to establish a Christian marriage, they could begin to lay the foundations of true freedom in the United States.* Interestingly, Elijah Muhammad and the Nation of Islam had reached similar conclusions, albeit from a different theological source, on the relationship between African American marriage and liberty.

For this reason, at the age of thirty, I began to believe that the conventional English common law definition of Christian marriage -- after having been systematically withheld from African slaves for 240 years during American slavery-- was the key to liberating underprivileged African American mothers and fathers from their lingering badges and incidents of chattel slavery in the United States.¹⁵ Thus, I had also concluded, at about the age of thirty, that the primary role of the Black Church in America continued to revolve largely around teaching the highest of Christian ethics and moral standards to underprivileged African Americans. And included within that role was promoting the institution of Christian marriage.

SUMMARY

The Holy Bible is the foundation of the Anglo-American traditional view of Christian marriage and family. The *Book of Genesis*, the Four Gospels and the Letters of St. Peter and St. Paul continue to mold and shape our ideas of marriage in the West. This essay carefully traces how the idea of Christian marriage was

¹⁵ See, e.g., Roderick O. Ford, *Bishop Edwards: A Gospel For African American Workers* (Tampa, FL.: Xlibris Pub. 2015).

developed in the Christian world through the writings of Church Fathers, theologians, and philosophers. As a result of the expansive jurisdiction of the Roman Catholic Church, the idea of Christian marriage was uniform throughout Western Europe and England. In England, the church's ecclesiastical court retained jurisdiction over marriage and family; and it was through these ecclesiastical courts that Catholic ideas of marriage came into England's family-law jurisprudence. This jurisprudence was carried over into the American colonies during the 1600s and has continued to influence American family and marriage law.

Part XI. Anglican Church: Christian Law of Marriage (1300 to early 1600s A.D.)

A. Of Christian Marriage: Human Reproduction: A Divine Commandment

The conventional Anglican ideal of Christian marriage as being only between a man and woman is not an irrational ideal. For it certainly comports with the highest, most sophisticated reason and scientific studies of human sexuality and reproduction. The Christian world has not simply relied upon the letters of St. Paul and the Book of Genesis to justify its teachings on Christian marriage. But, indeed, the Christian world has certainly relied upon reason and science in order to vindicate its position. Human biology is thus a major pillar of Christian theological doctrine of marriage. For there is no other way to justify the divine scriptures on marriage without reason, logic, and scientific proof—in this case, the science of human biology. Here, in the science of human biology, we find a natural law of human sexuality, child birth, and a prolonged childhood and dependency upon adults for safety and well-being. The writings of St. Augustine of Hippo, St. Thomas Aquinas, English theologian Richard Hooker, philosopher John Locke and many others take these factors into account. Hence, from this biological science we find their moral justifications for the Christian theology of heterosexual marriage.

First off, it is morally necessary for children to be born into the world in order for the human race to continue to exist; and, secondly, sexual union between

the male and female is also a moral prerequisite to childbirth. To the Christian mind, this law of sexual necessity is the eternal and divine law of God.

For this reason, the traditional doctrine of Christian marriage incorporates the very sacred idea of “Man” as including “two sexes,” one male and one female. This idea of “Man” as “one flesh” is the reflection of biological human reproduction. Within the Christian world, the biological law of human reproduction thus set the parameters of the Christian marriage. As we shall observe below from the writings of philosophers such as St. Augustine and St. Thomas Aquinas, the Christian marriage’s primary reason for being was biological human reproduction; its secondary reason for being was child-rearing (i.e., primary moral and cultural education) and the orderly preservation of the natural, biological family. Without the existence of these two necessities-- i.e., that of child birth and child-rearing (i.e., moral and cultural education) through family preservation—the Christian marriage is untenable. See, e.g., Figure 1.

Figure 1. Marriage as a Divine Law (or Law of Necessity)

Childbirth	Children must be born into the world. If this does not occur, then the human race will cease to exist.
Child-Rearing	Children must be protected and educated. If this does not occur, then the human race will degenerate and may eventually cease to exist.

According to the *Catechism of the Catholic Church*, childbirth and child-rearing constitute vital components of the institution of marriage, stating:

‘By its very nature the institution of marriage and married love is ordered to the procreation and education of the offspring and it is in them that it finds its crowning glory.’¹⁶

¹⁶ *Catechism of the Catholic Church* (New York, N.Y.: Doubleday, 1997), pp. 460-461.

Children are the supreme gift of marriage and contribute greatly to the good of the parents themselves. God himself said: ‘It is not good that man should be alone,’ and ‘from the beginning [he] made them male and female’; wishing to associate them in a special way in his own creative work, God blessed man and woman with the words: ‘Be fruitful and multiply.’ Hence, true married love and the whole structure of family life which results from it, without diminishment of the other ends of marriage, are directed to disposing the spouses to cooperate valiantly with the love of the Creator and Savior, who through them will increase and enrich his family from day to day.¹⁷

The fruitfulness of conjugal love extends to the fruits of the moral, spiritual, and supernatural life that parents hand on to their children by education. Parents are the principal and first educators of their children. In this sense the fundamental task of marriage and family is to be at the service of life.¹⁸

Spouses to whom God has not granted children can nevertheless have a conjugal life full of meaning, in both human and Christian terms. Their marriage can radiate a fruitfulness of charity, of hospitality, and of sacrifice.¹⁹

The Christian church, guided in large part by the letters of St. Paul, held that this human reproduction should occur only within the natural union between the human male (i.e., husband) and the human female (i.e., wife) within bonds of holy matrimony. See, e.g., Figure 2.

Figure 2. Man or Mankind: A Natural Union between Male and Female

Man or Mankind (i.e., Husband)	Man or Mankind (i.e., Wife)
Male	Female

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

The Christian teleological doctrine, particularly as reflected in the writings of St. Thomas Aquinas, held that the male sexual organs were primarily created and designed by God for reproductive union with the female sexual organs, and vice versa. Thus, human sexuality had originated in creation for a reason: human reproduction; and, without this human sexuality, there could be no continuation of the human race. The Christian teleological view thus held that human sexuality was a natural law of God. For instance, Genesis 1:26-28 states this eternal, divine and natural law of human sexuality as follows:

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

Hence, to the Christian world, the words “be fruitful, and multiply, and replenish the earth,” is an eternal and divine commandment. According to conventional Catholic or Christian doctrine, God created “man” in two forms—male and female—in order to reproduce the human race. From its inception, the Christian church (and particularly the numerous letters of the Apostle Paul) has held that sexual intercourse was designed by God alone and had to be governed by His divine law; sexual intercourse was reserved for the marital union between the male and the female, to be restricted for the sole and distinct purpose of human reproduction. Sexual intercourse thus was not designed for pleasure, casual or transitory relationships, human experimentation, or homosexual relations. For this reason, the Apostle Paul, who was perhaps very first “doctor” of the church, carefully enunciated the Christian law of sex, sexuality, and marriage throughout many of his New Testament letters.²⁰

²⁰ Perhaps the most controversial element of the conventional Anglican definition of marriage is the theological differences between male and female. Numerous Christian and biblical references insisted that the women (or the “wife”) was the weaker vessel than, and subordinate to, men (or the “husband”). Although both husband and wife were required to love, respect and honor each other, the Christian doctrine placed men (or the “husband”) at the

Anglo-American family law is thus largely derived almost completely from Christian teachings on marriage as they were developed within the Church of England throughout several centuries up to the late 1600s.

B. Of Christian Marriage: Jesus and the Law of Moses

Modern Christian theologians have held that the Christian ideal of monogamous, heterosexual marriage *elevated the status of women* above all other forms of marriages prevailing in the ancient, Medieval, and Early Modern eras.²¹ “In the Old Testament the polygamy of patriarchs and kings is not yet explicitly rejected. Nevertheless, the law given to Moses aims at protecting the wife from arbitrary domination by the husband, even though according to the Lord’s words it still carries traces of man’s ‘hardness of heart’ which was the reason Moses permitted men to divorce their wives.”²² This is true for a number of reasons:

The two most central scriptural texts influencing Jesus from his Hebrew heritage are Genesis 1:27 and Genesis 2:24. The first reads:

head of the household and therefore the head over the woman. To the extent that Christianity was used to subjugate and to suppress women, modern-day feminists have sought to controvert the Christian doctrine. But in the United States, where African American males were systematically and routinely prohibited from serving in leadership roles as husbands within their households, the American feminist challenge to conventional Christianity becomes more complicated where the African American church, which is traditionally conservative, now wrestles with the deterioration of the African American family structure.

²¹ “It is well known that the condition of womankind is improved in proportion to the progress of Christianity. Heathenism has usually made her to rank with the beasts of burden and regarded her as the property of her husband, as his slave, to serve him, to be sold, beaten, or killed as he chooses. Polygamy has been common among non-Christian nations. But the gospel exalts women to an equal place and participation with men in all the advantages and benefits of society. A polygamist is regarded in Christian lands as a monster. Not only women, but also children have been lifted up by the gospel. One of the most shocking aspects of morals in ancient Greece and Rome was the prevalence of infanticide. Their people were ‘without natural affection.’ In almost all the states of Greece and Rome, the murder of one’s own new-born children, or their abandonment to hunger and wild beasts, was allowed by law and approved by public sentiment. One so humane as Plutarch mentions as a merit such abandonment of all his children by Attalus, king of Pergamos. The greatest sages, philosophers, and moralists of Greece—Solon, Plato, and Aristotle—upheld infanticide by arguing in favor of it. Rome also was dyed with the blood of her murdered infants. In Rome, not only was infanticide common, but the law gave the father power to kill or sell into slavery his adult children at his will. Also he might legally dismiss his wife if he chose, and even for trivial offenses put her to death. Surely it is the gospel, above all other influences, that eliminates the oppression of the weak by the strong. To whatever extent true Christianity reigns in a community, to that extent the blessings of the highest civilization are its portion. There labor is ennobled, industry is encouraged, progress is promoted, learning is advanced, science and art are developed, pauperism is eliminated, and vice, crime, cruelty, and oppression are overcome. In society the fruits of Christianity have always proved to be good. ‘An evil tree can not bring forth good fruit.’ Therefore Christianity is good and from God.” Russell R. Byrum, *Christian Theology: A Systematic Statement of Christian Doctrine for the Use of Theological Students* (Anderson, Indiana: Warner Press, 1976), pp. 162-163.

²² Catechism of the Catholic Church (New York, N.Y.: Doubleday, 1997), p. 449.

‘So God created man in his own image, in the image of God he created him; male and female he created them.’ The second reads: ‘Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.’ Jesus refers to these two passages in his response to a Pharisee’s question as to whether it was ‘lawful to divorce one’s wife for any cause’ (Matthew 19:3). Jesus’ answers has probably influenced Western marriage patterns and law more than any other words ever spoken or written: ‘Have you not read that he who made them from the beginning made them male and female, and said, “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh”? So they are no longer two but one flesh. What therefore God has joined together, let no man put asunder. (Matthew 19:4-6)

In subsequent centuries, Roman Catholic canon law, the civil law of both Protestant and Roman Catholic countries, and the Anglo-American common law of marriage and the family have been influenced by Jesus’ reflection on these ancient passages from the Hebrew Scripture.²³

It has thus been held that Jesus of Nazareth understood that the egalitarian nature of the Mosaic law on marriage was designed to elevate and to dignify the status of wives within marriages. For this reason, Jesus set a very high standard on getting a divorce; for the Christian marriage held women in very high esteem, and made it difficult for the husband to arbitrarily divorce his wife without a justifiable cause such as fornication.

C. Of Christian Marriage: St. Paul and the Law of Moses

St. Paul expounded upon these same principles of marriage as a form of godly submission between a husband and wife, stating:

Wives, submit yourselves unto your own husbands, as unto the Lord.
For the husband is the head of the wife, even as Christ is the head of

²³ John Witte, Jr., and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008), p. 169-170.

the church: and he is the savior of the body. Therefore as the church is subject unto Christ, so let the wives be to their own husbands in every thing. Husbands, love your wives, even as Christ also loved the church, and gave himself for it; That he might sanctify and cleanse it with the washing of water by the word. That he might present it to himself a glorious church, not having spot, or wrinkle, or any such thing; but that it should be holy and without blemish. So ought men to love their wives as their own bodies. He that loveth his wife loveth himself. For no man ever yet hated his own flesh; but nourisheth and cherisheth it, even as the Lord the church: For we are members of his body, of his flesh, and of his bones. For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery; but I speak concerning Christ and the church. Nevertheless let every one of you in particular so love his wife even as himself; and the wife see that she reverence her husband.²⁴

Christianity has thus been actually viewed as elevating the status of women to an equal partnership and dignity with men, whereas all of the other non-Christian or pagan ideals of marriage actually debased and lowered the status of women.²⁵ “Recent New Testament scholarship now sees this view of male servanthood as a striking contrast to the aristocratic male honor codes of the surrounding civic society. Second, the ethic of neighbor love or equal regard, as I call it, it brought directly into the marital relationship: ‘husbands should love their wives as they do their own bodies’ (Ephesians 5:28). Finally, there is a reaffirmation of the Genesis 2;24 understanding of marriage as a one-flesh union: ‘For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh.’ (Ephesians 5:31).”²⁶

St. Paul’s words in Ephesians 5:32, to wit, “[t]his is a great mystery; but I speak concerning Christ and the church,” has created a lingering rift between Roman Catholic and Protestant churches and traditions regarding whether the

²⁴ Ephesians 5:21-33.

²⁵ John Witte, Jr., and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008), 171.

²⁶ *Ibid.*

institution of marriage is a “sacrament” or a lower form of Christian obligation. Nevertheless, St. Paul’s words certainly gave rise to the formulation of the canon and civil law on marriage in England and Western Europe. To begin with, the Christian ideal of marriage mandated certain criteria: “the male headship so prevalent in ancient families should be tempered if not absent. Marital relations should be characterized by a love ethic of equal regard, energized and renewed by openness to sacrificial love. These elements gave rise to the idea in both later canon and civil law that marriage should be a status with covenantal features—a predefined set of mutual and enduring obligations—as well as a freely chosen contract.”²⁷

D. Of Christian Marriage: St. Augustine’s Utility Theory of Marriage

St. Augustine of Hippo, perhaps more than any other Christian writer, “established the terms... the details, of the Western canon and civil view of marriage. He formulated the idea that marriage as an institution should function to channel the natural energies and goods of sexuality, procreation, and parental investment into this enduring union.”²⁸ First off, St. Augustine subscribed to a teleological view of human sexuality as an integral subpart to God’s entire creation²⁹; that is to say, Augustine believed that human sexuality is an important subpart to God’s eternal and natural laws that are readily obvious and apparent from carefully observing things in nature:

We see the waters gathered together in the vast plains of the sea; and the dry land, first bare and then formed, so as to be visible and well-ordered; and the soil of herbs and trees. We see the light shining from above—the sun to serve the day, the moon and the stars to give cheer in the night; and we see by all these that the intervals of time are marked and noted. We see on every side the watery elements, fruitful with fishes, beasts, and birds—and we notice that the density of the atmosphere which supports the flights of birds is increased by the

²⁷ Ibid., p. 172.

²⁸ Ibid., p. 173.

²⁹ See, e.g., Saint Augustine, *Confessions*, New York, N.Y.: Barnes & Noble Books (2007), p. 258 (“Let your works praise you, so that we may love you; and let us love you so that your works may praise you—those works which have a beginning and an end in time—a rising and a setting, a growth and a decay, a form and a privation.”)

evaporation of the waters. We see the face of the earth, replete with earthly creatures; and man, created in your image and likeness, in the very image and likeness of you—that is, having set over all irrational creatures. And just as there is in his soul one element which controls by its power of reflection and another which has been made subject *so that it should obey, so also, physically, the woman was made for the man; for, although she had a like nature of rational intelligence in the mind, still in the sex of her body should be similarly subject to the sex of her husband, as the appetite of action is subjected to the deliberation of the mind in order to conceive the rules of right action.* These things we see, and each of them is good; and the whole is very good!³⁰

For St. Augustine, human sexuality was manifest within the natural lusts of the flesh. These natural lusts of human flesh needed to be responsibly channeled in order to properly fulfill God’s eternal and divine law. Augustine knew the depths and despair of hurtful, slavish sexual lusts from first-hand experience. In his landmark work *Confessions*, he observed that “the question of conjugal honor in the ordering of a good married life and the bringing up of children was of only slight interest to us. What afflicted me most and what had made me already a slave to it was the habit of satisfying an insatiable lust....”³¹ Indeed, within Augustine’s classical Christian theology, there was no other appropriate provision for human sexual intercourse other than within institution of heterosexual marriage.³² For St. Paul, whom St. Augustine held in very high esteem, had admonished the early Church that:

I say therefore to the unmarried and widows, it is good for them if they abide even as I. But if they cannot contain, let them marry: for it is better to marry than to burn.³³

³⁰ Saint Augustine, *Confessions*, New York, N.Y.: Barnes & Noble Books (2007), p. 258.

³¹ *Ibid.*, p. 87.

³² In *Confessions*, St. Augustine held that the Roman Catholic Church could not condone homosexual conduct under any circumstances, since this was an offense against nature. “[O]ffenses against nature are everywhere and at all times to be held in detestation and should be punished. Such offenses, for example, were those of the Sodomites; and, even if all nations should commit them, they would all be judged guilty of the same crime by the divine law, which has not made men so that they should ever abuse one another in that way.” *Ibid.*, p. 36.

³³ 1 Corinthians 7:8-9.

Thus, for St. Augustine, the natural lusts of human flesh were to be channeled towards holy matrimony.

Importantly, St. Augustine's views of marriage were similar to the classical pagan or Greco-Roman perceptions and ideals of the institution of marriage, in that both views justified the institution of marriage by its obvious social utilities. For example, the Greek philosopher Plato "understood marriage as a natural institution that was simultaneously beneficial to the couple, to their children, and to the wider community."³⁴ Hence, this classical pagan view of marriage analyzed the institution of marriage and concluded that it served an important function in the entire civil society, particularly the education, protection, and nurturing children. This view also held that the institution of marriage brought certain important benefits to the husband and wife and to the provided an important function with respect to the education, protection, and nurturing of children.

St. Augustine thus borrowed heavily from this classical pagan view of marriage when formulating his own theological analysis of the sacrament of marriage. For Augustine, the institution of marriage constituted a universal and moral law of nature, and his theological views expressly condemned all other forms of sexual activity that occurred outside the boundaries of holy matrimony between heterosexual couples.³⁵ According to Augustine, the institution of marriage is a union of the sexes (i.e., male and female) that is directly tied to an eternal and divine law of procreation. In *The City of God*, St. Augustine wrote:

But we, for our part, have no manner of doubt that to increase and multiply and replenish the earth in virtue of the blessings of God, is *a gift of marriage as God instituted it from the beginning* before man sinned, when He created them male and female—in other words, two sexes manifestly distinct. And it was this work of God on which His

³⁴ John Witte, Jr., and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008), 173.

³⁵ In his landmark work *Confessions*, St. Augustine wrote: "Can it ever, at any time or place, be unrighteous for a man to love god with all his heart, with all his soul, and with all his mind; and his neighbor as himself? Similarly, offenses against nature are everywhere and at all times to be held in detestation and should be punished. Such offenses, for example, were those of the Sodomites; and, even if all nations should commit them, they would all be judged guilty of the same crime by the divine law, which has not made men so that they should ever abuse one another in that way. For the fellowship that should be between god and us is violated whenever that nature of which he is the author is polluted by perverted lust." *Confessions*, New York, N.Y.: Barnes & Noble Books (2007), p. 36.

blessing was pronounced. For no sooner had Scripture said, ‘Male and female created He them,’ than it immediately continues, ‘And God blessed them, and God said unto them, Increase, and multiply, and replenish the earth, and subdue it,’ etc.... “[M]ale and female’ cannot be understood of two things in one man, as if there were in him one thing which rules, another which is ruled; but it is quite clear that they were created male and female, with bodies of different sexes, for the very purpose of begetting offspring, and so increasing, multiplying, and replenishing the earth; and it is great folly to oppose so plain a fact. It was not of the spirit which commands and the body which obeys, nor of the rational soul which rules and the irrational desire which is ruled, nor of the contemplative virtue which is supreme and the active which is subject, nor of the understanding of the mind and the sense of the body, but plainly of the matrimonial union by which the sexes are mutually bound together, that our Lord, when asked whether it were lawful for any cause to put away one’s wife (for on account of the hardness of the hearts of the Israelites Moses permitted a bill of divorcement to be given), answered and said, ‘Have ye not read that He which made them at the beginning made them male and female, and said, For this cause shall a man leave father and mother, and shall cleave to his wife, and they twain shall be one flesh? Wherefore they are no more twain, but one flesh. What, therefore, God hath joined together, let not man put asunder.’ *It is certain, then, that from the first men were created, as we see and know them to be now, of two sexes, male and female, and that they are called one, either on account of the matrimonial union, or on account of the origin of the woman, who was created from the side of the man. And it is by this original example, which God Himself instituted, that the apostle admonishes all husbands to love their own wives in particular.*³⁶

In his work *On the Good of Marriage*, St. Augustine argued that the institution of marriage provided “three fundamental goods—the good of the procreation and education of children (*proles*), the good of faithfulness and chastity (*fides*), and the good of a permanent union (*connubi sacramentum*)....

³⁶ Saint Augustine, *The City of God* (New York, N.Y.: The Modern Library, 1950), pp. 467-470.

Augustine brought together what philosophers call a teleological language (a language about goods) with what they call a deontological language (a language of obligation), all designed to convey an integrational or one-flesh view of marriage that unified love, sex, procreation, and child-rearing into an enduring relation between husband and wife in the mother-father-infant union.”³⁷

St. Augustine’s utility theology of marriage remains largely the established canon law of the Roman Catholic Church and, indeed, of the entire Christian world.

E. Of Christian Marriage: St. Thomas Aquinas’ Natural Law View of Marriage

St. Thomas Aquinas synthesized both Christian and non-Christian views on the meaning, objective, and source of the institution of marriage. First, as a practical matter, St. Thomas observed that human infants take a long time to mature, unlike in other species of animals. This created a necessity of long-term parental responsibilities and duties. Furthermore, both Christian and non-Christian viewpoints held that these parental responsibilities were joint responsibilities between the mother and the father. For St. Thomas and others, this was the natural law foundation for the institution of marriage: the necessity for caring for children for long period of time. He wrote: “In man, however, since the child needs the parents’ care for a long time, there is a very great tie between male and female, to which tie even the generic nature inclines.”³⁸

Secondly, St. Thomas considered marriage to be the key to creating kinship ties. The male and female come together and produce children from their flesh—this is the mystery of the one-flesh theory of marriage. “But there is more, Aquinas also used a primitive theory of kin altruism as a trope to symbolize the wife-husband relation who in marriage treat each other as blood kin—‘bone of my bones and flesh of my flesh’ (Genesis 2:23)—even though, as a matter of fact, they are not. Hence, in Aquinas’ Christian view of marriage and family, the marital relationship symbolically builds on, transforms, and analogically generalizes the basic solidarities of kin altruism.”³⁹ Indeed, it is through marriage that the whole of

³⁷ Saint Augustine, *Confessions*, New York, N.Y.: Barnes & Noble Books (2007), p. 172.

³⁸ *Ibid.*, p. 174.

³⁹ *Ibid.*, pp. 174-175.

mankind is tied together through family, blood, and kinship. This aspect of St. Thomas' view on marriage is parallel to St. Augustine's utility theory of marriage.

Thirdly, St. Thomas also borrowed from pagan and Greco-Roman thought when formulating his ideas on Christian marriage. For instance, St. Thomas borrowed heavily from Aristotle's conception of marriage.⁴⁰ Aristotle believed that the institution of marriage arose fundamentally from the natural-law desires within human beings, who are like the rest of the animals which have a natural desire to leave behind an image or likeness of themselves.⁴¹ Aristotle also believed that the institution of marriage was largely premised upon the rational belief "that natural parents, who have bodily continuity with their offspring, are likely to care more for their children than alternative caregivers, especially the state nurses that Plato proposed should replace parents in order to overcome the injustice of nepotism."⁴² From this viewpoint, St. Thomas certainly incorporated St. Paul's restrictive views on sexuality and St. Augustine's utility theory on marriage into Aristotle's pagan philosophy on the foundations of marriage. For St. Thomas, (a) the purpose of sexual intercourse is procreation of children; (b) no sexual intercourse should occur outside the bonds of holy matrimony; and (c) holy matrimony must be between man and woman who mysteriously become "one flesh" through taking on the marriage sacrament and who also naturally come "one flesh" through the procreation of children. Today, this is still the basic theology on traditional Christian marriage in the Roman Catholic Church and most of the Christian world.

F. Of Christian Marriage: the English Common Law up to 1600

Up through the year 1600, the Church of England, through its ecclesiastical courts, maintained jurisdiction over marriage and family in England, thus applying the Roman Catholic Church's theology and canon law to the institution of English marriage, divorce and family. It is thus important to point out that, prior to the Reformation of the mid-1500s, the theology and canon law of the Roman Catholic Church were binding authority within England's ecclesiastical courts:

Jurisdiction of English ante-Reformation ecclesiastical courts over spiritual and ecclesiastical matters. The field of English ecclesiastical

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid., p. 174.

jurisdiction was extensive. The church tribunals had both civil and criminal jurisdiction. Before the Protestant Reformation, the English ecclesiastical courts had jurisdiction over the following matters: matters of ecclesiastical economy; church property; ecclesiastical dues and tithes; *marriage; divorce; legitimation*; testate and intestate successions of personal property; contracts involving pledge of faith or oath; various crimes and torts.⁴³

[T]o get at the truth of the matter, is not this the question to be investigated when considering the influence of the Canon law in England: did the English ecclesiastical courts "hold themselves free to accept or reject, and did they in some cases reject, the Canon law of Rome?" The answer is, that the English ecclesiastical courts possessed no such power as that of accepting or rejecting the Canon law—they acknowledged its binding authority on them. Although England curtailed greatly the claims, of jurisdiction advanced by the Church, yet the fact is that within the limits of that curtailed ecclesiastical jurisdiction, the English Church, as a provincial church subordinated (by its own admissions) to the supreme head of the Western Latin Church, administered and rendered obedience to Roman medieval Canon law in the English spiritual courts....⁴⁴

Hence, this Catholic conceptualization of marriage—the theology of St. Paul, St. Augustine of Hippo, St. Thomas Aquinas, and others--- dominated Anglican Christian theology and canon law and the English common law up through the period 1600, and easily throughout mid-1800s. For instance, political philosopher, physician, and theologian John Locke lucidly expressed the prevailing English views on marriage in *An Essay Concerning The True Original, Extent and End of Civil Government*, stating:

God having made man such a creature, that in his own judgment it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society, as

⁴³ Charles P. Sherman, "A Brief History of Medieval Roman Canon Law in England," *University of Penn. Law Review*, Vol. 68, No. 3 (Mar. 1920), pp. 233-258.

⁴⁴ *Ibid.*

well as fitted him with understanding and language to continue and enjoy it. The first society was between man and wife, which gave beginning to that between parents and children; to which, in time, that between master and servant came to be added; and through all these might, and commonly did meet together, and make up but one family....⁴⁵

Conjugal society is made by a voluntary compact between man and woman, and though it consist chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation, yet it draws with it mutual support and assistance, and a communion of interests too, as necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them till they are able to provide for themselves....⁴⁶

For the end of conjunction between male and female being not barely procreation, but the continuation of the species, this conjunctions betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them till they are able to shift and provide for themselves. This rule, which the infinite wise Maker hath set to the works of His hands, we find the inferior creatures steadily obey....⁴⁷

And herein, I think, lies the chief, if not the only reason, why the male and female in mankind are tied to a longer conjunction than other creatures—viz., because the female is capable of conceiving, and, de facto, is commonly with child again, and brings forth too a new birth, long before the former is out of a dependency for support on his parents' help and able to shift for himself, and has all the assistance is due to him from his parents, whereby the father, who is bound to take care for those he hath begot, is under an obligation to continue in

⁴⁵ The English Philosophers From Bacon To Mill (New York, N.Y.: The Modern Library, 1967), pp. 433-436.

⁴⁶ Ibid.

⁴⁷ Ibid.

conjugal society with the same woman longer than other creatures, whose young, being able to subsist of themselves before the time of procreation returns again, the conjugal bond dissolves of itself, and they are at liberty till Hymen, at his usual anniversary season, summons them again to choose new mates.⁴⁸

For all the ends of marriage being to be obtained under politic government, as well as in the state of nature, the civil magistrate doth not abridge the right or power of either, naturally necessary to those ends—viz., procreation and mutual support and assistance whilst they are together, but only decides any controversy that may arise between man and wife about them.... The conditions of conjugal society put not [absolute sovereignty and power of life and death in the husband]; but whatsoever might consist with procreation and support of the children till they could shift for themselves—mutual assistance, comfort, and maintenance—might be varied and regulated by that contract which first united them in that society, nothing being necessary to any society that is not necessary to the ends for which it is made.⁴⁹

The Anglo-American common law of marriage thus came from ecclesiastical courts of the Roman Catholic and Anglican churches of Medieval England. This law was characterized by the customary practice of handfasting (informal oral oaths and promises to marry) followed by more formal church weddings.

In medieval Europe, marriage was governed by canon law, which recognised as valid only those marriages where the parties stated they took one another as husband and wife, regardless of the presence or absence of witnesses. It was not necessary, however, to be married by any official or cleric. The Fourth Lateran Council (1215) forbade clandestine marriage, and required marriages to be publicly announced in churches by priests.⁵⁰

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ "Marriage in England and Wales," https://en.wikipedia.org/wiki/Marriage_in_England_and_Wales.

From about the 12th to the 17th century, the practice of "handfasting" was widespread in England. It was a term for "engagement to be married", or a ceremony held on the occasion of such a contract, usually about a month prior to a church wedding, at which the marrying couple formally declared that each accepted the other as spouse.⁵¹

Handfasting was legally binding: as soon as the couple made their vows to each other they were validly married. It was not a temporary arrangement. Just as with church weddings of the period, the union which handfasting created could only be dissolved by death. English legal authorities held that, even if not followed by intercourse, handfasting was as binding as any vow taken in church before a priest.⁵²

During handfasting the man and woman in turn would take the other by the right hand and declare aloud that they there and then accepted each other as man and wife. The words might vary but traditionally consisted of a simple formula such as "I (Name) take thee (Name) to my wedded husband/wife, till death us depart, and thereto I plight thee my troth". Because of this, handfasting was also known in England as "troth-plight". Gifts were often exchanged, especially rings: a gold coin broken in half between the couple was also common. Other tokens recorded include gloves, a crimson ribbon tied in a knot, and even a silver toothpick. Handfasting might take place anywhere, indoors or out. It was frequently in the home of the bride, but according to records handfastings also took place in taverns, in an orchard and even on horseback. The presence of a credible witness or witnesses was usual.⁵³

For much of the relevant period church courts dealt with marital matters. Ecclesiastical law recognised two forms of handfasting, sponsalia per verba de praesenti and sponsalia per verba de futuro. In

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

sponsalia de praesenti, the most usual form, the couple declared they there and then accepted each other as man and wife. The sponsalia de futuro form was less binding, as the couple took hands only to declare their intention to marry each other at some future date. The latter was closer to a modern engagement and could in theory be ended with the consent of both parties – but only providing intercourse had not occurred. If intercourse did take place, then the sponsalia de futuro "was automatically converted into de iure marriage".⁵⁴

In the sixteenth century, the Council of Trent legislated more specific marriage requirements, such as the presence of a priest and two witnesses, as well as promulgation of the marriage announcement thirty days prior to the ceremony. These laws did not extend to the regions affected by the Protestant Reformation. Despite the validity of handfasting it was expected to be solemnised by a church wedding fairly soon afterwards. Penalties might follow for those who did not comply. Ideally the couple were also supposed to refrain from intercourse until then. Complaints by preachers suggest that they often did not wait, but at least until the early 1600s the common attitude to this kind of anticipatory behaviour seems to have been lenient. Handfasting remained an acceptable way of marrying in England throughout the Middle Ages but declined in the early modern period. In some circumstances handfasting was open to abuse, with persons who had undergone "troth-plaint" occasionally refusing to proceed to a church wedding, creating ambiguity about their former betrothed's marital status.⁵⁵

Shakespeare negotiated and witnessed a handfasting in 1604, and was called as a witness in a suit about the dowry in 1612 and historians speculate that his own marriage to Anne Hathaway was so conducted when he was a young man in 1582, as the practice still had credence in Warwickshire at the time.⁵⁶

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

After the beginning of the 17th century, gradual changes in English law meant the presence of an officiating priest or magistrate became necessary for a marriage to be legal. Up until this point in England, clergy performed many clandestine marriages, such as so-called Fleet Marriage, which were held legally valid; and in Scotland, unsolemnised common-law marriage was still valid.⁵⁷

The English common law, as an instrument of the Roman Catholicism and, later, the Church of England, also embraced the “one-flesh” view of marriage which subordinated the wife to the husband. Legally, this subordination was most pronounced with respects to the right of property ownership, inheritance rights, and the right an independent identity.

English law defined the role of the wife as a ‘feme covert’, emphasizing her subordination to her husband, and putting her under the ‘protection and influence of her husband, her baron, or lord’. Upon marriage, the husband and wife became one person under the law, as the property of the wife was surrendered to her husband, and her legal identity ceased to exist. Any personal property acquired by the wife during the marriage, unless specified that it was for her own separate use, went automatically to her husband. If a woman writer had copyright before marriage, the copyright would pass to the husband afterwards, for instance. Further, a married woman was unable to draft a will or dispose of any property without her husband’s consent.⁵⁸

Women were often limited in what they could inherit. Males were more likely to receive real property (land), while females with brothers were sometimes limited to inherited personal property, which included clothing, jewellery, household furniture, food, and all moveable goods. In an instance where no will was found, the English law of primogeniture automatically gave the oldest son the right to all real property, and the daughter only inherited real property in the absence of a male heir. The law of intestate primogeniture remained

⁵⁷ Ibid.

⁵⁸ “Married Women’s Property Act 1882”,
https://en.wikipedia.org/wiki/Married_Women%27s_Property_Act_1882.

on the statute books in Britain until the 1925 property legislation simplified and updated England's archaic law of real property.⁵⁹

Aware of their daughters' unfortunate situation, fathers often provided them with dowries or worked into a prenuptial agreement pin money, the estate which the wife was to possess for her sole and separate use not subject to the control of her husband, to provide her with an income separate from his.⁶⁰

In contrast to wives, women who never married or who were widowed maintained control over their property and inheritance, owned land and controlled property disposal, since by law any unmarried adult female was considered to be a feme sole. Once married, the only way that women could reclaim property was through widowhood.⁶¹

The dissolution of a marriage, whether initiated by the husband or wife, usually left the divorced females impoverished, as the law offered them no rights to marital property. The 1836 Caroline Norton court case highlighted the injustice of English property laws, and generated enough support that eventually resulted in the Married Women's Property Act.⁶²

The Law of Christ, as previously mentioned, was copied almost verbatim into England's common law of marriage. The Christian injunction that wives must submit to their husbands was incorporated into the English common law of marriage. The Christian ideal of "one-flesh" was fundamental to the English policy and doctrine on family law, marriage, and the rights of the wife as the subordinate spouse. This "one-flesh" doctrine required that the husband honor and respect his wife. Unfortunately, a husband's unchecked power often opened the door to female spousal abuse. Nevertheless, the institution of marriage under the English common law afforded great benefits to women, children and the entire society.

This English jurisprudence was transplanted to the American colonies in the early 17th century and, subsequently, administered in American chancery, equity, and

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

family-law courts. In the early 19th century United States, French writer, social critic, and sociologist Alexis De Tocqueville observed that, under the American system, where much of the old English customs survived, the American women were afforded great respect, were allowed to perform no hard labor, and were held in very high esteem. He observed that an American white teenage girl could travel alone without fear of assault or violence almost anywhere in the young United States of America.⁶³

CONCLUSION

Through the Church of England, the Anglo-American idea of Christian marriage developed from a multitude of sources, including scientific observation, pagan ideals of marriage and sex, and ideas found in *The Holy Bible*. For this reason, the Christian ideal of heterosexual marriage should not be dismissed as religious dogma with not scientific foundation.

Although early Christian writings, such as the letters of St. Paul, point only to the authority of the Scripture as its basis for the institution of Christian marriage, the writings of later Christian theologians, such as St. Augustine and St. Thomas Aquinas, began to incorporate non-Christian sources into their notions of Christian marriage. When the English common law of heterosexual marriage was developed, it certainly drew upon the very best scientific methods which impacted the human understanding, together with the Sacred Scriptures. This does not intend to vindicate the lack of rights in women as wives, but it simply states that the institution of marriage had solid social, customary, theological, and biological (i.e., scientific) foundations.

⁶³ Perhaps the most controversial element of the conventional Anglican definition of marriage is the theological differences between male and female. Numerous Christian and biblical references insisted that the women (or the “wife”) was the weaker vessel than, and subordinate to, men (or the “husband”). Although both husband and wife were required to love, respect and honor each other, the Christian doctrine placed men (or the “husband”) at the head of the household and therefore the head over the woman. To the extent that Christianity was used to subjugate and to suppress women, modern-day feminists have sought to controvert the Christian doctrine. But in the United States, where African American males were systematically and routinely prohibited from serving in leadership roles as husbands within their households, the American feminist challenge to conventional Christianity becomes more complicated where the African American church, which is traditionally conservative, now wrestles with the deterioration of the African American family structure. For this reason, Frederick Douglass sternly warned against comparing the Women’s Suffrage Movement to the plight of African Americans, which, as Douglass himself observed, was saturated with arson, lynching, and other forms of outrage.

For example, St. Augustine's utility theory of marriage, parts of which he borrowed heavily from Plato, took into account a number of important factors to justify heterosexual, Christian marriages,-- factors which were not found in the Sacred Scriptures. This utility theory of marriage became foundation of family law and marriage in Anglo-American and western jurisprudence. It thus behooves both Christian and non-Christian to recognize that the conventional wisdom of traditional marriage is deeply rooted in social, economic, psychological, and biological factors which continue to remain critically important to the welfare of the social order.

Given the weight of this authority, which supports traditional, heterosexual Christian marriages, the African and African American churches' current orthodox position on marriage is vindicated. Indeed, the plight of underprivileged African American communities is best served through the conventional institution of Christian marriage. Although the objective of this essay is not to deprecate unconventional or non-Christian ideals of marriage, such as same-sex marriage or polygamy, the foundation of Anglo-American and Western family law jurisprudence is the orthodox or traditional Christian faith. Nevertheless, there is room from a multitude of marriage views, and laws, to co-exist within an authentic Christian commonwealth. For instance, in England, there have traditionally been two forms of marriages: *civil marriages* and *religious marriages*. The requirements for civil marriages did not necessarily correlate or correspond to the traditional requirements of Christian marriages. Similarly, in the United States, the Church need not relinquish its legal authority and jurisdiction over the institution of marriage to the secular state. Instead, and to the contrary, America's various church denominations—the Roman Catholics, the Baptists, Methodists, Presbyterians, etc.-- should instead commission private-church-sponsored *ecclesiastical courts* to administer their on canon laws of family and sacred religious marriage, leaving the secular civil courts to administer the secular civil marriage contracts.

THE END

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