

JUDGING MARRIAGE: AN EXPERIMENT IN MORALS AND CONDUCT

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INTRODUCTION: A LITTLE HISTORY

On April 23, 2004, I spoke at the *Ave Maria Law Review's* annual banquet. For three years before that event, my administrative duties as Chief Justice of the Michigan Supreme Court required that I study child-centered policy issues, including foster care, adoption, and child-support enforcement. While pursuing this study, I was shocked by what I learned about the decline of marriage and the resulting harm to children. I concluded that those two closely connected pathologies reside at the core of our society's most critical social and fiscal problems. So when I spoke to the banquet guests, I said:

It is in this light that I now am asking the Ave Maria School of Law, and particularly the scholars gathered in this room, to take on the most vexing social issue of our time: the disintegration of marriage and its disastrous effect on our children.¹

The *Ave Maria Law Review*, faculty, and its advisors immediately accepted my challenge and began planning this symposium devoted exclusively to the law of marriage. And, as if to prove that one should be careful what she wishes for, they asked me to contribute an article. I was honored by that request, as I had been by their invitation to speak at the banquet. Although I confess to feeling a bit intimidated by the scholarly credentials of the other invited contributors, I hope that I can add something useful to this discussion of the law and marriage.

[†] Justice, Michigan Supreme Court. I especially thank and commend the excellent research assistance of Glen Gronseth of the Michigan State Court Administrative Office.

1. Maura D. Corrigan, Justice, Michigan Supreme Court, Address at the Ave Maria Law Review Annual Banquet (Apr. 23, 2004).

The editors of the *Law Review* asked that each of us: (1) write from the perspective of our “field of study”; (2) comment on *The Nature of Marriage and Its Various Aspects*, the article by Alfonso Cardinal López Trujillo;² (3) identify particular “obstacles” to implementing Cardinal Trujillo’s natural law vision of marriage; and (4) offer “practical suggestions” for overcoming those obstacles.

I will comment from the perspective of a judge who sees, almost daily, the collateral damage to children caused by their parents’ decisions to divorce, or never to marry at all.

In his encyclical letter, *Fides et Ratio (Faith and Reason)*, Pope John Paul II wrote that faith and reason are fully compatible and that people ought to employ both faith and reason.³ Cardinal Trujillo does exactly that in his essay. But no matter how eloquently Cardinal Trujillo writes, he can persuade only those willing to read him and then willing to employ both faith and reason. I acknowledge that the world too often shows a lack of faith. It also needs desperately to embrace reason. The great chasm between Cardinal Trujillo and many who ought to read his essay (but probably will not) is the Cardinal’s willingness—even eagerness—to study the world as it naturally is.

Over the last thirty-five years, marriage as a social institution in the United States has been weakened by powerful forces: cultural, legal, and economic. Some of those destructive forces arose almost inevitably out of unrelated events, but others were unleashed intentionally by people who viewed themselves as social or legal reformers. With hindsight, we can see that the deconstruction and disestablishment of marriage have done great damage to our society and especially to our children. Judges see that every day in their courtrooms and their chambers.

The “reformers” did not set out to harm children or society. To the contrary, they had great faith that the changes they advocated would be beneficial. And they offered reasoned supporting arguments. But time and experience have shown that their faith was misplaced and their reasoning flawed.

In my 2004 remarks at the *Ave Maria Law Review* banquet, I offered the following observations about the social and legal changes I have witnessed since about 1970:

2. Alfonso Cardinal López Trujillo, *The Nature of Marriage and Its Various Aspects*, 4 AVE MARIA L. REV. 297 (2006).

3. Pope John Paul II, *Fides et Ratio* [*Encyclical Letter on the Relationship Between Faith and Reason*] (St. Paul ed. 1998) [hereinafter *Fides et Ratio*].

All states have enacted no-fault divorce laws, which permit a spouse to end a marriage and break up a family for no better ground than the wish to be free. This “reform” was part of a preoccupation with freedom of choice and personal privacy. These rights were being extolled in books, law review articles, and even court decisions.

At the same time, a new wave of advocates was migrating to the academic community. They saw family law as a vehicle for demanding equality in matters of gender and lifestyle. They argued that the concepts of “marriage” and “family” should be revised to encompass all forms of domestic association.

While most, if not all, Americans revere freedom and equality in the abstract, the revolution in domestic relations has placed our children and our future very much at risk. In one generation, the United States has moved from a culture of marriage to a culture of divorce, cohabitation, and one-night stands. The once-exalted institution of marriage has been reduced to a social option.

Look at the record. We all know that currently more than half of U.S. marriages end in divorce. But some of you may not know about the alarming consequences for children.⁴

I. WHAT ABOUT THE CHILDREN?

To illustrate for the banquet audience those “consequences for children,” I then summarized some truly frightening data (updated slightly here). In 1960, only 5.3% of all live births in the United States occurred outside marriage.⁵ By 1970, that number had doubled to 10.7%.⁶ The most recent available data show that in 2003 fully 34.6% of our new babies were born to unmarried parents.⁷ The only arguable silver lining in that dark cloud of data is that the *rate* of increase in unmarried births has slowed over the last ten years. But the *increase* still continues. That is bad news for children and custodial parents because children born to married parents and raised

4. Corrigan, *supra* note 1.

5. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORTS, Vol. 48, No. 16, *Nonmarital Childbearing in the United States, 1940-99*, at 17 tbl.1 (Oct. 18, 2000), http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf.

6. *Id.*

7. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORTS, Vol. 53, No. 9, *Births: Preliminary Data for 2003*, at 1 (Nov. 23, 2004), http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_09.pdf.

by both parents in one home are, *on average*, far better off than children born and raised in any other combination of circumstances.⁸ Additionally, statistics bear out that:

- “[T]he majority of children who grow up outside of married families have experienced at least one year of dire poverty.”⁹
- U. S. Census Bureau data for all single-parent households show that, in 2002, families with a female head-of-household and no husband present accounted for half of all American families living in poverty.¹⁰
- More than 31% of custodial parents have never been married.¹¹
- More than 27% of all children live apart from one of their parents.¹²
- An estimated 13.4 million parents have custody of 21.5 million children whose other parent lives elsewhere.¹³
- The poverty rate for custodial-parent families is four times greater than the rate for intact married families with children.¹⁴

The trends in my state, Michigan, essentially mirror the national data. Although Michigan’s population increased by 12% from 1970 to 2003,¹⁵ the state of Michigan issued 27% fewer marriage licenses in

8. COALITION FOR MARRIAGE, FAMILY AND COUPLES EDUCATION, ET AL., *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES* (2000), <http://center.americanvalues.org/?p=19> (formerly <http://www.marriagemovement.org>). See also Norval D. Glenn et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences*, AM. EXPERIMENT Q., Spring 2002. And children are not the only ones who benefit from marriage, so do parents. See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER-OFF FINANCIALLY* (2000).

9. THE NATIONAL MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2004: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 17 (2004) (footnote omitted).

10. BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, *POVERTY IN THE UNITED STATES: 2002*, at 13 (2003), http://www.inequality.org/census_poverty_report.

11. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, *CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001*, at 4 (2003), <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

12. *Id.* at 1. In this context, the Census Bureau report defines “children” as persons under age 21.

13. *Id.*

14. *Id.* at 3; see also Maura D. Corrigan, *A Formula for Fool’s Gold: The Illustrative Child Support Formula in Chapter 3 of the American Law Institute’s PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, in *RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 409, 414 (Robin Fretwell Wilson ed., 2006).

15. See MICH. DEP’T OF CMTY. HEALTH, STATISTICS & REPORTS, *POPULATION TRENDS, MICHIGAN POPULATION, 1990-2004*, <http://www.mdch.state.mi.us/pha/osr/Index.asp?Id=17>; MICH. DEP’T OF CMTY. HEALTH, STATISTICS & REPORTS, *POPULATION TRENDS, MICHIGAN POPULATION BY COUNTY 2004*, <http://www.mdch.state.mi.us/pha/osr/CHI/POP/PO04TOTY.ASP>; CAMPBELL GIBSON & KAY JUNG, U.S. CENSUS BUREAU, *WORKING PAPER NO. 56, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC*

2000 than in 1970.¹⁶ Meanwhile, despite fewer marriages (i.e., fewer *potential* divorces in the state), divorces actually increased by 30%.¹⁷ Over the same period, births to unmarried Michigan women jumped by a shocking 343%;¹⁸ the number of poverty-stricken Michigan households headed by unmarried females rose by 60%;¹⁹ and the 2000 census found that 340,254 minors in Michigan were living in poverty.²⁰

Thus, during the last three decades, the decline of marriage has caused a huge jump in impoverished unmarried-parent households and a concomitant plunge in the well-being of the children trapped inside the destructive cycle of poverty.

If absent parents and the resulting poverty told the entire story, that story would be troubling enough. But it gets worse. Splintered

ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES (2002), <http://www.census.gov/population/www/documentation/twps0056.html>.

16. MICH. DEP'T OF CMTY. HEALTH, STATISTICS & REPORTS, VITAL STATISTICS, MARRIAGES AND MARRIAGE RATES (2004), <http://www.mdch.state.mi.us/pha/osr/marriage/Tab3.1.asp> [hereinafter MARRIAGES AND MARRIAGE RATES].

17. MICH. DEP'T OF CMTY. HEALTH, STATISTICS & REPORTS, VITAL STATISTICS, NUMBER OF DIVORCES AND ANNULMENTS, DIVORCE AND ANNULMENT RATES (2004), <http://www.mdch.state.mi.us/pha/osr/marriage/Tab3.5.asp>. Here the data do show some arguable good news. After skyrocketing during the 1970s and 1980s, the raw number of divorces began a slow, uneven decline in 1990 (40,568). *Id.* That decline has continued through 2003 (35,596), the most recent year for which complete data are available. *Id.* But the number of marriages (i.e., potential divorces) also declined from 1990 (76,099) to 2003 (62,920). MARRIAGES AND MARRIAGE RATES, *supra* note 16. Conventional wisdom says that half of all marriages end in divorce. By that rough calculus, the decline in marriages *more* than accounts for the decline in divorces; so the reduced number of divorces may not reflect a strengthened commitment to marriage vows.

18. Since 1993, the Michigan Department of Community Health has not maintained official records of mothers' marital status. At my request, the Library of Michigan and MDCH located an MDCH record that showed 13,432 out-of-wedlock births in 1970. MDCH used paternity-acknowledgement records to estimate that there were 46,107 out-of-wedlock births in 2000.

19. In 1970, there were 62,299 impoverished households headed by unmarried females and also occupied by one or more minor children related to the female head-of-household. U.S. CENSUS BUREAU, U.S. CENSUS OF POPULATION: 1970, CHARACTERISTICS OF THE POPULATION, Part 24 (Michigan) 24-267. In 2000, the comparable figure was 99,905. U.S. CENSUS BUREAU, PROFILE OF SELECTED ECONOMIC CHARACTERISTICS: 2000 (2000), <http://www.census.gov/census2000/states/mi.html> (follow hyperlinks for "Selected Economic Characteristics (DP-3)").

This 1970-to-2000 comparison surely understates the increase in female-head-of-household poverty because I have compared the 1970 and 2000 numbers for female head-of-households with "no husband present." In recent years, the number of unmarried mothers *cohabiting* in poverty has increased significantly. The 2000 census probably counted many or most of those mothers as living in male-headed households.

20. U.S. CENSUS BUREAU, CENSUS 2000 PROFILE, MICHIGAN: 2000, at 4 (Aug. 2002), <http://www.census.gov/prod/2002pubs/c2kprof00-mi.pdf>. This figure (unlike the data cited in note 18) includes the children of cohabiters living below the poverty line.

families and poverty also usually portend serious social, educational, and emotional injuries to the children raised in those circumstances.²¹ Our children are our most precious national resource. Clearly, we are witnessing the dissipation of that resource and tremendous consequential damage to our society.²² Something must be done, and there is no mystery about what that “something” is. We must do everything possible to assure that more children grow up in homes with their married parents.

II. IMPLEMENTING THE NATURAL LAW VISION OF MARRIAGE

Mark Twain (1835-1910) was an American author, humorist, and folk philosopher who sometimes challenged the fundamental tenets of Christianity. Whatever one thinks of Twain’s stance toward Christianity, there can be no denying his rhetorical brilliance. In *Letters from the Earth*, he used his ironic wit to capture the essence of humanity’s internal conflict regarding obedience to natural law:

[*Enter a Messenger-Angel.*]

“My lords, He is making animals. Will it please you to come and see?”

They went, they saw, and were perplexed. Deeply perplexed—and the Creator noticed it, and said, “Ask. I will answer.”

21. Most of us know inspiring examples of single parents raising children who went on to achieve great success in life, but those are the wonderful exceptions. For too many, the prospects are bleak. See, e.g., PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *WHAT ABOUT THE KIDS?: RAISING YOUR CHILDREN BEFORE, DURING, AND AFTER DIVORCE* (2003).

22. See, e.g., JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 168-74 (2002). Professor Wilson’s book helped awaken me to the decline of marriage and why it is so threatening to our society and nation. Here is a brief excerpt from that book:

The family problem lies at the heart of the emergence of two nations [within the United States]. . . . There have been times in our history when unemployment was high and public schools barely existed. Yet in those days we were not two culturally opposed nations. . . . Today, we are vastly richer, but the money has not purchased public safety, racial comity, or educational achievement.

The reason, I think, is clear: it is not money but the family that is the foundation of public life. As that foundation has become weaker, every structure built upon it has become weaker.

The evidence as to the powerful effect of this familial foundation is now so strong that even some sociologists believe it.

"Divine One," said Satan, making obeisance, "what are they for?"

"They are an experiment in Morals and Conduct. Observe them, and be instructed."

....

After a long time and many questions, Satan said, "The spider kills the fly, and eats it; the bird kills the spider and eats it; the wildcat kills the goose; the—well, they all kill each other. It is murder all along the line. Here are countless multitudes of creatures, and they all kill, kill, kill, they are all murderers. And they are not to blame, Divine One?"

"They are not to blame. It is the law of their nature. And always the law of nature is the Law of God. Now—observe—behold! A new creature—and the masterpiece—Man!"

Men, women, children, they came swarming in flocks, in droves, in millions.

"What shall you do with them, Divine One?"

"Put into each individual, in differing shades and degrees, all the various Moral Qualities, in mass, that have been distributed, a single distinguishing characteristic at a time, among the non-speaking animal world—courage, cowardice, ferocity, gentleness, fairness, justice, cunning, treachery, magnanimity, cruelty, malice, malignity, lust, mercy, pity, purity, selfishness, sweetness, honor, love, hate, baseness, nobility, loyalty, falsity, veracity, untruthfulness—each human being shall have all of these in him, and they will constitute his nature. In some, there will be high and fine characteristics which will submerge the evil ones, and those will be called good men; in others the evil characteristics will have dominion, and those will be called bad men. Observe—behold—they vanish!"

"Whither are they gone, Divine One?"

"To the earth—they and all their fellow animals."

....

*Man is an experiment. . . . Time will show whether [he was] worth the trouble.*²³

So far, God's experiment has produced decidedly mixed results. Man has done much that is good and much that is bad, exactly as we should expect of a creature imbued by his Creator with so many conflicting instincts. The history of marriage illustrates those mixed results.²⁴ For thousands of years, our informal social customs, and later the formal laws posited by kings and legislatures, moved ever closer to the natural law model of marriage described by Cardinal Trujillo. Very recently, however, we seem to have lost our way, and both children and parents have suffered the disastrous consequences described previously.

III. DIVORCE LAW

Cardinal Trujillo's vision of marriage carries a presumption of permanence, but that presumption was abolished years ago in Michigan and throughout this country. With the advent of "no fault" divorce, a spouse now has no legal right whatsoever to a continuing relationship. As far as our civil law is concerned, every husband and every wife are just living together until one of them decides to leave because, in that one spouse's opinion of the moment, "there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."²⁵

True, one must acknowledge that divorce has always existed, but it is also true that divorce was formerly seen as the traumatic undoing of a marriage, and not merely as an optional next step that can flow sequentially out of marriage. Now, although property still must be divided and child custody matters resolved, the marriage relationship itself has *no* legally presumed durability under the current law of Michigan and other American states.

IV. SAME-SEX UNIONS

As Cardinal Trujillo notes, the recognition of, or attempt to recognize, same-sex marriage by judicial decisions in Massachusetts

23. MARK TWAIN, LETTERS FROM THE EARTH 4-6 (Bernard DeVoto ed., Harper & Row 1962) (1938) (emphases added).

24. See WILSON, *supra* note 22, at 1-3.

25. MICH. COMP. LAWS ANN. § 552.6(1) (West 2005).

and New York (and civil disobedience by elected officials in California and elsewhere) has prompted many states to enact statutes or amend their constitutions to define “marriage” as the union of one man and one woman.²⁶ In November 2004, Michigan voters approved such a constitutional amendment.

The question of whether two people of the same sex can “marry” is fundamentally important to any discussion of the obstacles to implementing Cardinal Trujillo’s natural law vision of marriage. Therefore, I must acknowledge that emerging issue here. But I also must limit myself to reporting documented facts, because it is virtually certain that our Court soon will be asked to interpret the Michigan amendment, and a Justice should not comment on issues that will likely come before her Court.

Before quoting the recent Michigan amendment, I think it instructive to look first at two forerunner constitutional amendments approved by voters in Colorado (1992) and Nebraska (2000). The Colorado amendment provided:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.²⁷

Back in 1992, same-sex “marriage” was not yet a high-profile issue. The Colorado amendment was intended to invalidate certain municipal ordinances that banned sexual-orientation discrimination in specified transactions, including those involving housing, employment, education, public accommodations, and health and welfare services.

Gay rights groups challenged the Colorado provision, and the U.S. Supreme Court invalidated it in *Romer v. Evans*,²⁸ ruling that the provision violated the Equal Protection Clause of the Fourteenth Amendment because it imposed a “special disability” on one class of

26. Trujillo, *supra* note 2, at 327 n.114.

27. COLO. CONST. art. II, § 30(b) (2001) (by Initiated Amendment 2 (1992)) (declared unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996)).

28. 517 U.S. at 626 (1996).

citizens for reasons that lacked even a “rational relationship” to “legitimate state interests.”²⁹ For present purposes, please note that the 1992 Colorado amendment imposed some very broad prohibitions and did not mention marriage at all.

In contrast, protecting the traditional man-woman “marriage” norm was the primary goal of the 2000 Nebraska amendment. As adopted by the voters, that provision stated: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”³⁰

Despite the Nebraska amendment’s narrower focus (defining “marriage” without classifying persons in any other context), a federal district court recently declared the provision unconstitutional in *Citizens for Equal Protection, Inc. v. Bruning*.³¹ The district court relied in part on *Romer’s* Equal Protection reasoning, but it also ruled that the Nebraska amendment violated the First Amendment³² (free speech and the right to petition the government) and was a prohibited “bill of attainder.”³³ The U.S. Court of Appeals for the Eighth Circuit reversed the district court and ordered that the case be dismissed with prejudice.³⁴ The appeals court ruled that the law did not violate the Equal Protection Clause, it was not a bill of attainder, and it did not violate the First Amendment rights to associate or to petition the government for redress of grievances.³⁵ For now, please note that the amendment’s first sentence is devoted exclusively to defining “marriage” and that the second sentence limits only those rights and protections that depend on marital status. The only restriction is that no *formal* same-sex union of any type “shall be valid or recognized.”

Now, have a look at the provision that Michigan voters added to our Constitution in November 2004: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be

29. *Id.* at 631-32.

30. NEB. CONST. art. 1, § 29 (2001) (by Initiative No. 416 (2000)) (initially declared unconstitutional in *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev’d*, 455 F.3d 859 (8th Cir. 2006)).

31. *Bruning*, 368 F. Supp. 2d at 1009.

32. *Id.* at 995-96.

33. *Id.* at 1005. See U.S. CONST. art. I, § 9, cl. 3.

34. 455 F.3d 859, 871 (8th Cir. 2006).

35. *Id.* at 868-70.

the only agreement recognized as a marriage or similar union for any purpose."³⁶

Compared to the Colorado and Nebraska amendments, this Michigan provision further narrows the focus. It both defines "marriage" and explains the social rationale for limiting that definition to the traditional man-woman model.

Beyond those general observations, I will not comment further on this subject because I expect that my own Court will be called upon to interpret the Michigan amendment in the near future. It is possible that the U.S. Supreme Court will provide further guidance before then.

V. OTHER RECENT REFORMS

Not everyone shares my opinion that marriage-law trends of the past thirty-five years have pushed society off course. The philosophies responsible for our current problems remain influential, a fact evidenced by the recent publication of two noteworthy family-law treatises, one in the United States and the other in Canada. I refer to the American Law Institute's (ALI) *Principles of the Law of Family Dissolution: Analysis and Recommendations*,³⁷ and the Law Commission of Canada's *Beyond Conjuality: Recognizing and Supporting Close Adult Relationships*.³⁸ Both are law-reform prescriptions that treat traditional marriage as merely one among many equally valid family forms.³⁹

The publication of those influential anti-marriage treatises might lead one to believe that any discussion of "marriage" as Cardinal Trujillo understands it (and as humanity has understood it through

36. MICH. CONST. art. I, § 25. Led by Initiative Petition and approved by electors as Proposal 04-02 on Nov. 2, 2004, the law became effective on Dec. 18, 2004.

37. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002).

38. LAW COMMISSION OF CANADA, *BEYOND CONJUALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (Dec. 21, 2001), http://www.lcc.gc.ca/about/conjuality_toc-en.asp.

39. On August 22, 2005, the California Supreme Court issued three opinions in which it held that children had two mothers (and no father). The cases required the court to analyze several combinations of insemination methods, pre-existing same-sex relationships, and specific disputed issues (child support obligations and visitation rights). See *K.M. v E.G.*, 117 P.3d 673 (Cal. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Kristine H. v Lisa R.*, 117 P.3d 690 (Cal. 2005). Although the court did not cite the ALI's *Principles of the Law of Family Dissolution*, *supra* note 37, its interpretations of California's Uniform Parentage Act, CAL. FAM. CODE §§ 7600-7730 (West 2004), were consistent with the new definitions of "parent" found in chapter two of the ALI's *Principles of the Law of Family Dissolution*.

the millennia) is simply moot at this point in history. But history has not yet ended. Man has temporarily put marriage asunder, but as Cardinal Trujillo points out, the natural order tends to reassert itself in time.⁴⁰

Today, I see many encouraging signs that marriage's restoration has begun. Not least among those signs is this special "marriage" edition of the *Ave Maria Law Review*. My husband was a law professor who served on more than his share of law-reform commissions.⁴¹ He often said, "If it's in the legal academy today, in twenty-five years it will be in the culture."⁴² For many years now, academics have disparaged marriage as "the 'M' word." Such voices are still heard in the academy, but no longer do they go unchallenged.

Not long ago, the presumed wisdom of the ALI and the Law Commission of Canada would have caused academics, legislators, and judges to accept without question the anti-marriage prescriptions in the ALI's *Principles of Family Dissolution* and the Commission's *Beyond Conjugal*. But that time of unquestioning acceptance has passed. In October 2004, I participated in a conference at Harvard Law School organized by law professors Mary Ann Glendon of Harvard and Robin Fretwell Wilson of the University of Maryland. Each conference participant presented a paper analyzing a chapter of the ALI treatise. Those collected papers have been published in book form.⁴³ The Canadian *Beyond Conjugal* report also has drawn critical fire.⁴⁴

Recently, three states have enacted "covenant marriage" laws,⁴⁵ and more than twenty other states have considered or currently are considering such legislation.⁴⁶ "Covenant marriage laws extend, to both couples anticipating marriage and to those already married, the

40. See Trujillo, *supra* note 2, at 322-23.

41. Joseph D. Grano (1943-2001), Wayne State University Distinguished Professor of Law.

42. I wish now that I had asked him whether he borrowed that insight or discovered it himself. Neither Google's search engine nor BARTLETT'S FAMILIAR QUOTATIONS (John Bartlett & Justin Kaplan eds., 17th ed. 2002) attributes it to anyone else.

43. RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (Robin Fretwell Wilson ed., 2006).

44. See, e.g., DAN CERE, COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (2005).

45. ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2000 & Supp. 2004); ARK. CODE ANN. §§ 9-11-801 to -811 (2001 & Supp. 2005); and LA. REV. STAT. ANN. §§ 9:272-276 (2000 & Supp. 2006).

46. See, e.g., Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. L. REV. 261, 262 n.7 (2003) (listing Alabama, Arizona, Arkansas, California, Georgia, Iowa, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia as states with proposed legislation).

option of designating their marriage as a ‘covenant marriage,’ thereby limiting the grounds upon which divorce can be achieved.”⁴⁷ That capsule definition of “covenant marriage” appears in a skeptical law review article whose author, Chauncey E. Brummer, doubts that covenant marriage laws are the best way to reinforce the traditional “for better or worse” marriage vow. Perhaps they are not, but the legislative activity on covenant marriages and the many new constitutional and statutory definitions of “marriage” are further proof that the social atmospherics are changing. In democracies, legislatures do respond—however slowly and imperfectly—to the collective will of the people. Ironically, that imperfect responsiveness has contributed to our “marriage problem.” But the covenant marriage laws are one more confirming sign that we will find our collective way out of the current sad state of affairs.

Another such sign is the Healthy Marriage Initiative that President George W. Bush proposed in early 2004, and for which Congress approved annual funding of \$150 million for marriage research and education programs.⁴⁸

Many who oppose the Healthy Marriage Initiative argue that the government should not intrude into something so personal as marriage and the family. Those critics somehow have failed to notice that the government already intrudes. Our federal, state, and local governments spend billions of dollars every year to help individuals and society cope with the wreckage of failed families. To cite just three examples: (1) we enforce child-support orders by seizing the tax refunds of delinquent child-support payers; (2) we require employers to withhold wages from support-paying employees (whether delinquent or not) who surely are embarrassed to have coworkers know the details of their divorces and out-of-wedlock parenting; (3) in foster care cases, the government decides whether parents are fit to raise their own children. Those are just three examples of widespread government intrusions into family matters. Most people accept those intrusions as necessary and proper. But if those efforts at after-the-fact damage control are widely acceptable, then I think it fully appropriate for government to devote some resources to helping people form and preserve families. The Healthy Marriage Initiative does just that by sponsoring marriage research and supporting

47. *Id.*

48. For details about the Initiative, see U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE HEALTHY MARRIAGE INITIATIVE, <http://www.acf.hhs.gov/healthymarriage>.

community programs that offer sound advice about how to create and maintain a healthy marriage.

VI. A JUDGE'S DILEMMA

I agree with Cardinal Trujillo that the natural law model of marriage is good for each of us (and for all of us). That personal belief is not the result of some recent epiphany. I have always believed in marriage and married parenting, and I have “walked the walk” with my late husband and our two now-adult children. That is how I have lived my life, and that is how I advise others to live theirs—if they ask me. But I can give that stance full expression only as a private citizen; as a judge, I must be more cautious precisely because, in my judicial role, I could use the law to enforce my “advice.”

In *The Nature of Marriage and Its Various Aspects*, Cardinal Trujillo exhorts “Christian jurists, politicians and legislators . . . to denounce contemporary nations’ systems of family law that dangerously separate them from the system of natural family relations.”⁴⁹ Perhaps, as Cardinal Trujillo asserts, our federal and state governments are sowing the seeds of their own destruction by enacting laws that reject the traditional marriage and family, and thereby damage the very social fabric that sustains democratic governments. If so, “politicians” and “legislators” should heed his call to denounce those laws and vote to change them. But I feel that I must sound a cautionary note regarding “jurists” or, more specifically, “judges” as we know them in this country.⁵⁰ Here, our separation of powers doctrine usually limits “jurists” to applying the laws enacted by our democratically elected legislators and executives.⁵¹

49. Trujillo, *supra* note 2, at 335.

50. In its broadest sense, “jurist” could include anyone with “thorough knowledge” of the law. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 950 (4th ed. 2000). Also, judges in some countries function as investigators and prosecutors. And, there may be places where judges assume additional roles that we in the United States have assigned exclusively to the legislative or executive branches. My “note of caution” is addressed to American judges and to judges elsewhere whose authority is similarly limited.

Incidentally, no one should infer that I do not consider American judges to be skilled politicians. But I interpret Cardinal Trujillo’s reference to “politicians” as referring to partisan advocates whom he would distinguish from “jurists.” I have followed his lead. See Trujillo, *supra* note 2, at 335.

51. The article text above obviously understates somewhat the authority of American judges. First, our courts can, of course, invalidate laws that exceed the constitutional authority possessed by legislatures and executives. Even then, however, the court is enforcing a law (the

As a Justice of the Michigan Supreme Court, I have taken an oath to uphold and enforce the laws enacted by the United States of America and my own state, Michigan. I could, of course, resign my judicial office. Then I would be free to advocate as a citizen. But the *Law Review* editors asked each author to suggest “practical solutions” within our particular “field of study.” In my case, I assume that they wanted suggestions for judges, not ex-judges. Thus, I propose to discuss whether sitting judges can promote the natural law model of marriage and family without disregarding their oath to uphold the laws enacted by their state and nation.

Here is the oath required of all Michigan judges by Michigan’s Constitution and Michigan Compiled Laws:⁵² “I do solemnly swear (*or affirm*) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of [Justice of the Michigan Supreme Court] according to the best of my ability.”⁵³ That same section of Michigan’s 1963 Constitution also states: “No other oath, affirmation, *or any religious test* shall be required as a qualification for any office or public trust.”⁵⁴

When I looked at those provisions in Michigan’s Constitution while preparing this article, I at first assumed that the “or affirm” option in the oath and the follow-on sentence barring “any religious test” reflected early stirrings of secularism among delegates to Michigan’s 1961 Constitutional Convention. Not true. Those clauses in the current Michigan Constitution and all of its predecessors⁵⁵ are

Constitution) adopted by others; and courts must show restraint when deciding whether to exercise this last-resort authority to declare a law unconstitutional.

Second, enforcing an enacted law often requires a court to design a remedy to fit the facts of a particular case. That discretion also serves to expand the court’s authority beyond the simple “uphold and enforce” prescription recited in the article text.

52. “The supreme court justices shall take and subscribe the oath required by the constitution before entering upon the discharge of their duties.” MICH. COMP. LAWS ANN. § 600.206 (West 2005).

53. MICH. CONST. art. XI, § 1 (emphasis added).

54. *Id.* (emphasis added).

55. The current Michigan Constitution is the first to mirror the U.S. Constitution’s prohibition of any “*religious test*” (emphasis added). All three previous state constitutions simply barred “tests” of any sort, but that broader term surely included religious tests. See MICH. CONST. of 1835, art. XII, § 7; MICH. CONST. of 1850, art. XVIII, § 1; MICH. CONST. of 1908, art. XVI, § 2. Before statehood, the Michigan Territory (and the larger territories from which Michigan was severed) were governed by an act of the Continental Congress, the Northwest Ordinance of 1787. That federal law required only “an oath or affirmation of fidelity, and of office” without further elaboration. Northwest Ordinance of 1787, § 12, *reprinted in* 1 U.S.C. LIV (2000). But territorial officers were federal officers and, therefore, subject to the oath provisions in the U.S. Constitution.

very similar to Article VI, Clause 3 of the U.S. Constitution,⁵⁶ as approved in 1787 by the delegates to our federal Constitutional Convention.

Two-and-a-half centuries ago, American society, government, and laws were much friendlier to Christian principles than they are today. But even then, the Framers of our federal Constitution took pains to protect their newly won religious freedoms. The convention was dominated by members of Protestant denominations.⁵⁷ The clause prohibiting any “religious test” for holding federal office was added at the behest of a few Catholic⁵⁸ and Baptist delegates, along with numerous other (non-Baptist) Protestant allies who feared sectarian clashes and ultimate domination by whichever Protestant denomination prevailed.⁵⁹ They intended the “test” clause to temper the immediately preceding “oath” clause and thus assure that no one would be disqualified from holding office because of *either* his particular faith *or* his belief in specific tenets of a particular faith.⁶⁰

Those somewhat obscure “oath” and “religious test” provisions in Article VI of the U.S. Constitution have drawn renewed attention lately in the context of the U.S. Senate’s deliberations over appointments to the U.S. Supreme Court. More often and more famously in our nation’s history, discussions of religious freedom have focused on the First Amendment to the U.S. Constitution, which provides in part: “Congress shall make no law respecting an

56. “[A]ll . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3.

57. Ironically, many of the same denominations have recently endorsed marriage “alternatives” that would have been anathema to the eighteenth-century Convention delegates.

58. Delegate Daniel Carroll was the brother of America’s first Roman Catholic Bishop, John Carroll of Maryland.

59. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 680, 702-03 (1987).

60. Tests based on membership in a particular church were not their only concern. Earlier, England had passed “Test Acts.” Those laws did not directly prohibit Catholics from holding public office, but they excluded, for example, anyone who believed that the Sacrament of the Eucharist transformed bread and wine into the body and blood of Christ. In other words, the Test Acts barred Catholics from holding public office even though they did not say so explicitly. So, when the United States and Michigan Constitutions bar “religious test[s],” they mean to bar tests based on *either* membership in a particular denomination *or* the holding of a belief taught by a particular denomination. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2176 (2003); Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 WASH. U. L. Q. 1129, 1145 (2004).

establishment of religion, or prohibiting the free exercise thereof”⁶¹

Two-and-a-half centuries later, we continue to debate what constitutes the “establishment of [a] religion” and whether particular laws facilitate or impede the “free exercise [of religion].” That is understandable. Fair-minded people often find it difficult to determine whether a particular law is neutral or biased regarding religion. We tend to overlook the “establishing” aspects of laws that are friendly to our own beliefs, but we immediately see the threat to religious freedom posed by laws that run contrary to our beliefs. Therefore, in response to Cardinal Trujillo’s exhortation to “denounce” bad laws, we—and especially we who live in democracies—must walk a fine line lest we slip into advocating theocracy over democratic decision-making. Judges who have taken an oath to uphold and enforce the law should not see their religious beliefs as justification for ignoring or frustrating laws that they do not like. On the bench, we must honor our oaths and enforce the law.

In November of 2004, not long after President George W. Bush had been re-elected, I listened to a post-election analysis on National Public Radio’s *Talk of the Nation* show. The host took a telephone call from a listener who described herself as a Florida college student. She seemed greatly distressed by the election’s outcome and almost disbelieving that the President had been re-elected despite her tireless work for Senator John Kerry’s campaign and the Kerry votes cast by herself and “everyone [she] knew.” Her conclusion: “Democracy doesn’t work.”

Being a bit older than the caller, I have seen many elections and have supported both winning and losing candidates. I smiled at what I then perceived as the youthful caller’s absurd conclusion that a victory by the candidate who received the most votes proved that “democracy doesn’t work.” But reading Cardinal Trujillo’s essay reminded me of that 2004 broadcast and caused me to realize that the caller meant that democracy had failed because the people had elected the “wrong” candidate. That interpretation is far more troubling and certainly no cause for amusement.

All governments make mistakes, and democratic governments are not immune. Fortunately, the citizens of a democracy can rid themselves of a mistake-prone government. But what if a democratic government makes a series of huge mistakes and, for whatever reasons, the people do not vote the rascals out? That, in essence, is

61. U.S. CONST. amend. I.

what Cardinal Trujillo asserts has happened in the Western democracies that have enacted laws that threaten the “original model” of marriage.

As Winston Churchill once said, “Democracy is the worst form of Government except all those other forms that have been tried from time to time.”⁶² Judges inclined to “denounce” democratically enacted laws that run contrary to their religious beliefs should recall Churchill’s observation. As the Framers of our Constitution recognized, when it comes to protecting true religious freedom, democracy is clearly superior to theocracy, and vastly superior to the violent anarchy that would prevail if each person tried to impose his own beliefs on everyone else. For proof, one needs look no further than today’s news. “We may carry . . . nationalities, but we belong to our religion.”⁶³ The speaker, a cleric belonging to one of the world’s great religions, made that statement as partial justification for the fatal bombings of the London Underground on July 7, 2005. Personally, I do not see any possible moral equivalence between: (1) advocating laws that are consistent with Christian beliefs, and (2) killing innocent people to establish a world-wide Islamic caliphate. But millions of devoutly religious people actually see the latter as morally superior to the former, and hundreds of millions more feel at least some instinctive sympathy for that speaker’s words and the bombers’ murderous acts.

Forced to confront that awful reality, “we” reassure ourselves that “our religion is better than their religion” or something to that effect. But “they” believe the opposite with equal fervor, a fact that ought to give pause to any judge inclined to “denounce” a democratically enacted law because it runs contrary to that judge’s personal interpretation of natural law. My caution to judges: No matter how certain you are of your own beliefs, do not let your beliefs determine your rulings; you must follow the law. Or, as Chief Justice John Roberts phrased it during his September 2005 confirmation hearings before the Judiciary Committee of the U.S. Senate: “[M]y faith and my religious beliefs do not play a role in judging. . . . I look to the law books and always have. I don’t look to the Bible. . . .”⁶⁴

I know that the Catholic Church teaches that Christians who hold public office should give voice to their personal beliefs, and should

62. THE OXFORD DICTIONARY OF QUOTATIONS 216 (5th ed. 1999).

63. Fouad Ajami, *Within the Gates*, U.S. NEWS & WORLD REP., July 25, 2005, at 24 (quoting an anonymous Wahhabi Muslim preacher).

64. Amy Goldstein & Charles Babington, *Roberts Avoids Specifics on Abortion Issue: Nominee Distances Himself from Reagan-Era Writings*, WASH. POST, Sept. 14, 2005, at A1.

conform their official acts to those beliefs.⁶⁵ For that reason, I repeatedly considered deleting the preceding paragraphs. But then I read an essay that reinforced my view that judges should not denounce democratically enacted laws. Here is a key excerpt from that essay:

Shortly before Iraq's January election, an audiocassette apparently from arch-terrorist Abu Musab al-Zarqawi was released to the press, declaring "fierce war on the evil principle of democracy." On it, Zarqawi lays out what he sees as the tenets of democracy—and why they are contrary to the tenets of Islam. In a democracy, Zarqawi explains, "the one who is worshipped and obeyed and deified, from the point of view of legislating and prohibiting, is man, the created, and not Allah." This, he adds, "is the very essence of heresy and polytheism and error."⁶⁶

That, I think, is exactly the kind of thinking that the Framers sought to protect us from when they wrote Clause 3 of Article VI of the U.S. Constitution, and that later caused Congress to include the First Amendment in the Bill of Rights.⁶⁷

65. See, e.g., Vatican Congregation for the Doctrine of the Faith (Pontifical Council for the Laity), *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, 32 ORIGINS 537 (2003); U.S. Conference of Catholic Bishops, *Living the Gospel of Life: A Challenge to American Catholics*, SOC. JUST. REV., March/April 1999, at 35.

66. Bret Stephens, Op-Ed., *In Today's Terror, An Old Allegory Gets a New Life: Has Abu Musab al-Zarqawi Been Reading Thomas Mann?*, WALL ST. J., Aug. 19, 2005, at A11.

67. As Bradley notes:

To put the proposition most succinctly: the founding generation entered the process of constitution-making firmly convinced that only Christians (and largely, only Protestants) should hold public office. They exited the process with those views intact. Yet, article VI was clearly understood to contravene that belief.

....

How do you sell a no-test clause to *these* customers?

The answer is deceptively simple. Federalists said, in effect: article VI prevents you from subordinating the despicable sect of your choice. So it does. But it also protects you from the oppressive designs of all the other sects, who think that your views are despicable and would subordinate you—as you would them—if an instrument of oppression such as religious tests were available. "Serious minds" wondered whether, absent a test, "Popery" or some other "tyrannical way of worship" might be established. In fact the opposite was true: "[I]t is most certain that no such way of worship can be established without any religious test." The ban on tests protects the Protestant character of the nation against a forced absorption of Romish ways, while it incidentally and perhaps unhappily secures Roman Catholics the legal eligibility for office.

The no-test clause was sold as a constitutionalized Golden Rule with a Machiavellian spin to it: "Constrain yourself as you would constrain others." *This* is

Of course, a judge's moral values always will *influence* that judge's decisions. Human judges cannot attain perfect impartiality. Fortunately, judicial decisions that are informed by moral values will be good decisions if the judge's moral values are sound. But no two of us see all moral issues in exactly the same light. And no human being can be *exactly* right on *all* moral issues. Therefore, we judges must take care that our values only inform our decisions, not dictate them.

For those reasons, I cannot counsel judges who are speaking or writing from the bench to "denounce" unsound laws. That promotes disrespect for the law, which, for reasons already mentioned, can lead to things worse than unsound laws. Except in rare instances where a question is unique and must be determined exclusively by judge-made common law, we judges are bound to enforce laws that others have enacted, even when we think that their choices were unwise.

I realize that what I have just written reads disturbingly like the statement of a politician who seeks to have it both ways by declaring a "personal" moral position and then "officially" voting for laws that contradict that position.⁶⁸ That criticism is valid to a point, but judges, unlike legislators and executives, can only acknowledge the inherent conflict and then enforce the law as written. In that context, we are not free to vote our consciences.⁶⁹

how conditions of pluralism ultimately accounted for article VI. Constitutional apologists convinced enough Americans that governmental power must be distributed, or withheld, on the assumption that the designs of future wielders of that power were unknown, but in the expectation that (in the words of Massachusetts' Reverend Shute) "most of men, somehow, are rigidly tenacious of their own sentiments in religion, and disposed to impose them upon others as the standard of truth." These premises, mixed with a gamble that the instinct to be free of oppression is stronger than the temptation to oppress, explain ratification of article VI. . . .

The classic expression here is of course Madison's. His Tenth Federalist Paper has endured as a landmark in both constitutional exegesis and political theory. The cure concocted there for the mischief of faction—extending the sphere to encompass the broadest possible collection of interests—is appreciated as a profound contribution to constitutional theory. Underappreciated, if appreciated at all, is Madison's treatment in Federalist Ten of religio-political conflict as but another example of factional discord, one more symptom demanding the same remedy. "A multiplicity of sects" assured religious liberty, just as a plenitude of factions was conducive to civil liberty generally.

Bradley, *supra* note 59, at 680, 702-03 (footnotes omitted).

68. See, e.g., U.S. Conference of Catholic Bishops, *supra* note 65, at 239.

69. "All Christians must be aware of *their own specific vocation* within the political community. It is for them to give an example by their *sense of responsibility* and their *service of the common good*. In this way they are *to demonstrate concretely how authority can be compatible with freedom*." Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on*

That is not to say that judges have no power to shape the law. First, we have some room to maneuver at the law's margins, between its seams, and when dealing with unprecedented facts. Perfect "textualists" will disagree with that, but I already have disclaimed perfection. In his much higher calling, Pope John Paul II did not write only of faith; he blended faith and reason, as the title of his encyclical bears out.⁷⁰ That blend works well for judges, too.

Second, issuing Solomon-like rulings from the bench is only part of what judges do. Hollywood may not see any dramatic potential in a judge helping to administer a bureaucracy that disburses tax dollars to children and families, but that is part of the job in my experience. Judges, acting as the reluctant administrators of such programs, have a major voice in determining how that money is spent.

Third, judges can influence proposed legislation affecting the law, the legal system, or the administration of justice. I have found that legislators and governors welcome a judge's views on what will (or will not) work, and what should (or should not) be done. Similar influence comes from lawyers' associations, civic clubs, and individual citizens, all of whom have their own ways to influence legislators, and all of whom are eager to hear judges' views on those subjects.

Judges often stand accused of suffering from "black robe disease," i.e., overestimating their own importance. But I think that judges actually underestimate their ability to influence by consultation those issues that affect the administration of justice. Pick up a telephone; send an e-mail; join a committee; make a speech. All of those law-shaping activities, and more, are approved explicitly by Canon 4 of the Michigan Code of Judicial Conduct and by the similar ethical standards adopted in other jurisdictions.⁷¹

the Church in the Modern World] ¶ 75 (1965), reprinted in *THE SIXTEEN DOCUMENTS OF VATICAN II* 595 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967) (emphasis added).

70. *Fides et Ratio*, *supra* note 3.

71. Canon 4 of the Michigan Code of Judicial Conduct, subtitled, "A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice," notes:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities:

CONCLUSION

In Mark Twain's *Letters from the Earth*, God describes all earthly fauna—and man in particular—as an “Experiment in Morals and Conduct.”⁷² For most of human history, His experimental subjects seemed to be learning that natural law's model of marriage is essential to the survival of our society and even our species. As we acquired the ability to adopt social customs and to posit laws, we chose customs and laws that generally conformed to the natural law of marriage as described by Cardinal Trujillo.

Then, in about 1970, we who reside in the historically Christian countries presumed to conduct our own experiment on marriage. We theorized that the scientific knowledge and societal compassion that we acquired during our “Enlightenment” (and subsequently) had so empowered us that we should dispense with traditional marriage. But our experiment on marriage has had disastrous consequences, most especially for our children.

Happily, the last few years have produced some encouraging signs that we have begun to realize our mistake and to bring our posited models of marriage back into harmony with the natural law model. A successful course reversal is by no means assured, but I see good people effecting beneficial changes.

My assignment for this article was to comment on how judges can and should assist that effort. I join Cardinal Trujillo in commending the natural law model of marriage. At the same time, however, I counsel American judges not to overreach by using judicial authority to trump democratically enacted laws that conflict with our personal

A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.

C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not individually solicit funds. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

MICH. CODE OF JUDICIAL CONDUCT Canon 4 (West 2005). *See also* MODEL CODE OF JUDICIAL CONDUCT CANON 4(B)-(C) (1998).

72. TWAIN, *supra* note 23, at 5.

beliefs. That road leads to trouble, as has been demonstrated both by religious totalitarians around the world and by another experiment (this one involving judicial activism) that America has conducted concurrently with its ill-fated experiment on marriage. Indeed, a closer examination probably would show that well-intentioned judicial moralizing has done more than its share of damage to both marriage and families.

We as judges should therefore heed both lessons. First, society likely will benefit if our posited marriage laws are brought back into harmony with the natural law. Second, although we judges may chafe at the restriction, our role in the American democratic system is to apply laws, not make them. We should not presume that our judicial offices give us the authority to disregard laws that we personally consider unwise or immoral.

That said, I do encourage judges to be visible public advocates for marriage-friendly laws. In their daily work, judges see the societal damage that has resulted from the decline of marriage. Our judicial positions give us ready access to platforms not available to most citizens. I know that public advocacy is not as immediately fulfilling as using the judge's gavel to undo laws that the judge believes unwise, but simple advocacy within the judicial canons' ethical restraints is, for a judge, the right thing to do. If enough people do the right things, then together we will solve the "marriage problem."