MARRIAGE, SELF-DEFINITION AND SELF-EXPRESSION

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INTRODUCTION

Professor Anthony Esolen begins a recent book with a question: "Is it possible . . . for a well-intended and intelligent person to get everything wrong, in the very matter upon which he sets his mind most energetically?"[1] He answers: "It is more than possible. If he begins from false principles."[2] Then, he offers this analogy:

> He will be like a carpenter whose tools are out of kilter. His T-square is oblique, his straightedge is crooked, his level wobbles, his plumb line drifts. If he keeps on building with those tools, never stepping back to look at what he has actually wrought, he will not have built a bad house; he will not have built a house at all. He will have built a wreck, a monstrosity. The first strong wind will send it toppling.[3]

For the United States Supreme Court, the tools of the trade are legal (and increasingly, sociological) analyses. They are disclosed in the written opinions of the justices and so are reasonably easy to identify. Thus, when the Court set out to refurbish the institution of marriage in the summer of 2015, to make it a little roomier, we could assess the soundness of the theoretical tools it used and make some predictions about the likely stability of the structure they have erected.

At the time of this writing, the national mandate for same-sex marriage is not even half a year old. So, it is too early to tell precisely how that structure will hold up, but there is still plenty we can observe about the Court's "renovation" project.

In *Obergefell v. Hodges*,[4] the Court's analytic tools were primarily, sociological and theoretical, rather than strictly legal. More simply, they are the justices' presuppositions about reality. These are derived from, and reflected in, a series of precedents (many noted in the majority opinion)

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1. ANTHONY ESOLEN, RECLAIMING CATHOLIC SOCIAL TEACHING 5 (2014).
2. *Id.*
3. *Id.*
4. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

involving claims for unenumerated rights surrounding sexuality and family, and beginning roughly with *Griswold v. Connecticut*.[5] These cases have established as orthodoxy among influential legal elites a series of propositions.

- "Sexual expression is," at best, the most important "item in the toolkit of expressive individualism."[6]
- There are no differences of any significance between men and women.[7]
- The State has an obligation to ameliorate or completely shield individuals from any unwanted consequences of sexual expression.[8]
- No freely chosen sexual coupling is illicit and none should be privileged above another.[9]
- Civil marriage is but a manifestation of individual will, valuable because it allows the State to bestow dignity on individuals by valorizing their intimate choices.[10]

These assumptions are evident throughout the *Obergefell* decision. Together, they contribute to the most salient assumptions the Court relies on in making its decision. These involve such things as the nature of personhood, the role of the State and the Court in particular, and the nature of marriage and of parenthood. The focus of this essay will be the latter two which are inextricably related. They not only determine the Court's ultimate conclusion but suggest future implications of that decision.

I. MARRIAGE

If one were to skip to the end of the decision to see how it ends, the Court's description of marriage would sound oddly traditional. Perhaps even echoing the famous passage in *Maynard v. Hill*.[11] Here is the language from the

5. Griswold v. Connecticut, 381 U.S. 479 (1965).

6. *See* William C. Duncan, *The Supreme Court Enlists in the Sexual Revolution*, 29 THE FAM. IN AMERICA 5, 15–16 (2015).

7. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

8. *See* Carey v. Population Serv.'s Int'l., 431 U.S. 678, 688 (1977). *See also* Roe v. Wade, 410 U.S. 113, 169–70 (1973).

9. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

10. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). *See also* Turner v. Safley, 482 U.S. 78, 95–96 (1987). United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

11. Maynard v. Hill, 125 U.S. 190, 211 (1888).

> It is also to be observed that, while marriage is often termed by text writers and in decisions of courts a civil contract . . . it is something more than a mere contract. The consent of the parties

penultimate paragraph: "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were."[12] The idea of "union," and the related idea that a married couple are more than just two associated individuals, are very much a part of the understanding of marriage that prevailed until quite recently. These related concepts derive, in part, from a recognition of the significance of the biological union of a husband and wife that, in the older formulation, forms the "foundation of the family" by making possible the addition of children. Such a relationship is surely more than the sum of its parts. These concepts also derived from a sense of permanence that pervaded the understanding of marriage prior to the no-fault divorce revolution.

This, however, is not precisely what the majority had in mind. The continuity of description is merely cosmetic. Like a "right" in the Soviet Constitution, the phrases do not necessarily mean what they seem to say.[13] So, for instance, the "union" spoken of the Court means not a joining of two individuals into a permanent and fruitful unit, but rather the association of two radically autonomous individuals engaged in parallel projects of self-expression of indeterminate length and significance. The use of the word union has only emotive significance, suggesting the importance of the relationship to the parties but not really its nature.

Indeed, in an earlier joint opinion, Justice Kennedy had compared a statutory requirement that a married woman *notify* her husband of her decision to abort their child (not a requirement of his consent, just a requirement of his being notified) with the doctrine of coverture, suggesting something far less than a real joining of two persons, even a mere requirement of consultation, was too constraining a view of marriage for the three justices jointly authoring

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> is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

12. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

13. Jingyuan Qian, *A Brief Research on 1936 Soviet Constitution under Joseph Stalin*, 2 MACALESTER REV. 1, at 8–9 (2011).

> Admittedly, the "rights clauses" voiced to protect individual political freedom, including speech, religion, assembly and demonstrations, but those rights were immediately limited by a vague statement in Article 135 that "it is the duty of every citizen of the U.S.S.R. to abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labor discipline, honestly to perform public duties, and to respect the rules of socialist intercourse." This clause tacitly stated that anyone who holds dissident opinions or actions against the Soviet authority's commands and orders will be 'constitutionally' deprived of those inalienable rights. (quoting The Rights Clauses as enumerated in Chapter X of 1936 Constitution).

the opinion.[14] The opinion goes so far as to charge that requiring a husband and wife to talk about whether their unborn child will live "embodies a view of marriage consonant with the common law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."[15] Needless to say, if a marriage in which spouses must consult one another is "repugnant" to the Supreme Court's understanding of marriage, then marriage is not a "union" in any substantial way.

The Court's real, substantive view of the meaning of marriage becomes evident at the outset of the majority opinion in *Obergefell*. In the opening paragraph of his opinion, Justice Kennedy says the same-sex couples in the lawsuit, by marrying, are seeking to find "a liberty." That liberty, he specifies, is the right "to define and express their identity."[16] This is not a mere rhetorical flourish. Later in the opinion, he underscores this idea. The passage is describing what the majority considers to be the deprivation historically experienced by homosexual persons who were unable to civilly marry a person of the same sex. It is described this way: "A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken."[17] The operative concept is expression. Marriage, to the Court, is a means of self-expression and the inability to label one's relationship a legal marriage is harmful because it impedes that expression.

This opening passage goes further, though, suggesting a grander purpose for marriage: the definition or creation of the self.[18] Here, the Court hearkens back to a famous formulation from *Casey*. There, the joint opinion is attempting to ground its reaffirmation of a right to abortion in substantive due process cases involving family relationships and argues:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[19]

14. *Planned Parenthood of Se. Pa.*, 505 U.S. at 898.
15. *Id.*
16. *Obergefell*, 135 S. Ct. at 2593.
17. *Id.* at 2596.
18. *Id.* at 2593–94.
19. *Planned Parenthood of Se. Pa.*, 505 U.S. at 851.

It is hard to know what precisely is meant by self-definition, self-creation or the individual formation of personhood. An essay like this is probably not the setting to grapple with the meaning of personhood as used by the Court, but there are some observations that can easily be made. First, the idea of self-creation requires a view of the person untethered from any social context. Our common sense would suggest that our personalities are shaped by, among other things, family relationships, social interactions and obligations we assume or inherit or of which we are the object. If we are the makers of ourselves, however, this can be true only in a limited sense. Indeed, the *Casey* passage suggests that a constructed "self" influenced by others is inauthentic. Of course, the passage singles out influence through formal legal rules, but it is clear from the discussion of spousal notification noted above, that family ties, like husband and child, that constrain the autonomous self are also suspect for the Court. Any social ties or obligations, then, must always be contingent lest they impose a meaning on a person at odds with his or her idiosyncratic self-conception.

Underscoring this, note that in both of the prongs of the Court's understanding of liberty, self-expression and self-definition, the operative term is "self." They are by their nature individualistic possessions, or rather entitlements the government must ensure access to. To be sure, they are not precisely the same as welfare disbursements but the context of the marriage dispute, not merely the right to call oneself married but to have the government ratify that assertion, make clear that it is a positive right guaranteed to an individual, as an individual.

The *Obergefell* decision goes on at some length in an attempt to flesh out its understanding of marriage but stays true to these basic foundational concepts. Marriage, the Court says, "has evolved over time"[20] but has now been recognized as a fundamental "interest[] of the person."[21] This is so because marriage has four attributes that make up its essence (and which apply as much, the Court says, to same-sex couples as to opposite-sex couples):

1. It is a "personal choice . . . inherent in the concept of individual autonomy."[22] It is not marriage itself, but the significance of the choice to marry that is important. Indeed, the Court says: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy and spirituality."[23] Marriage is just a vehicle to accomplish other values, like self-expression, which achieves its significance because it is a really big choice.

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20. *Obergefell*, 135 S. Ct. at 2595.
21. *Id.* at 2598.
22. *Id.* at 2599.
23. *Id.*

2. It is unique "in its importance to the committed individuals."[24] This importance springs from the desire to avoid personal loneliness and social exclusion. A passage in this section illuminates the Court's understanding of the connection between the primacy of individualism and the reality that marriage requires more than one person. It says the "right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[25] Thus, the second person in a marriage (or maybe more as Chief Justice Roberts' dissent suggests[26]) serves the function of an auxiliary to or accessory of the self-definition of the first. Having such an auxiliary in one's project of constructing personhood will have important psychic benefits, as the Court explains: "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[27]
3. It provides tangible benefits to the dependents of spouses, but also prevents "harm and humiliat[ion]"[28] that might fall on those dependents if the state's marriage laws created confusion for them about whether the adults raising them were the same as "'other families in their community.'"[29] This passage illuminates another important aspect of the Court's thinking about self-definition. It is essential to the Court, in theory at least, that all choices be treated as essentially equivalent. It is thus a cognizable harm that a person feels that his or her choices are not considered the same as another's. Or, in this passage, that a child not recognize a difference between her household and any other. It is important to note that though the Court sees a benefit to children if the adults raising her can legally marry, this does not mean, the opinion stresses, that marriage is *necessarily* related to children. That is "only one" of "many" aspects of marriage.[30]

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24. *Id.*
25. *Id.* at 2600 (quoting United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).
26. *Id.* at 2621–22 (Roberts, C.J., dissenting).
27. *Id.* at 2600.
28. *Id.* at 2601.
29. *Id.* at 2600 (quoting United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013)).
30. *Id.* at 2601.

4. It is a "keystone of our social order."[31] How so? Well, "society pledge[s] to support the couple,[32] . . . makes marriage . . . more precious by the significance it [the state] attaches to it,"[33] and uses marriage to teach that gays and lesbians are equal "in important respects."[34] The government also uses marriage to allow gay and lesbian individuals to "aspire to the transcendent purposes of marriage and seek fulfillment in its highe[r] meaning."[35] Presumably, this refers to the project of self-definition.

Though not all of this list is easily comprehensible, and certainly partakes more of rhetorical flourishes than legal analysis, what is immediately apparent is that each item is really just a way of underscoring the same point: marriage is a really, really important personal choice. To the Court, marriage does not have any inherent meaning. It is just a fancy way of describing a form of self-expression with benefits to its participants (and members of their household), which the state is obligated to endorse so as to enhance its value as a means of self-creation and self-expression. As the Court says later, if the state is to deny the label of marriage to same-sex relationships, it would "disparage their choices and diminish their personhood."[36]

II. PARENTHOOD

The *Obergefell* opinion elucidates not only the Court's view of marriage, but relatedly, its view of parenthood. There is, of course, little substantive discussion of that topic since, the Court makes clear, procreation cannot be essential to marriage since the capacity to create children without third-party intervention is an "unbridgeable difference between same-sex and opposite-sex couples."[37] Thus, the procreative elements traditionally associated with marriage had to be effaced or redefined to mean the possible presence of children in the household of adults. The Court did, however, talk about the relationship between marriage and parenthood, and the way it did so, discloses a significant shift in the legal understanding of these two and portends potential implications for the latter, from the redefinition of the former.

In *Obergefell*, the Court felt it could codify its redefinition of marriage because, it charged, the states could not show that John Stuart Mill's harm

31. *Id.*
32. *Id.*
33. *Id.* at 2601–02.
34. *Id.* at 2602.
35. *Id.*
36. *Id.*
37. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).

principle, which it has surreptitiously read into the Constitution, was violated: "these cases involve[d] only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."[38] To come to this conclusion, the Court created a straw man argument it attributed to the states: that "sever[ing] the connection between natural procreation and marriage" would "lead[] to fewer opposite-sex marriages."[39] No state had argued this but the Court could pretend it had responded to their concerns with redefinition by disposing of this invented argument.

The challenge with the Court's tortured formulation of the connection between marriage and childbearing (that a definitive link is automatically rebutted if the state cannot draw a direct line between the husband-wife understanding of marriage and a tangible increase in the population) is that it requires the Court to ignore what is in plain sight. Simply put, the social interest in ensuring a link between procreation and marriage is not primarily about adults and their choices but about children and their needs. Specifically, the state's historic interest in marriage lies in the fact that this institution channels the only types of relationships that can create children into a social institution that simultaneously ensures a child's opportunity to know and be raised by her own mother and father and ensures that these parents will care for one another and the children their union may create.[40]

The Court elides this reality by pretending it does not exist. Remember that the Court has talked about the link between marriage and children already in its opinion, suggesting that children are somehow likely to be the trickle-down beneficiaries of the self-fulfillment of the adults raising them. The Court's language is important: "By giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"[41]

The key phrase in this passage, of course, is "their parents'" (note the plural possessive). Note what the Court's formulation means. Each child now living, every single one, has a mother and a father. One of those people may

38. *Obergefell*, 135 S. Ct. at 2607.

39. *Id.* at 2606–07.

40. W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS 15 (Inst. for Am. Values 2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."); KINGSLEY DAVIS & AMYRA GROSSBARD-SCHECHTMAN, CONTEMPORARY MARRIAGE: PERSPECTIVES ON A CHANGING INSTITUTION 7–8 (1985) ("The genius of the family system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.").

41. *Obergefell*, 135 S. Ct. at 2600 (quoting United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013)).

have died, abandoned the child, decided that they cannot support the child and will allow someone else to do so, etc. But one thing is clear that as a simple biological fact, children raised by a married same-sex couple are necessarily not being raised by "their parents" in any strict sense. They might be raised by one parent and the parent's spouse, but at least one parent (and sometimes both, as in adoption) will necessarily be excluded from the child's life. Not, as has been the case with adoption, because a parent is not available or is incapable of fulfilling the responsibility of a parent, but by design. A child who is adopted may similarly not be raised by their biological mother and father, but if that child's parents are a married husband and wife, they will at least be raised by both kinds of parents, a mother and father. That will never be true in a same-sex marriage. The child the Court expresses concern about has necessarily been separated from one or both parents and from a mother or father. The justices in the *Obergefell* majority may think that having a mother or father excluded from a child's life is not a matter of any significance, but in candor, they should be explicit that this is what they are endorsing.

The majority ought also to have candidly admitted that, in order to support a redefinition of marriage, they have also redefined parenthood, to make it a status not derived from biological or adoptive ties but from the intent of one parent or two non-parents, to exclude at least one biological parent from the child's life for the adults' purposes.

Consistent with the Court's understanding of marriage, adult choice is the *sine qua non* of all family relationships. It is important to underscore the novelty of this shift. Our legal system and our cultural norms have not typically treated the responsibilities of parenthood as strictly "chosen." To take the most obvious example, biological parenthood creates significant support obligations for a parent. For instance, a state's Office of Recovery Services does not ask a noncustodial father whether his intention was to take responsibility for a child before seeking child support payments from him. The decision to stop caring for a child will usually result in termination of parental rights and possibly criminal prosecution. Intentionality has become an essential substitute for biological or adoptive ties only very recently and largely as a result of calls for adjusting legal rules to adapt to adult decisions about how to structure their intimate relationships.

That idea is clearly at work in the *Obergefell* decision. There, the Court expresses no concern about the wisdom of endorsing, or making legally permanent, the separation of a child from a mother and father. The Court's only expressed worry is that a child who has endured this separation notices that the separation has occurred and worries about it. That, the Court believes, can be remedied by its marriage definition which will allow children to "understand" the "concord" of their family "with other families in their

community."[42] As if a child noticing that other children have a mother and father will read *Obergefell* and say, "Oh well, that's alright then."

III. IMPLICATIONS

There are clearly other crucial assumptions the Court drew on in *Obergefell* to construct a new marriage edifice. These include preconceptions about the relative roles of the federal courts *vis a vis* the states in a federal system, the competence of judges to determine family policy, the role of evidence in litigation, and others. This essay has highlighted only two of the more substantive ones: the Court's understanding of marriage and parenthood. Now, given the tools the Court has used to create this new family structure, what is it likely to look like? What are the implications of the Court's reconstruction project?

As noted earlier, notwithstanding the Court's use of the term "union," it is not likely to look like a union—a joining of two people—at all. Rather, it will be the association of two (for now) parallel projects of self-creation; a choice of two individuals to affiliate as a way for each to engage in state amplified self-expression.

The Court's concern for loneliness is also not likely to be ameliorated by endorsing this new understanding of marriage because the obvious corollary of understanding marriage as a self-fulfillment project is that when the marriage fails to fulfill, one must have the right to abandon it, lest it threaten the sovereign self. An individual may "call out" for reassurance that he or she is not alone. That person may require or desire companionship or care but unless the person they are calling out to decides the provision of that companionship or care is consistent with his or her self-definition, the Court's sympathies must always be with the person preserving their autonomous personhood. If a member of the couple no longer "'wish[es] to define themselves by their commitment to [the] other,'"[43] there is nothing in the Court's conception of marriage that would offer a principled reason for even urging them to do so. The Court's decision may be undercutting the very values it proposes to advance.

This is a feature, not a bug, in the philosophy of the autonomous self. Remember that the constitutionally protected self-creation announced in *Casey* required literally doing away with a dependent child. In *Lawrence v. Texas*,[44] it involved fleeting sexual liaisons. Surely, this "right" at the center of the Court's conception of marriage, could not be limited if dissatisfaction

42. *Id.*

43. *Id.* (quoting United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).

44. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

with marriage stood in the way. With the architecture of no-fault divorce already in place, the state will be prepared to take the side of a spouse who wants to end the marriage, regardless of what the other may want.

Neither will children be at the center of the Court's marriage institution. Remember that in order to elide the formerly child-centered purposes of marriage, the Court had to reconceptualize the very meaning of parenthood, basing it, too, on the intention of adults. As a legal matter, society can no longer assert that a child is entitled to the love and companionship of a mother and father, and ideally to that of the father and mother who created her. Legally mandated same-sex marriage ratifies a child's separation from one or both parents. Any other preference would be contrary to the Court's holding that recognizing a difference between the complementary union of a man and wife, on one hand, and the association of two adults of the same sex, on the other, is constitutionally suspect.

This reduces parenthood to an assertion of will. In practice, to a contractual bargain between adults and often third parties. Already, there has been talk of family equality, which will require "eras[ing] cultural and legal attachments to biological, dual-gender parenting."[45] A proponent of this change recognizes the *Obergefell* decision as a step in the "right direction" because it "affirmed a model of parenthood based on chosen, functional bonds rather than biology alone."[46]

This means increasing legal acceptance of assisted reproductive technologies where children are made-to-order in transactions, often market transactions, which involve the production of children with the intent of excluding one or more parents from the child's life and which involve serious risks of exploitation, such as of surrogates.[47] It also means untethering parenthood from reality, as in a recent case where a federal judge in Utah required two women's names be listed as "parents" on a child's birth certificate.[48]

In fact, the Court undermines its own promise that same-sex marriage will provide "the permanency and stability important to children's best interests" when it embraces self-interest as the organizing principle of marriage, and of parenthood.

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45. Douglas NeJaime, *With Ruling on Marriage Equality, Fight for Gay Families is Next*, L.A. TIMES (June 26, 2015, 11:13 AM), http://www.latimes.com/opinion/op-ed/la-oe-nejaime-gay-marriage-decision-does-not-solve-everything-20150628-story.html.

46. *Id.*

47. *See* Carl Campanile, *Cuomo Might Life Surrogate-Mom Ban, A Priority For Gay-Rights Advocates*, N. Y. POST (Oct. 19, 2015, 12:13 PM), http://nypost.com/2015/10/19/cuomo-might-lift-ban-on-commercial-surrogates-a-priority-for-gay-rights-advocates. *See also* Jonathan Shorman, *Attorney in Sperm Donor Case Draws Connection to Same-Sex Marriage Rulings*, TOPEKA CAPITAL-JOURNAL (Nov. 28, 2015, 4:15 PM), http://cjonline.com/news/2015-11-28/attorney-sperm-donor-case-draws-connection-same-sex-marriage-rulings.

48. Roe v. Patton, No. 2:15-cv-00253-DB, 2015 U.S. Dist. LEXIS 96207, at *7–10 (C.D. Utah 2015).

CONCLUSION

For these reasons, and more, in time it will be obvious that the Court's attempt to erect a monument to the expressive self, a palace of personhood, will actually have created a ramshackle structure perched precariously on the stump of a formerly rich, organic understanding of marriage—a shack of selfishness.