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THE THEORY OF THE MARRIAGE TIE

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THE THEORY OF THE MARRIAGE TIE.¹

THIS paper will try to direct attention to the significance of our theories of the marriage tie or bond. By theory is here meant not speculation, but the real explanation or interpretation of the thought and practice of the people upon this subject. In this sense some theory, either expressed or implied, underlies all thinking and conduct regarding this, as well as other social affairs, and the theory affects conduct and conduct reacts upon theory.

Let us first note the vast importance of the family and its incidents to human life and society. This institution has elements of power and universality beyond almost every other, and its problems are correspondingly great and far-reaching. There can be little doubt that other forms of marriage will yield to monogamy in the advance of civilization. For there are two great forces in modern progress that compel this result. Christianity is on principle and by insistence of precept and practice preëminently monogamous. A life-long union of one man and one woman is beyond all doubt the social ideal of Christianity, and its religious and moral necessity. This is so much the case that Christianity may be said to stand or fall with the monogamous family.

The other great force of modern society, the institution of property, operates against polygamy in favor of monogamy. For property tends most powerfully to reduce the holding of it and its use to units of the simplest forms, whatever may be the size of the combinations that shall be made out of them. In other words, the influence of property is to individualize ownership, and combine the units it has made into social forms that are hostile to all domestic groups which do not rest upon the strongest and most secure foundations in both nature and religion. Polygamy thus stands in the way of the advance of property towards absolute ownership by the individual, and is certain to pass out of any modern social system in which it may chance to get a temporary foothold. The simplest form of domestic life, the family based on monogamous marriage, is also exposed to this pressure of property

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towards individualism. But, on the other hand, the social, moral, and religious influences of sex and its results create in the home of this family the surest foundation and supply the greatest incentives of property; and this security is made still greater by the system of modern inheritance, whether by intestate succession or by the will, both of which are the outcome of the theory of monogamy.

But in some ways these very forces, while they oppose polygamy, have some tendencies that of themselves, if uncorrected, would push society beyond monogamy towards an extreme individualism which threatens the social order far more seriously than any temporary advantage which polygamy may have got among us. Under the influence of this individualism some are willing to discard marriage altogether. Others have proposed to make it a mere contract to be terminated at the will of the parties immediately concerned, or more frequently by the license of society speaking through its courts of law, and even marriage for a fixed time has been deliberately recommended. The careful observer sees that the competitions of labor coöperating with the competitions of capital tend to crowd all the members of a household into the modern factory as so many individuals at the expense of the domestic life; that the commercial system, the ambition to maintain social position, and the influences of the hotel and boarding house reduce the inclination to marry and invite the temptations that lead to divorce and childless marriages. The startling increase of divorce in the most advanced of civilized peoples, the serious decline in the birth-rate of the classes best able to rear children, and the apparent decrease in marriages, afford clear evidence that our theories and practices are telling upon the family. That a purer, stronger family has to some extent followed in spite of these facts, or it may be partly because of them, — which I do not doubt, — does not by any means remove our fears. For the family, like other institutions, may improve, and yet relatively fall so far behind in the general advance as to be a subject of grave concern. Society may suffer because the rich resources of the family are still partially wasted and its very life too carelessly protected.

Now the significance of a discussion of the theory of the marriage tie depends upon the relation of this bond to the family, for one thing; and then, for another, the study of the family holds the key to the greater part of our social problems. The theory of the

marriage bond carries with it much the same kind and variety of subordinate matters as go with our theory of the life of the individual, which underlies and shapes all our treatment of him in other respects. For marriage is the act by which a family comes into existence, and it is commonly said that the marriage bond holds the family together. But whether we assent to the latter statement or not depends on the further answer which we give to the question, What is marriage? and what we think and do in our answer to it affects us in many ways.

The word *marriage* is commonly used for two things. In its first sense it is applied to that act by which the two persons enter into the relation of husband and wife, and thereby constitute a family. In its second use, the term marriage is carried over from this initiatory act to its consequent condition, and is used to designate the subsequent relation, or to mean in old legal phrase the status of matrimony. But now, speaking of the former use of the word, the marriage is, if made without the intervention of state or church, a mere agreement. If it is made before a civil officer, it is in the form of a legal contract. And if it is also made with the aid of the religious ceremony, it is a vow, or, if one so regards it, a sacrament.

But what of the subsequent relation also called marriage, which we are accustomed to speak of as the marriage tie or bond? Is that bond a contract? And if so, shall it be treated in law as a contract? May it be thrown up by the various parties to it? In case of a civil marriage without the religious vow, may the state as well as the parties themselves treat the whole relation as one of contract, and remedy its evils or break the relation by dissolution of the contract? The answer to this question depends a good deal upon what we mean by a contract, or rather upon the kind of agreement made, which in a marriage generally takes on the form of a legal contract. For we must remember that the latter word is often used, at least in popular language, for agreements that lie outside the domain of civil law.

There are, I think you will see, two kinds of agreements which concern this subject. For example, a man may agree to do a given thing. He may promise to perform an act or a series of acts. All these belong to one kind of contract, if we use this word. Of this sort also is an agreement to exchange goods for money, the pledge to abstinence from intoxicating drinks, and the promise to render a certain service in labor. This kind of agreement carries with it only such part of one's activities or

personality as may be necessary to accomplish the thing he has agreed to do. In other respects he is entirely free from obligation. But there is another kind. In agreements of this class, like the oath of allegiance, the covenant with a church, and the marriage contract, the emphasis of thought is not laid upon specific things to be done or precise services to be rendered, but upon the creation of a complete personal relationship. Or the agreement may take the form of the acceptance of obligations already existing, as in the case of a native citizen admitted to the privileges of the freeman, and, in some churches, of a child of the church to those of full membership. Things here follow the persons and not, as in the other class of agreements, the persons the things. And all the questions that arise here concern themselves with the terms of the agreement only long enough to prove the fact of the relationship. When this is decided the attention is directed almost wholly to the relationship itself as the real criterion of duty. The precise language of the marriage ceremony, of the church covenant, or of the oath of allegiance may be utterly forgotten. That served its purpose long ago. As has been finely said, "If marriage is a contract, it is a contract that takes the parties to it out of the sphere of contract." And we have little concern with the marriage tie in questions like those of divorce, if by that we mean the ceremony or act by which the relation of husband and wife was brought about. Our attention is fixed upon the relation. To try to take out of the established relation the exact contribution which the marriage ceremony put into it by measure of the contract is as useless as the attempt of Shylock to get his stipulated pound of flesh. We cut into a living organism. Like Shylock we try to apply the kind of contract which fits the bargain of things to the exigencies of a living human personality. So the compact by which our States entered into the Federal Union took them into the very life of the Nation. The compact could not be undone by mutual consent. But political revolution is possible, and, if successful, it becomes defensible in political ethics. And we may legally dissolve a relation established by marriage, or a family, as I prefer to call the entire condition that exists after the marriage has been celebrated, but it is then an established relation, and not a mere agreement that meets us. But whether we call it in legal phrase a *status*, or a union, or a family, the process is in no true sense less than revolutionary as it affects that family.

Now society must take its stand regarding marriage and divorce

upon one or the other of these two leading positions. According to the theory that a pure contract continues to be the essential of the bond throughout the continuation of the relation, the family is little more than a mere assemblage or aggregation of individuals on the basis of sex. Except in this principle of sexual association it does not differ from any other corporation founded on contract, like a bank or a railway, whose members have agreed to do certain things together. This makes the family a mere *modus vivendi*, whose members keep their relation to it wholly in their own hands save as they surrender the exercise of their rights to the state for the convenience of themselves and their neighbors.

The other theory maintains that while marriage brings about the relation by an act that is essentially a contract, it has put the parties into an entirely new relation to each other. It implies that this relation, formed in the complete surrender of each to the other in the profound and vital relations of sex carrying with them the most comprehensive moralities, has brought about a distinctive result which we call the family. And it follows that it is as inadequate to talk of a suit for the remedy of the marriage *contract* in the divorce court as it would be to relieve a ship in distress in mid ocean by repairing the dock from which she started on her voyage. Whether the husband and wife become one by the mergence of the personality of the latter in that of the former, as the old common law held, or the two become coördinate members of an organic unity with equalities and differences, is not germane to our immediate object. It is enough for this that we understand the two chief theories which are thought to explain the nature of the marriage tie. When carried to its end the question now is, What are the facts in the case? It becomes a subject of scientific inquiry. This has the highest authority. For we are pointed by the Great Teacher of the world on this subject to nature for our answer. An examination of his words, especially in the Gospel of St. Mark, will show how carefully he went to nature for the theory of marriage and divorce. He points to the constitution and natural operation of the sexes. The choices of men and women simply give expression to the forces of nature, and these become the great constitutional features of the relation, and what God had thus joined man is not to put asunder. He said substantially the same thing regarding the obligations of the oath, the Sabbath, and the state. Do not find, he said in substance, the law of your fidelity in the words you may take upon

your lips, nor the guide to your observance of the Sabbath in things that may or may not be done, nor the principle of loyalty in the conformity of the ruler to your own ideas of political conduct, nor the rule of your domestic duty in your personal caprice or individual choice, but in all these be faithful to the relations which nature and Providence have made for you. For these, and not the Pharisaic method of dispute about the letter and the thing, are your guide.

The reader perceives that in stating the terms of this radical problem of the family, I have brought out the essentials of the old political problem with which Rousseau convulsed the Western world in the last half of the eighteenth century, and whose principle became the working theory of one party in our Civil War. The historical student will also see that it is essentially the still older problem disclosed in the history of Roman law through its twin movements from status to contract, and from the family to the individual as its unit. He knows that it is almost as old as civilization itself.

It took a tremendous war to effect a political decision of the theory in this country. One party pointed to the original compact that formed the Federal Union, as it was called. The other pointed, with Mr. Webster, to the Union itself, but felt compelled to contend about the original bond and joined in the debate over its terms and their understanding by those who made them. The contest of war followed, and the dispute over the original letter ceased, not because it was settled in the debate, but because the people had become a nation and were bound to be one in spite of any interpretation that could be put upon its original act of union. The life had established a fact that was too large for the letter of the law. And now we guard the interests of the States by freedom within a permanent union. The theory of a contract has become idle talk except as we have recognized its true character as simply the creative act of a vital relation. It has lost all interest as the test of present conditions.

I would point to the importance of seeing that in our treatment of the marriage tie we are still in the conflict of the two social theories that has once shaken the United States with the convulsions of a civil war. If we have fought it out in the state, let us not now fail to see that it now confronts us in the home. If the one explanation of social relations be a political viper, we need now to consider the consequences of hatching serpents' eggs in the bosom of the family. If we found it hard to deal with

the doctrine of a business contract when it was the working principle of a section of country, it may be well to think of its danger when it permeates every section, and the foes of social order are found scattered among its friends and linked with them in the interests of business and social life. The anarchist carries the principle to its end. He simply says, I propose to discontinue the agreement by which I became a legal member of society, or perhaps he denies that he ever made any such contract, or ever came under any. What the burglar says in a single particular, the anarchist converts into a principle of universal application. And those who practice divorce and defend it upon the plea made in a large part of the thirty thousand divorces that probably now occur in the United States every year are bringing this bacillus into the very tissue of our national life. The open defiance of monogamy in Utah has been a far less serious menace to our social life than the insidious working of divorce in some of the older States.

We must not overlook the tremendous significance of the solidarity of our social life and of its organic nature, by which it becomes practically impossible to drive out a false theory in one of its departments, like that of citizenship, while it is left to fester in another. The ultimate social element is the whole human individual. He has different social functions, but he takes himself, his entire personality, into them all. All the complexity of motives, methods, habits of thought and action is ever present in him. Only the most highly trained can act with discriminating intelligence in the various spheres of social life. For in a democracy there is the largest community of social functions exercised by the greatest number, since duties and privileges are the common share of all.

It is just here that a pernicious social theory will readily pass from one person to another, and from one class of interests to all others. The man who has worked himself, his friends, and his legal advisers and judges into a false theory of the tie that led to his domestic life, is the same man who votes, holds office, makes laws, and is a laborer and capitalist. It may be psychologically possible for him to be a different man in the several places in which he performs social duties,—now Dr. Jekyll and now Mr. Hyde,—but the actual instances are infrequent in which the complete separation is maintained. The forces of his nature, the processes of his thought, and the motives of his action are towards unity.

The words of every man, and his theories, are always in some degree "an apology for his life," as the biography of many an assailant, as well as defender of the great social institutions shows. And so the false theory which is used to justify a great part of our divorces has dangers of infinite consequence beyond the numerous persons whom they directly concern.

The church, above all other institutions, is under obligations to be awake to the importance of giving the keynote on this subject full and clear. The spiritual principle of the Christian religion finds social organization in the institutions of the church, and these thereby become subject to sociological laws and give expression to social theories. Whether we know it or not, some social theory enters into our ecclesiastical forms and their activities. One or the other of the two chief theories of contract underlies the politics of the church, and is the warp of their forms for the reception of persons to membership, and thence breathes a silent influence into all social life. Creeds bear the marks of the great social and legal conceptions of their times. Baptismal vows and church covenants are cast in one or another form of agreement. The pledges made in the minor organizations of Christian activity and morals are making their interpretation of the rules of social life. The old movement from law to the freedom of personal relationship, from legalism to love, is ever going on; and men are in constant danger of turning back into that bondage of the law which looks to it to prescribe things to be done, to fix rules to be followed, and potters over the letter, always forgetting that the law is only a pedagogue to lead them to the Great Teacher, where the personal relationship of love is the fulfilling of the great purpose of law. They forget that law misunderstood tends to legalism, and that legalism has in it the prophecy of anarchy.

But let us find encouragement from the strong element which there is in our social life and in the best thinking of our times that helps the better theory. The close kinship of social interests is felt more than ever. This is helpful and constructive. The best ethical and social philosophies have cast off the theory of the social contract, and the historical and comparative method has dealt it severe blows as an explanation of society. Jurisprudence is making a significant change in its own definition of positive law. Law is now frequently defined in the leading schools as the science not of rights but of relations, thus passing from the indi-

vidualistic to the social conception of law. Education has renewed its vigor since it has learned to study the pupil in his environment, while religion itself is getting a new conception of the kingdom of God and its expression in human society. And behind the other sciences are the two new sciences of biology and sociology, pointing towards the conclusion that all the world is akin in most vital ways, and that this marvelous power of choice and agreement plays into an order of things and persons which so takes them into itself, that the order and not they themselves becomes the norm of our conduct.

All this finds its way to the domestic life and its institutions, and our hope lies in the progress of the better thought and the nobler living. We hinder the movement, we imperil the state, the church, and the objects of education and industry whenever we encourage the root of all social disorder in the home by forming the family in marriage or breaking it up in divorce on a theory that is inadequate to the explanation of the facts.