

IS FAMILY LAW SACRED?
TOWARDS AN ETHIC OF SACRALITY

By Scott FitzGibbon¹

“[T]he law is the art of goodness and fairness. Of that art, we [jurists] are deservedly called the priests. For we cultivate the virtue of justice, and claim awareness of what is good and fair”

Justinian, DIGEST 1.1.1

This article proposes that family law has a sacred character. It sketches an account of the sacred. It proposes an ethic of response to the sacred. It proposes that the attitudes and conduct which are appropriate when approaching the sacred are appropriate as well when interpreting and applying basic law relating to the family.

The thesis that family law has a sacred quality may appear implausible, accustomed as we are to the rough and ready way in which law is made and unmade in a popular democracy and acquainted as we are with the imperfections of its ministers. The thesis may also sound wrongheaded to those who, using the term “sacred cow,” apprehend that to deem something sacred is to award it an unwarranted immunity from criticism and alteration.

Such objections reflect cultural estrangement. Many of those who propound legal thought and engage in the practice of law have become oblivious to the sacred. Much of modern western culture has come to disregard the holy. (It has also come to lose the sense of desecration.). This article proposes familiarization with the unfamiliar and relocation of the sacred to a position near the center of legal thought. Being brief, this article merely sketches the outlines of this project.

The present conference of the International Society of Family Law, aiming as it should to consider things which are transcultural and perennial, is an appropriate forum in which to consider these fundamental matters.

¹ J.D., Harvard. B.C.L., Oxford. Member of the Massachusetts bar. Professor, Boston College Law School.

I. THE NATURE OF THE SACRED AND OF THE PROFANE.

This section proposes an account of the sacred which is firmly theist. No attempt is made to stretch the concept to reach phenomena unrelated to the divine. Attempts along those lines can only disfigure and distort. (However, this article does acknowledge meritorious secularist alternative approaches when it comes to *responses* to the sacred.)

A. *The Nature of the Sacred.* -- Several dimensions of the sacred can be identified (they often appear in combination). First, something may be sacred in that it is an attribute or quality of God. (Justice, mercy, and unswerving fidelity, for example.). Secondly, a thing may be sacred because it has been specially touched by God and perhaps still is in special contact with the divine; because it has been brought in a special way into God's service -- as with the land on which the burning bush stood and the sacred vessels of the Temple. Thirdly, a thing may be sanctified by divine fiat, as is the case, according to Catholic theology, with the consecrated bread and wine. Finally, some degree of sacrality may be recognized by an extension of one or another of these central dimensions. A holy man may be sacred in this way, by resembling the beneficence and self-sacrificing generosity of the deity, by participating in divine wisdom, and by putting his holiness at the service of the Kingdom.

In common, among these dimensions of the sacred, is the entry of the divinity among the things of this world. Mircea Eliade observes: "Every sacred space implies a hierophany, an irruption of the sacred that results in detaching a territory from the surrounding cosmic milieu and making it qualitatively different."² The sacred involves the "real unveiling itself"; "a revelation of being." The hierophany effects a "break-through from plane to plane" which puts earth and heaven "in communication."³ Sacred things display a kind of luminescence; a marked purity which stands in strong contrast to the slightly adulterated quality of the profane.

This account of the sacred stands in sharp contrast to those which might extend the term to include "something accursed or devoted to destruction."⁴ Similarly, this account rejects an understanding of the sacred which extends that condition to encompass the "hallucinatory, otherworldly spaces" occupied by the legal bureaucracy in Kafka's novel

² MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 36 (Willard Trask, trans., 1986).

³ *Id.* Eliade states that the three "cosmic levels "earth, heaven, underworld" are put in communication. It must be inaccurate. however, to assert that the sacred generally puts earth into communication with the underworld.

⁴ Martha Merrill Umphrey ,Austin Sarat, & Lawrence Douglas, "Introduction" to *LAW AND THE SACRED* 1, 2 (Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey, eds., 2007)("The Latin root of sacred, *sacer*, has a double meaning: It signifies both something holy or consecrated and something accursed or devoted to destruction.').

The Trial: an understanding which takes the sacred to be “an unstable combination of the venerated and the unclean.”⁵

Signs of the irruption of the sacred may include shock, awe and a sense of the incipience of great consequences. One may sense oneself to be in the presence of something otherworldly and at the same time familiar; something once known, perhaps, but long forgotten. One may sense oneself to stand in the presence of meaning: of a Source capable of communicating wisdom of the most fundamental order.

B. The Nature of the Profane. – The profane, as that term is used – broadly -- in this article, refers to that which is not sacred. The ground on which Moses had been walking *before* he approached the burning bush was profane. Bread and wine at the dinner table are profane. Art which does not pertain to religious topics is sometimes termed profane art.⁶

Another, narrower, meaning makes the term “profane” opprobrious: synonymous with “unclean” or “polluted.” This makes sense when using the verbal form “to profane,” since that means to render profane something which was formerly sacred, as in “profaning the Temple.” Such an act is wrongful and opprobrium is justified. But disgust and opprobrium are not justified when referring to the condition of things which never were meant to be sacred nor ought to have been. It is not disgraceful to write profane music or paint a profane picture. Accordingly, in this article, the term “profane” is not opprobrious. Another term -- “desecrated” -- is used to identify the thing which has been disgracefully deprived of its sacred character.

Is anything really appropriately profane? A leading writer asserts that “for those who have a religious experience all nature is capable of revealing itself as cosmic sacrality. The cosmos in its entirety can become a hierophany.”⁷ This passage may point to a sort

⁵ *Id.* at 3-4:

“And where [in this novel] does the law reside? Not in the world of every-day places and procedures but in hallucinatory, otherworldly spaces. The ‘courtroom,’ the closet, the stale hallway, the cramped artist studio with hidden doorways – all of these are places set apart from the knowable and comprehensible city in which K. has lived his life. Whatever . . . obscenities they may contain, in their feeling of spatial and temporal dislocation, they signal K’s departure from the common and quotidian and his entry into the realm of sacrality.

“Identifying this ethos as ‘sacred’ locates this kind of analysis in longstanding anthropological, sociological, and psychoanalytic literatures that define the sacred as an unstable combination of the venerated and the unclean.”

⁶ See generally FRITHJOF SCHON, ART FROM THE SACRED TO THE PROFANE: EAST AND WEST 3 (Catherine Schuon, ed., 2007) (“If sacred art expresses what is spiritual . . . profane art must also express some value . . . ; the value it expresses . . . is, first, the cosmic quality of its content and, secondly, the virtue and intelligence of the artist.”).

⁷ MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION 12 (Willard Trask, trans., 1986). *Accord id.* at 29: “for religious man every world is a sacred world.”

of subjectivity; to a mystical projection of religious consciousness (“for those who have a religious *experience*”). But a similar conclusion might be defended without subjectivity: it might be observed that *everything* has been created by God, reflects God’s nature, and fulfills God’s purposes, and so, the thesis proceeds, everything is sacred. Such a line of thought would altogether abolish the distinction between the sacred and the profane and is in sharp variance from Jewish and Christian thought, which emphasizes the difference in many important ways. Such lines of thought, taken literally, undermine Eliade’s understanding, quoted above, that the sacred is an irruption which “*detaches* a territory from the surrounding . . . milieu and mak[es] it qualitatively different.”⁸

To avoid an implausible broadening of the concept of the sacred, we must sharpen the definition of the term to allow it to refer only to special, *supernatural* irruptions into the ordinary world. The ordinary world, operating according to the established regularities of biology and physics and the natural normativity of human society is, despite its divine source, profane.

C. *The Good of the Profane; the Good of an Order which is Partly Sacred and Partly Profane.* -- The profane is good: basically and unless distorted it is full of good things, or so this account proposes. God has created a world in which there stands a wide and fascinating natural order: “small and great beasts,”⁹ the “young lions [which] roar after their prey,”¹⁰ the “great and wide sea, wherein are things creeping innumerable,” “that leviathan, whom thou hast maddest to play therein.”¹¹ This profane world is beautiful; it is bounteous; and it is not the same as the sacred, which makes an occasional appearance and which distinguishes itself sharply from the profane order into which it makes its interventions. This way of looking at the matter can be illustrated by the distinction between profane and sacred art. Few would maintain that profane art is, in its proper places, a desecration or that it should be abolished or ignored.

Special goods may be involved when the sacred operates on the profane, and when the profane responds appropriately to the sacred. The sacred shows itself most vividly in contrast to the profane; it displays its strength and sanctity most vividly when it operates in the profane order. The profane is a field upon which the sacred extends itself and an idiom in which the sacred expresses itself. Contrariwise, the profane takes on a special iridescence when brought into contact with the sacred. It becomes memorable, emblematic, and enhanced. Since the sacred can be redemptive, the profane which is touched by the sacred may itself be, in some degree, itself sanctified. Like the donkey Chesterton’s poem:

⁸ *Id.* at 36 (emphasis added).

⁹ Psalm 104:25.

¹⁰ Psalm 104:21.

¹¹ Psalm 104:25-26.

“I also had my hour,
One far fierce hour and sweet,
There was a shout about my ears
And palms before my feet.”

D. *Desecration.* – The fully opposite of the sacred is not the profane but the desecrated. A desecrated thing is one which once was sacred, or in contact with the sacred, but which has been polluted in such a way as to remove it from contact with the divine. The effect of desecration is god-forsakenness.

What produces desecration? Inappropriate responses to the sacred trend in this direction. Desecration may involve treating the sacred as though it were profane, or putting it into the service of the profane. Simony – the sale of divine office – is a desecration in this way, putting the sacred office into the service of worldly economic purposes. The most extreme form of desecration occurs when the sacred is placed in the service of that which is opposed to the authentically divine, as when an idol of Zeus was set up in the Second Temple.

II. RESPONSE TO THE SACRED; CONSEQUENCES OF ENCOUNTERS WITH THE SACRED.

A. *Appropriate Responses and Their Consequences.*-- The sacred is portentous with consequences for the destiny of those who approach it. Encounters with sacred persons and texts leads on to fundamental alterations in understanding and belief. Contact with the sacred changes lives. It provides food for thought and meditation. It plants seeds in the soul.

Approaching sacred things – standing in the presence of sacred things – is an occasion for elevated levels of respect and deference. It elicits formality of demeanor, modesty of speech and conduct, forbearance to touch or to disturb. Approaching a sacred thing appropriately entails its recognition and a formal acknowledgement that it is what it is. Respect for the sacred demands respect for the distinctiveness of sacred things: an acknowledgement of their separation from the profane.

“One does not act lightly in synagogues; one does not enter them in the heat because of the heat, in the cold because of the cold, or in the rain because of the rain. One does not eat in them, nor drink in them, nor sleep in them, nor walk around in them nor relax in them, but one does read and study and preach in them.”

Approach to the sacred elicits the exercise of the virtues and the abjuring of vice. The person who takes staff in hand so as to seek the holy is called upon to sustain certain virtues in high degree. A special sort of discernment is required; and a capacity for respect. Contact with the sacred *enhances*, in the appropriately responsive person, his faculties of discernment and perception. The sacred induces a heightened awareness. The holy engages the heart.

To respond appropriately to the sacred after the encounter entails remembering and honoring the memory. In many cases it inspires to an attempt at reporting the encounter and encourages its recording. This endeavor is challenging beyond measure, since the holy cannot be entirely perceived not thoroughly transcribed. “Eye hath not seen, nor ear heard, neither have entered into the heart of man the things which God hath prepared for them that love him.”¹²

At stake, in how we respond to the sacred, is our own relationship with the divine. To respect and honor the sacred is itself a sacred office, and ennobles the person who fulfills it. Perhaps it may even sanctify him. To report well – that is, to report tellingly of things so difficult to conceive -- is to approach the utterance of sacred speech.

(The desecrated provokes responses which are the opposite of elicited by the sacred. You do not wish to approach. You put on protective garments rather than remove them. You avert your eyes or put your fingers in your ears. Participation in the desecratory itself may desecrate, impairing your relationship with the divine.).

B. Inappropriate responses. – Inappropriate responses include obliviousness, self-involved disregard, “light” conduct, and the sort of instrumentalist attitudes which might lead someone to treat a synagogue as no more than a place to keep cool on a hot day or to shelter from the rain.

An inappropriate response may arise from inattentivity, insensitivity, and obliviousness. People habituated to making wealth their good – habituated to life in a cocoon of comfort, security and prestige -- are especially likely to indulge in this form of disregard, little attending to the sacred when they encounter it. Perhaps this is why, as leading sociologists emphasize, “the process of secularization – a systematic erosion of religious practices, values, and beliefs – has occurred most clearly among the most prosperous social sectors living in affluent and secure post-industrial nations.”¹³

¹² I Corinthians 2:9.

¹³ PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE 5 (2004).

Someone habituated to living in a mental world whose components are rules and principles, or theoretical constructs and philosophical postulates, may fall victim to a similar sort of obliviousness. W.H. Auden wrote:

“I see myself as a Hellenized Jew from Alexandria taking an afternoon stroll with a friend, engaged in a philosophical argument. Our path takes us near Golgotha. I look up and see a familiar sight, three crosses surrounded by a crowd of onlookers. ‘Really,’ I say, ‘it’s disgusting the way the mob enjoy such things. Why can’t they execute criminals quickly and mercifully by giving them, like Socrates, a draft of hemlock?’ Then I banish the disagreeable spectacle from my mind, and we resume our fascinating discussion about the nature of the True, the Good, and the Beautiful.”¹⁴

To disrespect and dishonor the sacred merits a more severe punishment than analogous offenses, bringing down on the offender, not only the standard range of punishments known to the law which applies to profane matters, but obloquy and ostracism as well. The defiler of the sacred is himself defiled.

C Basic Ethics. -- From a theistic point of view, the basic good involved in appropriate response to the sacred is the good of piety. Piety involves, as Aquinas states, “worship and duty ... to God” and to things related to God.¹⁵

People who are not theists often respond respectfully to sacred things. What basic good is involved then? Perhaps it is still piety, evoked by an intuitive sense of the presence of the divine even where no explicit recognition will be admitted.

An alternative explanation relies on another good: that of honor. Sacred things and persons are usually also deserving of respect. They merit, in other words, that recognition and approbation which is accorded to excellence in profane matters. This level of response is elicited, for example, by the precepts of the Law which commend just social practices. Many decent people who are not practitioners of any religion respect the principles of fairness in trade. Similarly, honor is often accorded, even in secularized society, to those persons whose characters and ways of life reflect the divine. Everyone respects Thomas More and Mother Theresa.

Inappropriate responses implicate these basic virtues. The oblivious man dulls his capacity for discernment. The impudent profaner of the sacred compromises his own capacity for piety, and occludes his sense of honor.

¹⁴ ARTHUR KIRSCH, AUDEN AND CHRISTIANITY 113 (2005) (quoting Auden’s notes).

¹⁵ THOMAS AQUINAS, SUMMA THEOLOGICA II-II Q 121 reply to objection 3.

III. THE SANCTITY OF CERTAIN HUMAN PROJECTS.

Human projects and affiliations may sometimes have a sacred character. They may obtain such a character by divine fiat: as Scripture reports, divine decree conferred a holy character upon the Jewish people. They may obtain a sacred character owing to divine commission: election by God for special service, as with the disciples in the “Great Commission.”¹⁶ They may in some degree resemble the divine or reflect attributes of God. Philosophical discourse, the composition of learned text, government, law, and family have recurrently been recognized as partaking in a sacred character when they are well conducted. (Contrariwise, they are redolent of desecration when they are abused.).

Wisdom, philosophical inquiry, and the learned text have been identified as sacred according to recurrent themes in the Jewish and Christian traditions. Wisdom is a gift of the Holy Spirit. “For to one is given by the Spirit the word of wisdom; to another the word of knowledge by the same Spirit;”¹⁷ “Word” here is *logos*: a characteristic of God; something central to the nature of God; perhaps a name of God. “In the beginning was the Word” (*logos*).¹⁸

Wisdom and, philosophical inquiry *about the good* may have this sacred quality in a marked degree. Philosophical inquiry about the good of the political community possesses this quality in a special way. Aristotle states in the *Ethics*:

“Even if the end is the same for an individual and for a city-state, that of the city-state seems at any rate greater and more complete to attain and preserve. For although it is worthy to attain it for only an individual, it is nobler *and more divine* to do so for a nation or city-state.”¹⁹

IV. THE SANCTITY OF LAW.

Shari’ia is sacred law according to the teachings of Islam.. Torah is sacred as ordained by God and as forming, according to some Rabbinic authorities, the blueprint into which God looked when creating the world. St.Paul wrote: “the Law is holy.”²⁰

¹⁶ “Go therefore and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age.” Matthew 28:16-20.

¹⁷ 1 Corinthians 12:8 (emphasis added).

¹⁸ John 1:1.

¹⁹ NICHOMACHEAN ETHICS 1094b7-10 (emphasis added).

²⁰ Romans 7:12.

Responses to Torah, commended in the Psalms, correspond to the appropriate responses to the sacred as set forth in this article above. They raise them to loftier heights. The law is to be loved; pondered day and night; and of course it is to be faithfully observed. It is not to be put to profane purposes. The scroll itself commands respect; traditionally in the synagogue people stood when it was carried past. To disrespect the Torah is of course to profane the sacred; and to desecrate it merits death:

“Rabbi Tzadok said: Do not separate yourself from the community; do not take the role of a counselor-at-large; make of it [the Torah] neither a crown with which to aggrandize yourself, nor a spade with which to dig. . . .Hillel used to say: He who makes [selfish] use of the crown [of Torah] shall perish. Hence you can learn that whoever derives personal benefit from [exploiting] the words of Torah is arranging for his life to end in this world.”²¹

Those who study the Torah for many years – learned scholars – attain a similar sacrality. “[S]urely, the scholar or rabbi who has studied this sacred Heritage has the words of God etched into his mind and memory. He is . . . a bearer of Scripture, a living Torah scroll as it were. If he has honored the Torah by devoting to it years of study and observance, his body . . .has become sanctified through it, and deserves reverent honor no less than the Torah itself.”²²

The sacred character of law must be grounded firmly in those fundamental virtues which underlie law particular precepts of the law, guiding them and giving them their meaning and purpose. These are what Scripture identifies as the “weightier matters of the law: justice and mercy and faithfulness.”²³ They are aspects of the divine nature itself.

The sacrality of the Torah can attach to all that pertains to law and its application. A leading author refers to the:

“awe, the utter reverence and profound respect with which Judaism approaches all matters of law and the judicial process. To determine justice, fairness, right, and to administer it – this is a matter which lies very close to the heart of heaven”.²⁴

²¹ IRVING BUNIM, *ETHICS FROM SINAI: A WIDE-RANGING COMMENTARY ON PIRKEI AVOS* 479 (2002) The words in brackets above also appear, bracketed, in this book.

²² *Id.* at 484.

²³ Matthew 23:23 (New American Standard translation, 1995): “Woe to you, scribes and Pharisees, hypocrites! For you tithe mint and dill and cummin, and have neglected the weightier provisions of the law: justice and mercy and faithfulness; but these are the things you should have done without neglecting the others.” See Luke 11:42: ““But woe to you Pharisees! For you pay tithe of mint and rue and every kind of garden herb, and yet disregard justice and the love of God; but these are the things you should have done without neglecting the others.”

²⁴ *Ethics from Sinai, supra*, at 495.

It is reasonable to propose something like the same sacred character to law which is framed and enacted by man. It is reasonable to discern a special degree of sacrality in those legal principles which, articulated and applied in the opinions of judges and legislators, adduce fundamental principles of justice and fidelity as guides to the development of doctrine.

V. THE SANCTITY OF FAMILY.

In Catholic teaching, marriage is a sacrament; a union directly ordained by God. It is, Christ taught, a union which “God has joined together” (“What God has joined together, let no man put asunder.”). The love and obligation which form the foundations of marriage are also biblically established: “Husband, love your wives,” St. Paul enjoins. “Wives, be obedient to your husbands.” The relationship between parent and child, and other familial relationships, are also of prominent canonical status in Christian teaching.

Judaism does not, of course, identify marriage as a sacrament, and Isaiah Gafni emphasizes that “we do not find the rabbis suggesting – as did the Church – that the institution [of marriage] was, in and of itself, a sacred institution or a sanctifying one.”²⁵ But Gafni also observes that “God’s presence – the Shekhinah – may be considered a *sine qua non* for a happy marriage” and sets forth spousal obligations – the husband’s duty of material support, notably – which were religiously established. Gafni notes that:

“Jewish marriage . . . was also intrinsically linked to the mitzvah (divine commandment) of procreation It was only through marriage that a Jew could properly meet the standing obligation to reproduce”²⁶

Further: “the idea that marriages, or matches, are made in heaven found its way into numerous legends and midrashim * * * and the Babylohnian sage Samuel could . . . conclude that on each and every day a heavenly voice issues forth proclaiming: ‘the daughter of X is for Y.’”²⁷ As to the relation between parent and child, the commandment “Honor thy father and thy mother” tells much. Jewish biblical history from Abraham through the exile is the history of families.

VI. THE SANCTITY OF FAMILY LAW

²⁵ Isaiah M. Gafni, *The Institution of Marriage in Rabbinic Times*, in *JEWISH FAMILY: METAPHOR AND MEMORY* 13, 14 (David Kraemer, ed., 1989).

²⁶ *Id.* at 15-16.

²⁷ *Id.* at 13-14.

The basic law of the family is sacred. It stands at the intersection of several of the projects identified above: it involves basic law, basic principles of justice, marriage, and parenthood.

Some of the substance of family law, according to Jewish and Christian tradition, is directly expressed by God. More of it extends and expresses divine doctrine, giving it the backing of the human social and political order. At the most basic level, family law instantiates principles of right and wrong which are elements of justice and thus part of the divine nature. Family law, properly understood and articulated, protects and defines love and fidelity.²⁸

Because of its sacred quality, basic family law merits the respect and deference which are elicited by sacred things generally. It should be approached with circumspection, examined with discernment, articulated with care and fidelity to principle, and revised only deliberately and with respectful attention to the sacred principles upon which it is founded.

The offenses of impiety and wrongful disregard for honor are committed by the scholar or the legislator or the judge who takes a glib or dismissive attitude towards precepts of family law. A similar sort of offense is committed by the oblivious or neglectful judge or scholar; or by one who debases family law by reducing it to the pursuit of the purely economic or the transiently emotional.

VII. THE SANCTITY OF SPEECH AND DISCOURSE ABOUT FAMILY LAW.

Speech about family law is sacred. Basic discourse and exposition, that is, which faithfully reports and insightfully develops the understanding of the nature of the family and its basic normativity and which seeks and articulates the principles on which family law can reasonably be based – these are sacred. There is a degree of sacrality in the mission of the International Society of Family Law; and especially so when it pursues its mission in the Holy Land.

²⁸ See my article *Marriage and the Good of Obligation* which develops a similar line of thought.

