A RATIONALE OF ANTENUPTIAL REPRESENTATIONS AND PROMISES

By Paul Sayre

We quite properly think of both representations and promises in connection with marriage to be binding in a different sense and within different limits than in the case of representations or promises in the field of commercial activities or human relations generally. Put bluntly, the differentiating element is that marriage involves a status, with rights and duties incident to that status and apart from any agreement or representation that the parties themselves may make. Yet so pervasive is the general applicability of contracts impersonally in the commercial field, and so elusive is this intangible field of rights and duties separate from any contract, and indigenous to the marriage status itself, that not only the persons who make such representations and promises, but the courts themselves in interpreting them may well permit the two situations to become confused. And when confused, the usual result is that the accepted tests of business activities, to which enforceable promises generally apply, is the one that dominates and the very important (though difficult to define) qualifications incident to the marriage status become submerged or lost altogether.

Even within the field of the marriage status itself there must be a division. Some agreements incident to marriage involve property and, with only slight variations from the general commercial field, should be enforced as business contracts. Thus a property settlement in consideration of marriage is one of the oldest and most

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2. It is beyond the scope of this paper to consider antenuptial contracts for their own sake. Analytically, of course, they differ from both representations and promises, but their place in the whole scheme of matters affecting marriage is considered here because they are like representations and promises in that they affect the marriage status in advance of marriage. Corker v. Corker, 87 Cal. 643, 25 Pac. 922 (1891); Unger v. Mellinger, 37 Md. App. 639, 77 N. E. 814 (1906).
important projects in the whole field of property law and contract law. But the detailed activities of the different members of the family after marriage, are still justly and very significantly considered to go to conscience and to individual interpretations of duty which neither statutes, nor the varying but still more dangerous control through courts of equity, could justly direct. Freedom here means freedom to change an opinion and hence, to put it literally, it means freedom to change or break what would be contractual liability in a commercial field.

How should we fix these categories and upon what principle should we put a particular problem into one pigeon-hole or pull it out of another? It is no answer to say that the whole thing is bothersome and it would be better to give it up as a bad job. It is still less of an answer to do just this under polite cloaks as the courts often do, and dodge the real difficulties by subsuming everything under new terms that have nothing to do with the real problems. Like it or not, we must recognize significant differences and treat particular representations or promises according to their substantial characteristics. Personal rights in tort and contract must be served on the one hand, and the essential dignity of the individual and his freedom of choice in matters of conscience must be protected on the other.

AGREEMENTS IN CONSIDERATION OF MARRIAGE

Marriage settlements in the form of property given by either spouse or by third persons to one of the spouses, or to both spouses and their issue jointly, are quite usual, though not so usual now as formerly and not nearly so usual at any time in the United States as in the British Isles. Under the Statute of Frauds in England and correspondingly in all of the United States now, such transfers of property are in consideration of marriage and must be evidenced by writing if they are to be proved.  

3. We must note that duress may well be ground for annulment but it is not a matter which we even discuss here. In no fair use of language does it turn on representations or promises at all. Indeed it generally turns upon force in the sense of a complete denial of voluntary results through the effect of representations or promises of any kind. Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521 (1905). Also, we do not consider marriages that are voidable because of mistake as to the identity of the parties. These cases are rare, and the remedy of annulment applies whether or not there were representations or fraud involved. Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119 (1921) ; Note (1921) 19 Mich. L. Rev. 881. We shall consider only representations that are actionable because of fraud, and promises involving conduct (not property rights) that may justify annulment of marriage, or specific enforcement of the promise after marriage.

4. At common law, and before the Statute of Frauds, even an antenuptial agreement between husband and wife would be ineffective since the wife, due to marital disabilities, could not enforce it after marriage. Co. Littr. (Coventry's ed. 1830) 187b, 3a, 112a; Foley v. Ronalds, 107 Misc. Rep. 125, 177 N. Y. S. 55 (1919). The Statute
Not only may there be antenuptial agreements incident to the transfer of property, but also by antenuptial agreements, either spouse may waive his dower or curtesy interests in the property of the other, provided the spouse in question is entirely protected against duress and provided also that he is fully informed of all his rights and all the significant facts bearing on his decision, roughly in keeping with the duty of a fiduciary to give full disclosure to those for whom he acts.\(^5\)

Granted that these requisites obtain, it is said that the marriage itself is consideration for the transfer of property to the new spouses, or their waiver of dower and curtesy rights in each other's property.\(^6\) But the courts somewhat inconsistently also say at times that such waiver of property rights would involve lack of good faith unless the interests of the other spouse were roughly equal in property value.\(^7\) This last qualification seems not only inconsistent in logic but unwise in its results. There seems nothing in policy to keep a spouse from waiving his marital interest in the property of the other spouse, even though the waiver by the other spouse involves far smaller property interests.

Sometimes a happy marriage is possible between persons of widely different wealth, provided no question of dower or curtesy is involved incident to property that either may inherit from the respective families. What they want to do is to get rid of the question of inherited wealth in every way, leaving each spouse free to control and enjoy his wealth roughly as if he were not married so far as inheritable interests are concerned.\(^8\)

Of course the duties of supporting the wife or rendering service to the husband and the powers of a court of equity to decree alimony upon divorce remain in full force, regardless of antenuptial agreements waiving dower. Within these bounds the real test seems to be that of freedom from duress in the sense of real freedom of choice and a full disclosure by both sides in keeping with the duty of a fiduciary.\(^9\) If these requirements are complied with, then it may aid romance in the sense of marriage between rich and poor, frankly and dependably to eliminate all questions of inherited wealth by either spouse, so far as the fixed claims of dower and curtesy are concerned.\(^10\)

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\(^5\) Kline's Estate, 64 Pa. 122 (1870).  
\(^7\) Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57 (1905); Gordon v. Munn, 87 Kan. 624, 125 Pac. 1, Ann. Cas. 1914A, 783 (1914).  
\(^8\) RADCILFEE, REAL PROPERTY LAW (1933) 93-106.  
\(^10\) Denison v. Dawes, 121 Me. 402, 117 Atl. 314 (1922); Watson v. Watson, 104 Kan. 508, 180 Pac. 242 (1919); Stratton v. Wilson, 170 Ky. 61, 185 S. W. 522, Ann. Cas. 1918B, 917 (1916).
We are told quite justly that one objection to discrepancies in wealth is that they tend to limit the extent of choice in marriage. But antenuptial agreements within these limits might tend to eliminate these objections where the poor girl marries the rich man or vice versa. Could not some of the romantic parade of virtue as expounded in the novels be avoided, if the hero (or heroine) did not have to protest and suffer through several hundred pages because of the embarrassing wealth of his intended? He could cut short his own woes, get himself happily married, and cut the romantic novels in less than half by signing an antenuptial agreement and doing other forthright and honest things to marry the young lady for her own sake and protect her separate property interests also.

On the other hand, agreements that change the rights and duties incident to marriage apart from these property rights that attach from the fact of marriage itself, are generally invalid. The husband may agree that he will continue to live in the same town or the same state as he then lives, yet if he moves elsewhere for reasonable economic causes, his wife cannot object. The wife may agree that her husband's mother shall live with them, yet if later she finds this displeasing she can refuse to continue in his home, and if she pursues this course for the statutory period, he and not she will have given grounds for divorce on the basis of desertion. In general, there is no way in this hard world to arrange a legally enforceable scheme of marriage conduct in advance. You can arrange all the voluntary schemes you like, but, with very minor exceptions, the law will not help you even indirectly, except in making it possible for gifts to be made in contemplation of marriage and in making it possible for the spouses to waive their rights in each other's property.

Representations or Promises Which Are Properly Subject to Legal Liability and Which Involve the Marriage Status

At the outset, we might divide representations or promises of this kind into two classes. First, those indicating the spouses' condition in terms of then present facts at the time of the marriage;

12. Meredith v. Shakespeare, 96 W. Va. 229, 122 S. E. 520 (1924). It must be remembered however that under canon law and in England until it was abolished by statute in 1753, the courts of equity would specifically enforce an agreement to marry. See 7 BACON, A NEW ABBREVIATION OF THE LAW (1876) 530; and for the statute abolishing this jurisdiction of the ecclesiastical courts, 26 Geo. II, c. 33 (xiii) (1753). Thus religious courts, acting on the conscience of the individual, may quite reasonably enforce particular commitments. But courts of equity acting for people of many religions, have a very different problem.
second, those representing what the spouse will do in the future if the other spouse carries out the marriage. There are a number of misrepresentations incident to the promise to marry which might give rights to a valid defense in case one party refused to carry out the marriage because of the misrepresentation and the other thereupon sued for breach of promise to marry. But breach of promise suits are becoming less frequent and this defense in breach of promise suits is proportionately less important in recent years.

So far as the two main types of representations as ground for annulment or other relief by a court of equity are concerned, the chief instance of the first type is perhaps misrepresentations about chastity or unborn issue, while the chief instance of the second type would be a promise to have a second religious ceremony after a valid civil ceremony, with a later failure to carry out this promise.

It will be noted that both of these do go to the essence of the marriage status, while neither of them turns upon the free exercise of conscience. Chastity goes directly to the significance of the marriage relation, affecting the morale of the parties to the marriage and indirectly affecting the atmosphere in which the children must live. Unborn issue may amount to foisting upon the other party legal liability for the child that is not his, and in many other ways secure for this child property rights by deed or will or intestate inheritance to which he is not entitled and which works a fraud on third persons as well as upon the parents and the other children. Most courts will not annul a marriage because of false representations of chastity in either the man or the woman, and this is true regardless of the reasonable presuppositions of the local social environment in which both parties to the marriage lived. On the other hand, largely because of the danger of securing property unjustly, most courts will grant annulment where the wife was pregnant by another man before the marriage, where she concealed this fact, or falsely assures her husband that he is the father and where he does not later condone her deception.13

As to the second type of misrepresentation, the promise of a later religious ceremony, there is a real conflict here and the courts at first were particularly hesitant about granting relief even indirectly, holding that where one spouse later refuses to enter into a religious ceremony after the civil ceremony has been performed, the other spouse will not be guilty of desertion if he discontinues the marital relation until such time as the promised religious ceremony is performed. Judge Cardozo was the first to give effect to this promise of religious ceremony even

in this indirect way.\textsuperscript{14} The courts generally refuse to enforce such a promise, somewhat it seems on a rather vague deference to the old rule that a common law marriage is valid if the consent is \textit{in praesenti}, but not if it is \textit{in futuro}. It should be noted historically that this distinction in common law marriage was indirectly supported by the tendency of the times to avoid secret marriages with their obvious dangers. This of course culminated in England in 1844 in holding all common law marriages invalid, but for several hundred years before that the very practical reason for requiring an \textit{in praesenti} intent was the obvious fact that a present holding out of marriage between persons capable of marriage did away with much of the evil of clandestine marriage.\textsuperscript{15}

It is submitted that refusal to carry out a promise of religious ceremony should justify the other spouse in living apart until that ceremony is performed. First, because the other spouse should be allowed to sue for divorce or separation after the statutory period on the ground of desertion by the spouse promising the ceremony even though the first one insists on living apart, since he lives apart for cause. Second, because in case of a clear refusal to carry out a religious ceremony the other spouse should be entitled to an annulment. This matter clearly goes to the essence of marriage. It seems that it does not turn on free choice so far as the constraining of the religious conscience goes. One spouse has definitely agreed to a religious ceremony knowing the consequences and substantially that the ceremony is to be performed at once. While he may have a change of conscience even in a short time, it is a fair statement that a true change of conscience under the circumstances in so short a time on an issue of this kind is most unlikely. It is much more likely that he used the promise falsely and by way of trick to secure the consent of the other party to a civil marriage and to marital relations intending later to break his word and not carry out the religious ceremony. In any case, the nature of their union has been very brief and to the full knowledge of both parties, on a highly conditional and precarious basis. Thus the party who deceived through the promise of a religious ceremony cannot justly complain if such a brief and precarious marriage secured through his own falsity is terminated at once by annulment or later—through the action of the other spouse—by action for separation or for divorce on the ground of desertion.


\textsuperscript{15} The case of Regina v. Millis, 10 Cl. and F. 534 (1844) was probably incorrectly decided as the law then stood.
ANTENUPTIAL REPRESENTATIONS

There is another group of representations which, it is submitted, should give rights to annulment, but doesn't: when one represents that he has not been divorced, although in fact he has, and this fact of previous divorce would be a bar to his then present marriage under the religious beliefs of the other party.\textsuperscript{16} It seems annulment is here denied because of the old erroneous fear of not enforcing the valid civil ceremony. This goes to the integrity of the marriage itself, and involves a present false statement used clearly by way of trick with no question of freedom of conscience at a later time.

But of course most representations or promises affecting the condition of the parties at the time of marriage or their conduct in the future upon their marriage, are not grounds for annulment even though they are false from beginning to end and the other party is cruelly injured by their falsity. Thus representations about the social positions of either spouse,\textsuperscript{17} or financial powers or previous conduct whether of an honorable or dishonorable nature, or previous marital conditions (so long as they don't amount to a bar to the known religious beliefs of the other party)—all these and many other things that certainly would affect one's choice in determining whether or not to undertake the marriage if they were known, are still not actionable at law or in equity.\textsuperscript{18} Perhaps most lawyers would not quarrel so much with the results of these cases as they would about the strange and contradictory reasons that are given for the decisions. Sometimes the courts say that it is a very confusing and unpleasant business, and they prefer not to talk about it. They give their decisions and then say they prefer not to discuss the case because each one must be decided on its own circumstances. Others say that marriage is a matter of embarking on strange seas and each couple must chart their own course regardless of the difficulties. Still others say that marriage is a status and that even serious false representations cannot change the status since that status is presumed to continue without dissolution in spite of occurrences of the most unexpected nature ("for richer, for poorer, in sickness and in health").

But these reasons amount to no more than evasions. More and more cases of this kind are coming before the courts; it seems some rationale is inevitable. Is it not fair to say that a general standard in this field is desirable? If either the representation before marriage, or the promise as to conduct after marriage goes to the essence of the

\textsuperscript{17} Woodward v. Heichelbeck, 97 N. J. Eq. 253, 128 Atl. 169 (1925).
status, then it should be cause for annulment, providing only that representation or promise does not turn on matters involving the free choice of conscience which is essential to the integrity of any man regardless of even the most solemn obligations that he has undertaken before.

**Representations or Promises Which Do Not Involve Legal Liability Although They Affect the Marriage Status**

May there be a conditional marriage? Yes; but why is it that the courts, as we have noted, are so hesitant to grant annulment where there have been very serious misrepresentations before marriage upon which the other party reasonably relied? Is it because these representations or these promises involve matters that are not to be taken seriously or involve unimportant matters? Not at all. Surely in many instances they involve very important matters, as in the case of the religious education of the children, yet the courts invariably refuse to attach legal consequences to the representations or enforce the promises even by indirect methods. Why? The courts usually tell us that it is against public policy and they do not want to intrude in the marriage relation. But these assertions are too vague to be convincing and they do not have the ring of truth as far as ultimate reasons are concerned.

But does this mean that the courts are wrong in their attitude? I think not. Does it not come down to this? These representations and promises when they involve the marriage status are not such as would give rise to a simple contract in other relationships or be the foundation for tort liability in an action on the case for deceit. They do not involve a single transaction at all. They involve the whole conduct and experience for these two persons for the rest of their lives, perhaps for many years incident to marriage.

It is undignified and indeed debasing for one irrevocably to commit himself to a particular line of conduct incident to so profound and intimate a relationship as marriage. If representations of this kind involve legal liability, or if promises incident to these activities were directly or indirectly enforced, it would amount to constraining conscience at the best, and downright slavery at the worst. It is surely not because the issues involved are unimportant, or the parties were not serious in wanting to fix an agreement in these matters. The spouses might well be more serious in this than in anything else in their lives, and the issues might well involve matters which were dearer to them than life itself. But representations or promises may well be
legally enforceable when incident to the buying or selling of a bushel of potatoes, but not when they affect all the cultural elements that go to make up an entire life.19

Freedom of religion under our Constitution, or what our lady of the common law called “freedom of conscience”, involved freedom to change one’s way of life or his religion as well as freedom to pursue the particular religion to which he at the moment adhered.20 Indeed this business of getting the other fellow to change his religion is one of the things that each religion prizes to the point of exultation. If they can get a convert from another religion, they have snatched him (in their view) from possible torments worse than death and hence unselfishly they are rendering him a great service and rendering the faith which they serve a great service also. Why shouldn’t they exult in such an unselfish and beneficial consummation? And when one leaves one faith to join another does he not thereby break various promises or go back on various representations which involve permanent commitments of a most serious nature? Certainly. Yet, once more, commitments about our bushel of potatoes are more or less effectively enforced by the courts while these commitments involving religion are not.21

There was a time when they were enforceable, in the direct or indirect ancestry of our present law, and in some other systems of law they still are. For instance, in the middle ages, the penalties involving religious offenses administered by the church in western Europe were very mild, forgiving, and calculated to put the offending branch back into healthy and happy union with the main trunk of the living faith. But the civil authorities, in what seems to us now an unwise zeal, passed a great deal of criminal legislation, adding criminal penalties for offenses that were punishable under ecclesiastical law. Thus a relapsed heretic might be excommunicated but no punishment except by way of penance was visited upon him under canon law. The burning of heretics as practiced in western Europe under different religions was all a matter of state statute, usually the result of a perfectly honest

21. There is real substance to this explanation. A court of equity usually does not assume detailed supervision over anything, and certainly not over a highly difficult problem within the life of the family. Unless you treat the control of religious education as if it had no elements of degree in it but could be handled categorically one way or the other, it would seem that this limitation on the power of the court of equity alone would preclude the specific enforcement of an agreement about religious education of children. But see White, LEGAL EFFECT OF ANNUPTIAL PROMISES (1932).
and devoted wish to give further enforcement to ecclesiastical judgments.\textsuperscript{22} The repressive statutes in England following the Reformation and designed to crush all faiths that differed from the new state religion constitute other instances of this misguided zeal.\textsuperscript{23}

But there are no statutes in this country for enforcing ecclesiastical decrees, and couldn’t be in view of our Constitutional provisions. Furthermore, our judges in exercising their equitable powers refuse to enforce any agreements about the religious education of the children, though they put this on rather vague grounds as we have noted. But is not the real ground the proper one of not wanting to constrain conscience, no matter how seriously one may have undertaken certain vows or made certain promises, or even how pathetically the other spouse may have relied upon these promises in changing his or her position in a basic way because of these promises? Whatever the commitment is, it involves the whole period of minority for the child—that is, twenty-one years. But one’s opinions in so long a time may well change, and however disappointing this may be to one religious sect, though apparently most pleasing to another, this right of conscience in matters of the basic conduct of life necessarily involves the right to change one’s activities or allegiances, and neither the exercise of one faith nor the right to change to a different faith can be constrained.

Another sort of difficulty has been that people have felt they could commit their children to a definite course as if they owned their children and dealt with them as property. This is shocking to our ears now and does not represent our law, but the previous techniques of the courts must be judged in all fairness in the light of the legal conception that prevailed at that time. For instance, as late as the time of the Revolution it was quite usual to apprentice children to a trade during the period of their minority. Incident to these articles, the parent made a profit from this hiring out of his children. Such apprenticeship is still legal though it surely is very rare in practice. But a survival of this basic point of view is very present today in the strange attitude of many courts that hold that where one has “given” his child to another, in the sense of giving custody, the “donee” of this gift acquires an interest in the custody during the entire minority of the child, and the parent is not supposed to take back his “gift”, except for very serious cause. Is this not ridiculous or barbarous or both? Is the child a piece of property owned by the parent for him to give as he would a bag of coal?\textsuperscript{24}

\textsuperscript{22} I Lea, A History of the Inquisition in the Middle Ages (1922) 234 et seq., 399 et seq.
\textsuperscript{23} Friedman, supra note 20.
\textsuperscript{24} See generally Sayre, Awarding Custody of Children (1942) 9 U. of Chi. L. Rev. 672.
The explanation in this instance as in others seems to be that while the courts never said directly that a child was property and that the parent had possession of him, many practices in the law and inarticulate major premises in their analyses of family relations caused them to come out with something rather close to this actual result. The law itself now seems very clear that a parent has rights of regulation of the child's life and rights to his earnings incident thereto as well as duties to support him and to further his welfare, but that all of these rights and duties are limited in turn by rights and duties in the child as an independent legal person, even though he is not entirely sui juris. Correspondingly, in this matter of antenuptial promises about religious education the courts hold that they are not enforceable directly or indirectly. And in the content of the "public policy" which they talk about, it seems we can fairly include not only the basic issue of not constraining conscience, but also the important issue of the limited power over the child which the parent himself can properly exercise. Indeed, it seems that most conversions to religion occur during adolescence, and the infant must have very extensive rights in himself to inquire into religious claims and make his own decisions. No doubt the father could protect his child against rude and arbitrary intrusion by missionaries that would be a source of undue emotional strain and perhaps eventual mental instability in a child of sensitive nature at least during his younger years. But on the other hand, it seems clear that a parent could no more exclude all knowledge of other religions from his child until he was twenty-one years of age (provided the religion did not have practices contrary to law) than he could keep his child from a substantial education, or from reasonable freedom of action and participation in social life generally.

In a word, promises of this kind involve the exercise of conscience, both for the parent and for the child, and where the rights and duties of the parent leave off and those of the child begin involve very nice and varying questions of adjustment. The courts use the technique in solving this of putting the test upon the essential good faith and reasonable discretion of the one who has custody. They refuse to enforce commitments as to particular practices or particular beliefs.

The situation itself is difficult. This is to be expected when you are dealing with the whole character of a human life, and not a particular contract over a bit of property or a single tort invasion of a legal interest. The basic view of leaving freedom of conscience, whatever the commitments and however serious the matter, seems sound. The further view of recognizing the right in conscience of the child as well as the parent seems also sound. Finally, the technique of ap-
proaching the problem through wise selection of a guardian and his honorable exercise of his powers in all these complicated situations seems good sense as well as the actual law at present. This technique helps to get us away from the analogies of property ownership in the field of custody that have debased this phase of the law in so many instances in former years.

And the clear policy of the law in dealing directly with these matters of conscience throws a reflected light upon its policy in not enforcing representations or promises incident to the normal conduct of marriage—such as representations about wealth or social position or previous conduct, although they deeply affect the marriage relation;—or promises about how a spouse will conduct himself after marriage even though the promise is quite reasonable under the circumstances and the other spouse undoubtedly relies upon it and would not have married at all without this assurance.

When one considers the disappointments because of broken promises, that husbands and wives suffer in marriage, one may feel at first that the courts of law and equity have permitted very serious wrongs to go without a remedy and have been crassly and stupidly indifferent to the plainest injustices and the basic needs of marriage. But is it not a question of constraining conscience again, though in a humbler field? Freedom to choose is of the essence of freedom itself. These representations and promises do not pertain to a particular transaction (as in contracts and torts generally), where we enforce the undertaking at law or in equity. They are representations and promises incident to the whole varied, complicated and changeable conduct of life, and indeed often affect the children after one dies. No man is wise enough to foresee all the eventualities of his marriage and, as we have noted, it would constrain conscience and amount almost to slavery to hold him to a sweeping promise of particular conduct, applicable for the rest of his life and regardless of developments. Such a course of the law would be most unwise culturally and would make the marital relationship tyrannical indeed.

Consider some of its important applications at present where the activities of women in particular are much more extended and varied than before. Formerly there was a more or less recognized pattern for women within marriage and the few exceptions could be dealt with, with reasonable fairness, without disturbing this pattern. It involved personal care of the children and of the home and of social activities. But the plain fact is that women simply are not in the home in this literal and physical sense now as they formerly were. We fervently hope that this does not impair their allegiance to children and to the spiritual qualities of home, but we must recognize the physical fact
that much of the housework now is done by mechanical appliances and many of the wives and mothers themselves are working elsewhere during at least part of their time. At the present moment we are urging them, if not indeed requiring them, to leave their homes to work in factories or elsewhere in furtherance of the war effort. Few if any seem seriously to believe that this great change in their activities will leave no mark at all on their post-war activities.

Furthermore, under the married women's separate property acts and derivative legislation, women generally now are free to seek commercial employment rather than work in the home if they wish to do so, and undoubtedly they have legal title to their earnings and the right to receive them and to spend them as they think best. These are facts. It would be very sad indeed if this varied activity worked injury on the children of the next generation or impaired the spiritual qualities (whatever the managerial and physical details may be) of our homes. But they do indicate that the ways in which the marriage status in a cultural sense shall be served by both husband and wife are now much more numerous and varied than before.

We come back to our original thesis. If the particular representation or promise deals not only with property but also with many other things that are subject to particular commitments incident to the marriage status, then they should give rise to legal consequences in tort or in contract, or indirectly by annulment as the case may be. But if these commitments, however seriously made, and however important the matter itself, really deal not only with the honorable discharge of this allegiance to the marriage status, but with the particular way in which it shall be done, then the present state of the law is right in which the courts refuse to protect them. Quite properly they should be protected by religious sanctions, by moral sanctions, by general traditions if possible, and of course ultimately by the individual conscience. But it is too costly, it is too dangerous, it is contrary to our basic presuppositions of life to do more.

This then is the content of "public policy" which is so often mentioned in this field. It is a technique that works for apparently minor matters as well as basically important ones. Whether a wife should work at home entirely and care for her children or should work at least part of the day elsewhere in order to get additional money for their service, is a question which she as a free person and in connection with her marital relationship must decide. That is, marriage involves all of life and one cannot make literal commitments on the whole of his life without the right to change. Though he be a high priest of Buddhism, he must have the ultimate right of conversion to Taoism,
however uncomfortable this may make the Buddhists. Though a husband faithfully promised his wife that he would pursue the shoe business after marriage, she has no legal remedy if he changes his mind. If he feels that he must be a missionary to the Zulu Isles, this may upset his wife and children very much but it is not ground for divorce and indeed it is generally regarded as virtuous conduct. Honorable and devoted allegiance to the marriage itself is indirectly enforced by annulment, or divorce. But particular promises about future conduct within that marriage cannot be enforced by the law, however serious they may be, and however deeply committed one or the other spouse may be in honor and in morals to follow a particular course.

CONCLUSION

On the philosophical side, this is exemplified by the reasonable scope and implications of the usual marriage vows. Husband and wife promise to “love” each other. Since Old Testament times, the religious marriage services have tended to take the view that marriage is a permanent status, not to be terminated by any cooling of the affections that may occur after the marriage itself has begun. But the civil law of Rome did quite definitely predicate marriage on mutual affection and justified divorce upon its termination. These two basic approaches are of course reflected in modern divorce laws as well as in the concept of marriage itself.

But marriage is a status, as well as a contract. Life long marriage is presumed by all our statutes, and divorce literally at the will of either party is not reflected in the laws of any state. In a word, we do not in the law assume that the basis of marriage is the personal preference of either party or of both parties. It is an inarticulate major premise that the parties have duties to their children and that many other obligations flow from marriage which claim their allegiance regardless of personal affection for the respective spouse. Under all our statutes, marriage cannot be terminated by divorce except for cause. In this respect, our civil law of marriage differs from many religious interpretations which may allow no divorce, as well as from the Roman law of the empire which allowed divorce at the will of the parties.

To some degree at least, we recognize that when we promise “to love” in the marriage service this means sacred love, redeeming love, roughly what many people probably have in mind when they speak of “mother love”. Certainly in many religious writings where people are exhorted to “love one another” or to “love their brethren” the word in

25. Epstein, Marriage Laws in Bible and Talmud (1942) 194-196, 183 et seq.
the Greek text is always *agapao*. It would be ridiculous to command people to love each other in the sense of delighting in them or having a personal preference for them of any kind whatsoever. Love in the sense of preference and personal delight is *phileo*. *Phileo* of course is a perfectly worthy attitude and may be ethereal in nature. For instance, the most exalted characters in various religious writings experience *phileo* for some of their followers in preference to others. Friendship itself comes from the same Greek root. Lovely as it is, it is not redeeming love. It is not consecrated devotion to a life of service for others, apart from personal preferences or sacrifices.

In the middle ages the great distinction was between profane love and sacred love, profane love including all the innocent enjoyments of life. *Phileo* had nothing to do with *thero* (lust) which our medieval ancestors simply ignored in this connection, although our modern novelists at times seem to give it first place.

My point is this. The love which one promises in marriage must in common sense as well as in honor be *agapao*, redeeming love, upon which the other can rely apart from the varying emotions of likes and dislikes that must inevitably occur from time to time. If you marry and establish a home and bring children into the world, you have duties from these facts whether you like it or not and the love pledged in marriage is a phase of the undertaking to live life honorably and fully according to the need and not merely to your varying affections or according to what the law can compel.

If the representations or promises go to the initial status of marriage, to which the parties pledge their redeeming allegiance (*agapao*), then they will be enforced. But the detailed forms in which this allegiance is expressed, involving matters of choice and conscience, will not be subject to legal regulation under any circumstances.