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ENSURING FAIRNESS IN FAMILY LAW

IT IS NOT HARD TO BELIEVE THAT FATHER DRINAN BEGAN HIS TEACHING and scholarly career in family law. Family law was a natural area of interest because of his serious study of theology, which he undertook during his Jesuit training, and his interest in the application of religion to law. The interface between religion and law became a lifelong interest, although it took various forms, ultimately manifesting in his work on the separation of church and state.

Father Drinan was chairman of the Family Law Section of the American Bar Association, which was established in 1958. Under his leadership, the *Family Law Quarterly*

was begun, and he was its first editor-in-chief. The *Quarterly* has become the most influential family law journal in the United States.

In the forty years that have passed since Father Drinan published his article, “Reflections on Contemporary Dilemmas in American Family Law” in the *Family Law Quarterly*, the issues that he thought were important remain relevant. He was concerned with the legal issues regarding the establishment and termination of marriage and the treatment of children of divorcing couples. He recognized the tension between the religious and secular aspects of marriage and believed that the state should be neutral towards all religions. However, he believed that the state should not reject “the ideal of marriage as a solemn covenant.”

Unlike in many other countries, especially Europe, marriage laws in the United States do respect the religious aspect of that status. There is a merger of the religious and the civil. Indeed, provisions in marriage laws allow clergy of recognized faiths to marry couples under the authority vested in them by the state. Marriage ceremonies in churches and synagogues are both civil and religious events. The date of the marriage is, therefore, the date of that ceremony. In recent years, provisions allowing clergy to preside at marriage ceremonies have come into question and there has been some thought given to removing that authority and adopting the European model of separating the religious from the civil. That would mean that couples would be formally married in a civil ceremony at the site where today marriage licenses are secured, like an office in the city hall, and

that event would constitute the legal marriage. Any religious ceremony that followed would have purely religious significance. Reading his article today, I am not sure whether Father Drinan would agree with such a change in state marriage laws.

A year after Father Drinan’s article was published, California passed its no-fault divorce law, which became a model for other states so that today all states have some form of no-fault divorce. Because Father Drinan believed in the sanctity of marriage, I am not sure he welcomed the new laws which, by abandoning fault, made divorce easy and basically allowed husbands and wives to break their marriage vows—so solemnly stated during the marriage ceremony—at will. Father Drinan recognized forty years ago that it would be difficult to assign the increase in divorce rates to the advent of no-fault divorce, and that is still true today. Divorce rates increase and decrease because of a number of factors, only one of which is divorce laws.

Another major concern is the divorce process itself. How can it be humane? How can it be fair? How can the vulnerable, women and children, be protected? How can an angry, often disappointed and distressed, couple go through a legal process and complete it feeling that they have been treated fairly? Father Drinan welcomed marital counseling programs, whether independent or court-related. He felt that hasty decisions about divorce could be examined and perhaps reversed with the appropriate kind of therapy. In this view, he has found many supporters.

The fairness of the divorce process is most important with regard to the assign-

ment of property and the disposition of children. How unfair it would be if a husband could walk out on his wife without any economic consequences. But that is not how the law works. Whether a divorce is granted for fault or for no-fault, in an equitable distribution state, like Massachusetts, marriage is treated as a partnership. Upon divorce, the controlling question is not who has title to what, but who has contributed to the acquisition and/or the appreciation of property during marriage. Such a question takes into account all kinds of contributions, including, but not only, financial. The fact that “contribution” is the key to determining who gets what means that non-working spouses who stay home, raise children, and provide all kinds of support to the other spouse, are not forgotten and left without means at the time of divorce.

Throughout Father Drinan’s career, he was very concerned with the plight of children. He believed that they were often the victims of divorce and that a special effort should be made to protect them. He was particularly mindful of their need for financial support. At his death, Father Drinan was completing a book on human rights for children, as part of his major interest in international human rights. To the end, it was the vulnerable in society who concerned him and for whom he felt a special affinity.

Family law has changed enormously since Father Drinan left the field. It has taken various turns and moved into new directions. The major issues in family law today concern the application of state and federal constitutional law and the impact of new assisted reproductive technology on family formation. In both of those areas, Father Drinan’s cautious voice and sense of humanity will be missed.