I have decided not to present you with anything very formal. I don’t want to say that I’m following the idea that you should teach them in parables, but I do have a story to tell you; and it’s a story that picks up very exactly after the talk that Professor Browning gave, and reaches in a different sort of way the kinds of problems that Professor Browning was talking about.

I am the author of a casebook on bioethics, but before that, I was the co-author of a casebook in family law with Peg Brinig. And in the process of preparing for that, I was trying to figure out something that would be interesting to do in the section on divorce when the law of divorce is so boring.

The law of divorce is this: if you would like a divorce, you may have one. That’s not enough to keep the mind alive for a chapter.

And so I thought it would be a good thing for the students to try to think a little bit more seriously about what is, after all, one of the repeating features of family law – that it continually must decide moral questions, whether it faces them expressly as moral questions or whether it handles them using some other kind of language.

And so I sort of made up the case of Mr. and Mrs. Appleby of Milan, Michigan. Mr. Appleby is 59 – at the time when I made this story up, that seemed to me quite an elderly age. I now wish that I could stay 59 a little bit longer. He has been married for some 30 years to Mrs. Appleby. They have one child, grown up and moved out of the house.

Pretty much at Mr. Appleby’s insistence, Mrs. Appleby has never worked out of the house. Most of their friends are his friends, not her friends. He is employed, but never been employed in a very lucrative kind of way. They have very little money.
One day, he comes home and says, “I have fallen in love with a 19-year-old co-worker, and I want a divorce so that I can marry her, and live with her, and her two infant children.”

And the question that I then asked the classes to think about was whether Mr. Appleby was morally entitled to a divorce. The answer that I got, repeatedly, was that he was legally entitled to a divorce. And I said – finally, in one of the classes – “No, I teach family law. I know that he is legally entitled to a divorce. Hell, everybody is. Is he morally entitled to a divorce?” And finally the class began to ask “What’s that mean?” And I said, “You know, morally.”

And one student said, “I don’t understand what that question is. If you’d asked me whether it was psychologically prudent of him to get a divorce, I would be able to address that question, but I don’t know what you mean by morally.”

And I said, “Morally, about right and wrong.”

At which point, the editor of the law review at the time raised her hand and said, “But that would make murder a moral issue.”

And I said that I truly hoped that it was. And that she would continue to think about it that way.

But at this point, of course, the professor is getting quite frustrated because the real conversation that he wants to have has been sidetracked by some problem of communication. And over the years, I began to try to figure out why we were not communicating better than we seemed to be. Part of the problem here was, I think, that for my students – who are, I think, quite representative of the professional upper middle class – they grew up in comfortable houses and comfortable times. For all of our talk about diversity, they come from quite a narrow range of social class.

And let me just say at this point, they’re very lovable kids. One of my side research interests has been in how people make decisions about legal careers, and I interviewed 40 of my former students to try to get some understanding of how they had made a decision to come to law school, and how they’d made decisions about their careers after they left law school. And they were really inspiring interviews. I came away thinking very highly of all of these individuals that I had talked to.

So that made me particularly anxious to try to figure out what was going on here. So I think part of the problem was, for them, morality referred only to sexual morality, and probably referred only to sexual morality understood in what would pejoratively be called a Puritanical kind of way.

But I think that was only a fairly small part of it. I tried to get at the question by saying, “Forget about this question of what would be morally the right thing to do. What kind of conversation should Mr. Appleby have with himself about whether he should seek a divorce or not?”

And we came back to the therapeutic argument. It was to be an argument about whether or not he would come to realize that living with a 19-year-old when you’re 60 is not as fully rewarding
as you anticipate, and why living with two infant children is a lot more horrifying than you remember.

The next thing they said, though, was it really wouldn’t matter, even if he talked about this issue in moral terms, because morality would not constrain him, and it wouldn’t constrain him in a couple of senses. First, it wouldn’t constrain him because, after all, he could still do anything he wanted to and no agency would stop him, and it wouldn’t constrain him because he would be intellectually ingenious enough to find a rationale for whatever he wanted to do.

And that led to, I think, an even more common view, which was that he might well have moral ideas, but those moral ideas were happenstential. They were the ideas that he happened to have been brought up with and had no more meaning beyond his own historical experience than any arbitrary fact would. And it was certainly not something – this, the kind of moral constraints on him – it’s certainly not something that he could discuss profitably with other people. We all have our own values, and those values are simply this idiosyncratic process or product of history.

And so I said, “Well, what would you do in his circumstances?”

And they hued their belief that morality is essentially arbitrary, and they said, well, I might not get a divorce, but that’s just me. That’s just the way that I was brought up.

And so I tried to probe a little further, and got another kind of criticism of morality, which was that it constrains. The idea that somebody somehow, something somehow might be limiting your freedom seemed to them very wrong and, in fact, stigmatizing impunitive, which was part of the problem with morality, that it stigmatized people and that it was punitive. Punitive did not mean arising out of a desire to punish, to deter. It meant that unpleasant consequences might follow for whatever kind of reason. Punitive was the word that they used to describe the unhappy consequences.

So I said, “What about the unhappy consequences for Mrs. Appleby?” We’ve been focusing on the unhappiness that it might cause Mr. Appleby if he restrained himself from marrying the young woman. And the students said a couple of things: The first thing they said was that Mrs. Appleby would be behaving wrongly – they really don’t mind thinking morally if you don’t call it thinking morally -- she would be thinking wrongly if she tried to restrain him from getting a divorce. One of the things that I had said, in setting up the hypothetical, was that Mrs. Appleby was very strongly opposed to the idea of a divorce, partly for religious reasons, partly for economic reasons, and partly for social reasons. She would be socially isolated, and partly because her life had become so intertwined with her husband’s that she could not imagine what life without him would look like.

But the argument I got was that her attempt to limit him was an attempt to constrain him from doing what he was entitled to do – what everybody is entitled to do – and that is to find a happy life, to find a life in which you can grow and become the kind of person that you believe that you ought to be.
And in fact, a few students took that argument further and said that Mrs. Appleby herself was at fault because she had run her own life irresponsibly, that she was obliged, like all people, to be responsible for the decisions she made, and she had put herself in a position which now made her very vulnerable. She had made herself dependent, and dependence is not a situation that responsible people should allow themselves to slide into.

And here let me say parenthetically that in my work as a bioethicist, I encounter that view of sickness from courts and even from patients, that the horror of sickness is that it makes you dependent, and dependent is a humiliating and degrading condition.

So Mrs. Appleby had allowed herself to fall into this humiliating and degrading condition and really should not be heard now to complain about the consequences of her decisions.

Now, there were some students who felt that, although you wouldn’t want to say that Mr. Appleby was morally constrained, he was constrained. And he was constrained in a way that you might well predict, which is that he had “shaken hands.” He had shaken hands. He had entered into a contractual relationship with Mrs. Appleby.

And so the question then was, well – okay – what about the doctrine of efficient breach? Is that what you planned to advance here? The doctrine of efficient breach – for those of you who are not law students or went to law school before Judge Posner became quite so powerful – the doctrine of efficient breach says you’re in a contract. If you can breach the contract and pay the damages to the other party to the contract that make that other party whole, with you still being better off, it’s an efficient breach. Everybody is better off, or at least everybody in the whole situation is better off. The breached against party is no worse off, and you’re better off.

And the answer was yes, that it would be impossible to hold him to the contract, and it would in fact be impossible for he himself to hold himself to the contract, that he was in the grip of preferences that he could not control. So you could not hold him to the contract in the sense that Mrs. Appleby wanted, which was him staying home whether he truly loved her or not.

But you could demand financial damages. He was supposed to put her in the same situation that she would have been in economically had the marriage continued. And I said, “I constructed the hypothetical so that that can’t happen. He doesn’t have enough money to support two households. He can’t possibly do that.”

And at that point they said, “In that case, he is simply a judgment proof defendant. He can breach his contract. He has a sort of continuing duty to pay, but if he cannot fulfill the duty, that cannot stop him from seeking his freedom.”

Now, I think there is a very complicated set of things going on here that may give us some insight into some of the very complicated things that are going on in family law.

In the meantime, as Professor Browning said, there has been quite a large change in the way that family law has talked about the problems that it faces. The language which the law of the family uses is decreasingly the language of morality, and that’s happened in a variety of ways.
But before I explain those, let me rush to say that I am not suggesting at this point that family law has necessarily become less moral, and I am not suggesting that you cannot find moral justifications for almost all the positions that the law has adopted, and almost all the positions the commentators about the law advance.

I’m talking about the language that the law uses, and that language has changed a lot. And by the law, I mean the legal institutions that have to announce law and to make legal decisions. To give you a couple of examples--The obvious example here is no fault divorce. It used to be that if you wanted a divorce, you had to go to a court and you had to say I made a promise, and I have been morally relieved of that promise because of something for which I am not responsible – generally the moral fault of my partner – and then the court had to think about whether or not that was a sufficient moral justification.

Now of course – and I’m generalizing hugely – divorce is available essentially on the demand of one party, and any thought about the moral justification for the divorce must be undertaken by the plaintiff or the petitioner seeking the divorce.

Similarly, in a lot of the problems that surround the divorce – like child custody, the division of marital property, decision whether to grant alimony – there used to be a fairly large moral component in many ways and many of these areas, and increasingly, there are attempts to find ways of deciding these kinds of cases without talking about moral issues. The child custody area is an excellent example of that, and one of the important ways in which this has happened is that courts have looked for experts in child welfare – psychologists, psychiatrists – to tell them what would be best for the child so that the decision becomes a technical question about what is therapeutically best for the child. The court listens to the experts, and chooses the expert that seems to be making the most sense.

There’s another kind of example of this change in moral language that is exemplified by the opinion in *Roe v. Wade*, which I will briefly describe to you so you have a somewhat more accurate sense of what it did with the moral question that agitates people about abortion, which is the moral status of the fetus and the way in which the situation in which the woman finds herself should be thought of morally before an abortion is sought.

The Court starts off in a very strange kind of way. The opinion is very important. Before *Roe v. Wade*, essentially what you’d had in relatively modern law was really a couple of, two or three, contraception cases, the last of which was based on an equal protection argument and not an argument about what your rights are.

The Court says, very vaguely, there are a lot of places where you might find a right to make this kind of decision, and we don’t really have to decide what it is, but – and I’m quoting almost verbatim here – whatever it is, whatever the source is, the right is big enough to encompass the woman’s choice of whether or not to have an abortion.

The Court stops then. It does not try to explain more why that kind of choice is a choice that endows you with specially strong constitutional rights. The only additional thing it does in talking about the origin of the right is to say if the woman didn’t have this right, she would suffer
in lots of kinds of ways. Well, that’s not really an explanation, because we suffer in all kinds of ways from all kinds of law without thinking that the fact that there are detriments gives us a right to resist the law. What was particularly interesting about the detriments was that they were therapeutic kinds of detriments. They were either physical kinds of detriments or psychological kinds of detriments.

The woman, the Court goes on to say, this is Justice Blackman, the woman makes these decisions in consultation with her physician, suggesting once again this is a kind of technical problem. And in fact, the Court actually expressly says, at one point, the physician will decide in consultation with the patient whether the abortion is a good idea or not.

The Court, having finished establishing to its satisfaction that there was a right to make this decision, then presumably was going to talk about the state interest in the fetal life or whatever it is. And the Court says it’s a really hard question what the moral status of the fetus is, and people disagree about it a lot. Let’s think about this moral status of the fetus, and they do it by asking whether or not the framers of the Constitution suppose that the fetus was a person within the meaning of that word in the Constitution. After an extremely laborious investigation of the emoluments clause, the apportionment clause, the Court concluded that the framers never had fetuses in mind when they wrote the Constitution.

The Court then said Texas may not, by adopting one definition of life, preclude the woman from exercising her right. But it never said why. So the moral issue that has aroused so much anxiety after Roe v. Wade was simply never addressed by the Court.

The next thing that happened in this story, essentially, was Casey. The case in which the Court looked as thought it might overrule Roe versus Wade, and didn’t. And the influential opinion in Casey starts off by saying, “Liberty find no refuge in a jurisprudence of doubt.” And it harshly scolded people who had not acquiesced in the opinion because the Supreme Court had spoken, and whence the Supreme Court speaks, we should stop criticizing and stop causing social trouble, and go along with the Court’s decision – particularly when the Court has told you so often that that’s what you’re supposed to do.

So I think part of what was going on in that decision was that the justices lived in a different world from a lot of the people who have been upset by the decision. They lived in a world in which the moral status of the fetus had not been a difficult question, and I think they were quite astonished to find the kind of reaction to Roe v. Wade that they got. And that they were astonished because their moral vision was such a limited one.

And that is, I think, more generally a problem with the tendency to avoid thinking about problems and talking about problems in moral terms. The people the law regulates – the husbands and the wives who are getting divorced, the husbands and the wives who are getting married – do, in important ways, think about their relations in moral terms. They expect that the law – which they don’t really know – will also be talking in those kinds of terms. When they go to the court on divorce, they expect to get justice, and they expect to have their relations analyzed in the moral terms in which they’re thinking about them.
There’s some quite interesting empirical information about people who practice divorce law who have a terrible time because the clients keep saying you don’t understand how unfair this all was. And the lawyers keep saying if we keep talking about unfairness, the bill will run up and the court will never listen to anything that you’re saying. So there becomes a kind of disjuncture between what the law seeks to accomplish and what people expect it to that makes it very hard for them to see each – for the people and the law – to see each other very clearly.

Now I must be running out of time, so let me say the last thing here, which is the source for an awful lot of the moral ideas in traditional American family law obviously is religion. The question one might ask is can we go back to religion in order to replenish the supply. And I think that one could be pessimistic for a couple of reasons.

First, the kind of people who write ALI reports tend to be vehemently hostile to the law. I was at a conference once, and a classmate of mine came up to me – a classmate who teaches family law at a different institution – and before she said hello, hi, Carl, or anything like that, she said, “Do you want to know why I’m not adopting your casebook?”

And I said nothing because I was so taken aback at this approach.

And she said, “It’s because you included the marriage ceremony in that. Religion has no place in this casebook.”

I’d included the marriage ceremony because it’s the most influential statement on the understanding of marriage in the United States. To her, it was a religious document, and religious documents did not belong in discussions about family law.

The other problem, though, is that I wonder what you get when you go to religion. When I talked to people who counsel young couples getting married, what they counseled them about is the same kinds of therapeutic things that the law talks about and my students talk about.

The question that I would love to have you answer – because you’re more knowledgeable than I – is whether, if you actually go to American churches today, whether you’re going to get a significantly different kind of approach to these problems from the kind that you get from the law.

Thank you.