

COVENANT MARRIAGE: AN ACHIEVABLE LEGAL RESPONSE TO THE INHERENT NATURE OF MARRIAGE AND ITS VARIOUS GOODS

Katherine Shaw Spaht[†]

INTRODUCTION

The *Code of Canon Law* describes marriage as a covenant: “The marriage *covenant*, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children, has, between the baptised, been raised by Christ the Lord to the dignity of a sacrament.”¹

~Alfonso Cardinal López Trujillo

As canon law so aptly distinguishes, the concept of marriage as a *covenant* differs from marriage as a *sacrament*. Marriage is a covenant through which a man and a woman create a partnership for “their whole life” with the purpose of providing for the welfare of the couple and the conception and rearing of children.² This *covenant* entered into by the baptized has “been raised by Christ the Lord to the dignity of a *sacrament*.”³ For Catholics, marriage is not simply a covenant, but by Christ’s act, it is also a sacrament, “the intimate mystery of God, manifested across the centuries.”⁴ The *covenant* represents the agreement between husband and wife, an exchange of promises, with God as a party, to join together for life for two

[†] Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center. This article is dedicated to my father, who died April 10, 2005, and my mother, who died August 18, 2005. They had been married for sixty-four years and considered their marriage a covenant. After his death she said that the light had gone out of her life, and she thereafter died of a broken heart.

1. Alfonso Cardinal López Trujillo, *The Nature of Marriage and Its Various Aspects*, 4 AVE MARIA L. REV. 297, 308 (2006) (emphasis added) (quoting 1983 CODE c.1055, § 1).

2. *Id.* (quoting 1983 CODE c.1055, § 1).

3. *Id.* (emphasis added) (quoting 1983 CODE c.1055, § 1).

4. *Id.* at 298 (footnote omitted).

fundamental purposes: (1) mutual love and support and (2) procreating and rearing the next generation.⁵ *Marriage*, which the *covenant* creates, is a natural, social institution, universally recognized across generations and cultures, and is, “a response to God’s design and the inherent necessity in the nature of man and woman, invited by God himself, to form a very special unity, ‘one flesh.’”⁶

Legally, by contrast, marriage in the United States during the last fifty years has been understood as a private *contract*, “grounded in new cultural and constitutional norms of sexual liberty and privacy.”⁷ Marriage formation rules were simplified with virtually no requirements for waiting periods, publication of banns, or requisite public celebration. Dissolution rules were simplified by the introduction of unilateral no-fault divorce accompanied by streamlined procedures for divorce that significantly hastened dissolution of marriages. A divorce can now be obtained upon the simple petition of either party, which is touted as means to the end of a “clean break” from the other spouse. And, as at least one observer commented: “America’s experiment with the private contractual model of marriage has failed on many counts and accounts—with children and women bearing the primary costs.”⁸

As a legal response to the social costs levied by the streamlined divorce system, three states have adopted covenant-marriage statutes that offer couples an optional—and I argue preferable—form of marriage. Covenant marriage imposes obligations upon husband and wife to prepare for marriage and to take “reasonable steps” to preserve their marriage if difficulties arise. Divorce, in the covenant marriage context, generally requires proof of serious fault on the part of one spouse or a lengthy waiting period of living separate and

5. As Cardinal Trujillo states:

The *Catechism of the Catholic Church* emphasizes the importance of the consent of the spouses when it asserts: “The consent by which the spouses mutually give and receive one another is sealed by God himself. From their covenant arises ‘an institution, confirmed by the divine law . . . even in the eyes of society.’ The covenant between the spouses is integrated into God’s covenant with man: ‘Authentic married love is caught up into divine love . . .’”

Id. at 303 (footnotes omitted) (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 1639 (2d ed. 1997)).

6. *Id.* at 297 (quoting *Genesis* 2:24).

7. John Witte, Jr. & Joel A. Nichols, *Introduction* to COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE 1, 2 (John Witte, Jr. & Eliza Ellison eds., 2005).

8. *Id.* at 3.

apart. The statutes adopted by Louisiana,⁹ Arizona,¹⁰ and Arkansas¹¹ share three principal characteristics: (1) mandatory premarital counseling by a religious cleric or professional marriage counselor about the seriousness of marriage; (2) the execution of a Declaration of Intent (the *covenant* or agreement containing their promises¹²)—a legal obligation to take reasonable steps to preserve the marriage if marital difficulties arise (in at least one state, this obligation explicitly lasts until divorce¹³); and (3) limited grounds for divorce, consisting of serious fault on the part of one spouse or, in the absence of such fault, a significant period of time living separate and apart.¹⁴ In Louisiana, the legislation governing a covenant marriage also includes special obligations imposed upon a covenant couple during their covenant marriage that are not imposed upon other married couples. These obligations include: (1) to love and respect each other; (2) to live together; (3) to make decisions relating to family life in the best interest of the family; (4) to maintain and teach their children “in accordance with their capacities, natural inclinations, and aspirations”; and (5) the right and duty of each spouse to manage the household.¹⁵

9. LA. REV. STAT. ANN. §§ 9:272 to :275.1, :293 to :298, :307 to :309 (2000 & Supp. 2005).

10. ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 to -314, 25-901 to -906 (2000 & Supp. 2005).

11. ARK. CODE ANN. §§ 9-11-202, -11-215, -11-220, -11-801 to -811, -12-301, -12-324 (2002 & Supp. 2005).

12. For example, a Louisiana statute mandates that both parties intending to contract into a covenant marriage sign a recitation including the following statement:

A COVENANT MARRIAGE

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.

LA. REV. STAT. ANN. § 9:273(A)(1) (2000).

13. *See, e.g., id.* § 9:307(C) (Supp. 2005).

14. *See, e.g., id.* § 9:307(A) (2000 & Supp. 2005) (defining serious fault as: (1) adultery; (2) committing a felony which results in a death sentence or imprisonment at hard labor; (3) abandonment of the other spouse; or (4) physical or sexual abuse of the other spouse or children).

15. *Id.* § 9:294 to :298 (Supp. 2005). *See also* Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 623-24 (2005) [hereinafter

Part II of this essay summarizes the major aspects of marriage and its goods, with emphasis on its indissolubility, as explained in Cardinal Trujillo's article in this symposium. Part III examines some of the obstacles to restoring an indissoluble form of marriage, consisting principally of legal elites who possess an alternative vision of marriage and family law bar members who are quite content with easy, uncomplicated divorce rules. Part IV explores the extent to which a covenant marriage conforms to God's marriage design. Part V offers two practical suggestions for increasing the number of covenant couples in affected states: (1) removing obstacles of implementation constructed by the staff members of bureaucracies who were originally intended to facilitate effective choice of a marriage model by citizens; and (2) soliciting and demanding official encouragement—if not requirement—of choosing covenant marriage by Christian denominations, in recognition that covenant marriage more nearly accomplishes God's intended purpose for marriage. Yet, adoption of covenant marriage statutes in the other forty-seven states remains the ultimate goal, a goal which would permit all United States citizens to take advantage of this more committed form of marriage.

I. MAJOR ASPECTS OF MARRIAGE AS THE FOUNDATION OF THE FAMILY

Marriage, as a natural institution, reflects the mutual gift of a man and a woman and forms the foundation of the family, "a divine institution."¹⁶ These observations are, as Cardinal Trujillo opines, "natural realities."¹⁷ Marriage and the family it founds are natural because "they hold and reveal the truth coming from the beginning."¹⁸ As evidence of its natural character, all civilizations have recognized the truth revealed in marriage and family, "enlightening them from within and, at the same time, transcending them."¹⁹ Yet, marriage as a sacrament goes further and "inundates

Spaht, *Covenant Marriage Seven Years Later*] (revealing that these Louisiana provisions parallel marriage protections in different countries throughout the world).

16. Trujillo, *supra* note 1, at 298 (citing Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution of the Church in the Modern World*] ¶ 48 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 561 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*]).

17. *Id.*

18. *Id.* at 299 (internal quotations omitted).

19. *Id.*

the whole of its value with a new brilliance and depth and with a more demanding commitment."²⁰

The relationship between nature and culture, and more particularly between nature and the law, Pope John Paul II explained, means that "family cannot disregard the cultural vehicle in which it has to express itself: 'Man comes to a true and full humanity only through culture, that is through the cultivation of the goods and values of nature.'"²¹ Cardinal Trujillo further states:

This correlation between nature and culture has a direct influence on the understanding of both natural and positive law as elements that are necessarily present in every legal system or order. Two orders do not exist, one natural and one positive, but a single legal system in which the demands of justice 'coming from' the family (nature) are integrated with the necessary historical determinations derived from positive law (culture).²²

Marriage, which gives birth to the family, "lights the path for us and introduces us to the legal nature of the family. . . ." ²³

Marriage, as a mutual gift of one's innermost self, is evidenced by the total physical self-giving of man and woman and is characterized by "the value of a *total* surrender—the resultant faithfulness and stability last forever."²⁴ The mutual gift of oneself to one's spouse "pervades the whole of their lives" and by virtue of "its busy generosity it grows better and grows greater"; "this love remains steadfastly true in body and in mind, in bright days or dark. It will never be profaned by adultery or *divorce*."²⁵ Christian marriage "invigorates and reinforces the foundational properties of natural marriage, unity and *indissolubility*, consequently imposing duties on the spouses with more force than in the natural institution."²⁶

Ultimately, it is from the logic of total giving, the essence of marriage, that "the *indissolubility* of the conjugal bond must be seen more deeply. Marriage, like conjugal love, is a commitment that lasts a lifetime."²⁷ Marriage, which by its nature is a total self-giving,

20. *Id.* at 298.

21. *Id.* at 300 (quoting *Gaudium et Spes*, *supra* note 16, ¶ 53).

22. *Id.* at 300-01 (footnote omitted).

23. *Id.* at 305.

24. *Id.* at 302 (emphasis added) (footnote omitted).

25. *Id.* (emphasis added) (quoting *Gaudium et Spes*, *supra* note 16, ¶ 49).

26. *Id.* at 305 (emphasis added) (footnote omitted).

27. *Id.* at 306.

cannot be provisional or temporary: "Giving oneself with the reservation of being able to disconnect oneself would mean an incomplete gift, contrary to that which gives rise to marriage."²⁸ The community of marriage, unlike every other relationship no matter how intense, is a communion²⁹ for life, a community "always . . . exclusive to those participating in the reciprocal gift of masculinity and femininity."³⁰ Thus, any description of marriage should include a "community for a lifetime."³¹ To be certain, "this understanding of marriage does not permit marriage to be viewed as a simple contract[,] . . . [or] rescindable at the free and arbitrary will of the contracting parties and the complacent acceptance of legislators, seduced by legal positivism."³²

Prophetically, Cardinal Trujillo opines that certain "legal systems and much contemporary legislation departed from the Western legal tradition on the family from the moment they conceded the right to divorce."³³

The right to divorce now enjoys the same value in many countries that the recognition of the right to marriage enjoys. Husband and wife are no longer seen in these countries as a parental unit, since their identities—that of husband and wife—are not defined with any reference to modes *of being or personal identities* and are limited to reflecting social functions created by the positive legal order. In marriage as well as in its dissolution, it is the state which

28. *Id.* at 307-08 (quoting ANTONIO MIRALLES, *IL MATRIMONIO: TEOLOGIA E VITA* 87-89 (Cinisello Balsamo ed., 1996)).

29. Communion and community are closely related but not identical concepts according to the previous Holy Father:

"*Communion*" has to do with the personal relationship between the "I" and the "thou." "*Community*" on the other hand transcends this framework and moves towards a "society," a "we." The family, as a community of persons, is thus the first human "society." It arises whenever there comes into being the conjugal covenant of marriage, which opens the spouses to a lasting communion of love and of life, and it is brought to completion in a full and specific way with the procreation of children

Id. at 310-11 (quoting Pope John Paul II, *Gratissimam Sane* [*Letter to Families*] ¶ 7 (St. Paul ed. 1994)).

30. *Id.* at 309 (quoting MIRALLES, *supra* note 28, at 38).

31. *Id.* (quoting MIRALLES, *supra* note 28, at 38).

32. *Id.*

33. *Id.* at 332.

respectively attributes or eliminates the legitimate use of those functions on the part of the citizens.³⁴

From the perspective of legal positivism, “legal knowledge must do without any value judgment with respect to legal norms”—a clear rejection of natural law.³⁵ As a consequence of legal positivism, the evolution of family law reveals a radically individualist anthropology that manifests a “dehumanization of contemporary society.”³⁶

How the historical connection between nature and culture, or natural law and positive law, can be restored in a country like the United States remains elusive. Attempts at divorce reform—other than covenant marriage statutes—have been overwhelmingly unsuccessful. In the marriage context, Americans have embraced both the concept of legal positivism and of the related radical individualism; they reject any notion of sacrificial self-giving that binds them to another person permanently. No *total* surrender exists for them. A substantial amount of Christian individuals, lay persons as well as clergy, oppose efforts to restore the connection. Most often, however, legal positivism and the rejection of natural law find refuge in the legal academy among “intellectuals” and those who cooperate with these “intellectuals” for purposes of pure self-interest, as Part III will detail.

II. OBSTACLES TO RESTORING THE INDISSOLUBILITY OF MARRIAGE: LEGAL ELITES AND THE FAMILY LAW BAR

A. *American Law Institute’s Principles of the Law of Family Dissolution: Legal Elites Reject Inherent Nature of Marriage in Favor of “Diverse Family Forms” and “Individual Freedom”*

The American Law Institute’s *Principles of the Law of Family Dissolution (“ALI Principles”)*,³⁷ was unveiled to great fanfare in 2002. The project reflects the attitudes and philosophy of legal elites in this country: marriage is merely one of a variety of intimate, “close

34. *Id.*

35. *Id.* (citing Michel Troper, *Positivisme Juridique*, in *DICTIONNAIRE DE PHILOSOPHIE POLITIQUE* 495, 498 (Philippe Raynaud & Stéphane Rials eds., 1996)).

36. *Id.* at 333.

37. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002) [hereinafter *ALI PRINCIPLES*] (The Reporters are Professors Ira Mark Ellman of Arizona State University College of Law, Katharine T. Bartlett of Duke University School of Law, and Grace Ganz Blumberg of University of California at Los Angeles School of Law.).

relationships,” which the law ought to recognize and regulate at their termination.³⁸ Furthermore, “family diversity,” a core value of the *ALI Principles*, requires the recognition of forms of parenting that disconnect “biological” from “functional” parenting.³⁹ In proposing rules for compensatory payments, division of property, child custody and support to take effect at the dissolution of marriage, and rules on “domestic partnerships,” the *ALI Principles* communicates an anemic, fragile, impoverished vision of marriage. The *ALI Principles* describes marriage not as a social institution, but as “an emotional enterprise with high returns and high risks.”⁴⁰ As Cardinal Trujillo describes, the relativization of marriage that the *ALI Principles* seems to reflect, is that “[l]ove is not true love anymore but is only a simple means of gratifying [some of] the emotional ‘needs’ or passions.”⁴¹ In fact, the *ALI Principles* views marriage, “marriage-like” relationships, and even parenthood as extremely malleable⁴²—a result of legal

38. Academic theorizing on sexual intimacy during the 1980s and 1990s urged scholars to think about intimacy in radically new ways. The new thinking focused on what has become known as “close relationship theory.” Under such a theory, marriage is treated as a private relationship between two people created primarily to satisfy the needs of adults.

For close relationship theorists, marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its importance as a social institution. Marriage is examined primarily as a relationship created by the couple for the satisfaction of the two individuals who enter into it.

DAN CERE, INSTITUTE FOR AMERICAN VALUES, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 8 (2005).

39. Bartlett, one of the three Reporters for the *ALI Principles*, explains that her passion is the consequence of

the value I place on family diversity and on the freedom of individuals to choose from a variety of family forms This same value leads me to be generally opposed to efforts to standardize families into a certain type of nuclear family because a majority may believe this is the best kind of family or because it is the most deeply rooted ideologically in our traditions.

Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 817 (1998). Regarding the disconnection of “biological” and “functional” parenting, see CERE, *supra* note 38, at 17 (positing that the *ALI Principles* “shift[s] the focus from biological parenthood to functional parenthood”); Katherine Shaw Spaht, *How Law Can Reinvent a Robust Vision of Marriage and Rival Its Post-Modern Competitor*, 2 GEO. J.L. & PUB. POL’Y 449, 455 (2004) [hereinafter Spaht, *How Law Can Reinvent*] (“[F]amily diversity’ includes . . . forms of parenting which disconnect ‘biological’ from ‘functional’ parenting.”).

40. ALI PRINCIPLES, *supra* note 37, at 63.

41. Trujillo, *supra* note 1, at 305.

42. See CERE, *supra* note 38, at 17 (“[T]he report’s recommendations shift the focus from biological parenthood to functional parenthood (with ‘functional parenthood’ meaning the day-to-day work of raising children). The report argues that the traditional biological view of

positivism in opposition to natural law about which Cardinal Trujillo warns.⁴³

For example, in the discussion of the risks and rewards of the “emotional enterprise” called marriage, one legal treatise observes that “[s]ome individuals tolerate their spouse’s drunkenness or adultery and remain in their marriage. Others may seek divorce if their spouse grows fat, or spends long hours at the office.”⁴⁴ By far the more common risk, that a spouse will suffer a “fading of affective ties[, naturally] makes spouses less tolerant of one another.”⁴⁵ The court in these situations, according to the Reporters, cannot determine whether the dissolution of the marriage was caused “by the [one spouse’s] adultery or the [other ‘fat’ spouse’s] failure to keep fit.”⁴⁶ Thus, clearly, or so the Reporters conclude, no one can adequately judge conduct within marriage because inevitably it will reflect the individual judge’s moral judgment about “*private* marital behavior”⁴⁷; this is a hint of the “privatization of the family” and consequential reduction “in its public and social role” according to Cardinal Trujillo.⁴⁸ The *ALI Principles* goes on to state:

Different couples arrive at different accommodations in their relationship, and some depart from the social conventions. *Intimate relationships* often involve complex emotional bargains that make no sense to third parties with different needs or perceptions. Those who sufficiently dislike their spouse’s behavior can seek a divorce.⁴⁹

Ultimately, for the *ALI Principles*, “[t]he gap between societal aspiration and individual ability [to meet those aspirations] may be especially great in marital relations, and the range of wrongful behavior that the law can sensibly address is correspondingly

parenthood as ‘an exclusive, all-or-nothing status’ fails to grapple with diverse constructions of parenting in contemporary society.”) (footnote omitted).

43. Trujillo, *supra* note 1, at 332 (“[L]egal positivism is one of the factors that has contributed to the current decline of the proper role of the family, especially when it is seen as a theory of law in opposition to natural law.”).

44. *ALI PRINCIPLES*, *supra* note 37, at 51.

45. *Id.*

46. *Id.*

47. *Id.* at 58 (emphasis added).

48. Trujillo, *supra* note 1, at 316.

49. *ALI PRINCIPLES*, *supra* note 37, at 63 (emphasis added). “First, the Reporters suggest that there is no demonstrable societal consensus about proper marital behavior. But later . . . they disapprove of ‘the imposition of external standards on an intimate relationship.’” Spaht, *How Can Law Reinvigorate*, *supra* note 39, at 455 (footnote omitted) (quoting *ALI PRINCIPLES*, *supra* note 37, at 60).

small.”⁵⁰ Punishment, if any is due, belongs in the sphere of criminal law, which “appropriately reaches a much narrower range of marital misconduct than do the marital-misconduct rules of fault states.”⁵¹ By refusing to judge a spouse’s conduct during marriage, either spouse is “free” to behave badly and to leave the marriage. This freedom can be most aptly described as that of the *individual*, a freedom that “follows a selfish design that leads to the ‘instrumentalization’ of others.”⁵² This freedom to misbehave, with a few extreme exceptions,⁵³ even extends to decisions affecting the custody of the children, especially if the misconduct involves the “extramarital sexual conduct by a parent.”⁵⁴ Marriage, as envisioned by the *ALI Principles*, is stripped of virtually all normative standards, including societal condemnation of the essential distinguishing feature of this relationship—sexual fidelity.

In addition, the *ALI Principles* creates a competitor to marriage, a domestic partnership, with assurances that “[i]t is not an objective (or a likely effect) of this Chapter to encourage parties to enter a nonmarital relationship as an alternative to marriage.”⁵⁵ Justification for the creation of this competitor, according to the Reporters, was

50. ALI PRINCIPLES, *supra* note 37, at 63.

51. *Id.* at 66.

In the context of [a no-fault divorce] regime especially, it will be the unusual case in which the fairness of the result will be improved by a judicial inquiry into the relative virtue of the parties’ intimate conduct. In some cases the result will become less fair. And the rules that invite such misconduct claims will surely increase the cost and degrade the process in many other cases”

Id. at 66-67.

52. Trujillo, *supra* note 1, at 323-24 (distinguishing between “freedom of the *individual*,” described above, and “freedom of the *person*,” an authentic freedom that fulfills the truth about the person).

53. See ALI PRINCIPLES, *supra* note 37, at 255 (including as exceptions: abuse and neglect of a child, infliction of domestic violence, and abuse of drugs or alcohol that “interferes with the parent’s ability to perform caretaking functions”).

54. *Id.* at 283. To consider sexual conduct, according to the Reporters, encourages an overreliance on factors that are grounded in prejudice and bias Even a child’s awareness of such a relationship, or dislike of the individual with whom a parent has developed an intimate relationship, should not justify inferences relating to the child’s welfare or parental fitness; *children cannot be protected from every source of unhappiness and unease*. To prevent courts from exaggerating the significance of parental practices of which they disapprove, the section allows consideration of sexual misconduct *only* when there is a showing of harm.

[This approach] applies equally to homosexual and heterosexual conduct.

Id. (emphasis added).

55. *Id.* at 916.

that “[d]omestic relationships that satisfy the criteria of § 6.03 closely resemble marriages in function.”⁵⁶ Only by ignoring the wealth of social science data that exist to the contrary can the Reporters of the *ALI Principles* make such a statement. Cohabiting relationships *do not* function similarly to marriage: cohabitants are often not sexually faithful, they do not pool their economic resources, they are significantly less interdependent, and they have different expectations for and about the relationship.⁵⁷ Typically, cohabitants do not consider themselves to be a child-rearing, economic partnership—a unit. Remarkably, according to Cardinal Trujillo, these de facto unions “give rise to a[n] . . . internal contradiction” as they “lack stability, obligations, and a public dimension—all qualities of marriage—but are nevertheless given legal recognition by the state and granted the full gamut of legal effects.”⁵⁸

The *ALI Principles* accepts family breakdown both “as a given” because either no one is at fault or both individuals share blame, “and [as] an appropriate, [sic] basis for dissolution.”⁵⁹ The legal framework that surrounds “the Project’s implementation is oriented towards fair treatment that is nonpunitive, nonsexist, [and] nonpaternalistic.”⁶⁰ Assuming that Americans have accepted serial marriage, Professor Herma Hill Kay, an active member in the American Law Institute and its consideration of the *ALI Principles*, opined that:

a more realistic analogy for marriage in the twenty-first century is the joint venture, given the unilateral nature of no-fault divorce. A joint venture is defined in the commercial setting as “[a] legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit.” A joint venture differs

56. *Id.* at 915.

57. See Linda J. Waite, *The Negative Effects of Cohabitation*, THE RESPONSIVE COMMUNITY, Winter 1999-2000, at 31-38 (arguing that the “Cohabitation Deal” differs radically from the “Marriage Bargain”); Marsha Garrison, *Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 307-10 (Robin Fretwell Wilson ed., 2006); Margaret F. Brinig, *Domestic Partnership and Default Rules*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra*, 269, 274-77.

58. Trujillo, *supra* note 1, at 326 (footnote omitted).

59. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2073 (2000) [hereinafter Kay, *Women’s Rights*]. In her earlier writings, however, Kay observed that “[d]ivorce by unilateral fiat is closer to desertion than to mutual separation.” Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM AT THE CROSSROADS 6, 8 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

60. Kay, *Women’s Rights*, *supra* note 59, at 2073.

from a partnership in that it “does not entail a continuing relationship among the parties.” At first glance, the joint venture *may seem to be the exact antithesis of a stable relationship and therefore poorly suited as a conceptualization of an enterprise that typically involves the rearing of children.*⁶¹

Completing her analogy, Kay observed that: (1) in a joint venture, the model is one of “spouses who are self-sufficient at the outset of the undertaking”; (2) a joint venture “requires a community of interest in the performance of the subject matter,” such as having children and rearing them; (3) a joint venture presupposes “a right to direct and govern’ the undertaking”; and (4) “[t]he *most attractive aspect* . . . is the possibility of renewal [at each stage of completion of the project of family life].”⁶² Despite Kay’s belief in the analogy’s attractiveness and traditional marriage’s lack of adaptability to dual-career couples, she admitted that “a concept of marriage as a joint venture is not yet an appropriate model for all couples. . . . [Since] [t]his vision of equality between men and women in the home as well as the market-place . . . has not yet been realized.”⁶³

Interestingly, Ira Mark Ellman, one of the Reporters for the *ALI Principles*, also explored the persistence of traditional marital roles.⁶⁴ He primarily observed that from an economic viewpoint of maximizing production, egalitarian marriage would not be predicted.⁶⁵ This observation stemmed from the idea that specialization by spouses creates a gain that is lost in an egalitarian marriage “in which the spouses share domestic tasks equally, and have equal market labor commitments.”⁶⁶ For, in truth, working wives continue to shoulder an unequal share of housework, a phenomenon that “must in some sense result from the interaction of common preferences of men and women, whether or not one regards

61. *Id.* at 2089 (emphasis added) (footnote omitted) (quoting BLACK’S LAW DICTIONARY 839 (6th ed. 1990)).

62. *Id.* (emphasis added) (quotations omitted) (quoting BLACK’S LAW DICTIONARY, *supra* note 61, at 839); see also June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 77 (2002) (arguing that the conception of marriage as a joint venture “would provide a stronger framework for the ALI approach than the conclusion that the otherwise relevant consideration of fault is simply too difficult to define”).

63. Kay, *Women’s Rights*, *supra* note 59, at 2090.

64. Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1 (2000).

65. *Id.* at 19.

66. *Id.*

the preferences as unfairly or improperly constrained."⁶⁷ Such common preferences would include a wife's preference for more of the domestic role and a preference for a husband with higher earnings who is not domestically inclined to permit her to perform that role. Regarding these preferences, Ellman further stated that:

[I]t may be that if one looks at what people actually do, rather than at what they say, one finds a pattern that is more consistent with *the continued durability of traditional gender roles*. Perhaps, then, the tension is between what people think they ought to want, and what they actually want: we *ought* to want gender equality, which perhaps means we *ought* to want to abolish gender roles in marriage. But one may believe that eliminating gender roles in marriage is an important societal aspiration but have preferences in the conduct of one's own marriage that are not entirely in accord.⁶⁸

Accordingly, Ellman concluded by recognizing that "[h]umans are enormously adaptable, but our preferences may be less malleable than our tactics."⁶⁹

B. *Family Law Bar Opposes Any Changes to Easy Divorce*

In their insistence that marriage is simply one of many varieties of intimate adult relationships without moral content (which inherently requires making a moral judgment), legal elites find family law bar members to be their strongest allies. Content with divorce law practice stripped of *fault* and the trial of such allegations, the family law bar resists any return to marriage law with moral content.⁷⁰ Much of this resistance stems from the fact that, since 1970, no-fault

67. *Id.*

68. *Id.* at 36 (first emphasis added).

69. *Id.* at 39; see also STEVEN E. RHOADS, TAKING SEX DIFFERENCES SERIOUSLY 248 (2004) (arguing that the traditional idea of marriage, having "a loving husband and children," remains appealing to women). In addition, a "close relationships" culture that equates marriage to a joint venture and ignores traditional sex roles

fails to acknowledge fundamental facets of human life: the fact of sexual difference; the enormous tide of heterosexual desire in human life; the procreativity of male-female bonding; the unique social ecology of parenting which offers children bonds with their biological parents; and the rich genealogical nature of family ties and the web of intergenerational supports for family members that they provide.

CERE, *supra* note 38, at 8.

70. See Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 751 (1994).

divorce law has been a financial boon to an increasing number of lawyers.⁷¹

No-fault divorce means that a lawyer need not allege a *fault* ground for divorce and prove it by factual evidence designed to fit within jurisprudential interpretations of what constitutes adultery, cruel treatment, or habitual intemperance. There is no need to extensively interview the spouse, friends, and family, to hire investigators, or to marshal credible testimony—actions designed to be distasteful and, consequently, deter people from divorcing. Accordingly, no such evidence will be offered by the defendant in response to allegations in the plaintiff's petition. The petition may simply allege that plaintiff desires a divorce because of irreconcilable differences or irretrievable breakdown of the marriage. Most significantly, no defense exists absent reconciliation, allowing the plaintiff's attorney to accomplish the desired result for his client (unlike the experience of lawyers prior to the enactment of no-fault divorce who often were unsuccessful in obtaining a divorce for fault of the other spouse) without the expenditure of time previously required to gather the factual evidence necessary to establish fault. Not surprisingly, the history of the passage of no-fault divorce legislation indicates that members of the legal profession, in cooperation with legal elites, were the primary moving force behind no-fault divorce reform.⁷²

Economically, no-fault divorce meant that a divorce law practice could finally be feasible, if not very lucrative. Until the widespread adoption of no-fault divorce in the United States in the mid-1970s, very few, if any, lawyers specialized in the practice of divorce law.⁷³ Lawyers simply could not sustain a practice economically by handling only divorce cases. The law required proof of serious fault

71. See Joseph N. DuCanto, Book Review, 68 A.B.A. J. 452 (1982) (reviewing JAMES T. FRIEDMAN, *THE DIVORCE HANDBOOK: YOUR BASIC GUIDE TO DIVORCE* (1982)); *A Few Paragraphs From a Text by Stephen Baskerville*, PACE NEWSLETTER (Parents and Children for Equality, Columbus, OH), Sept. 2001, at 9; Stephen Baskerville, *The Great Divorce*, WASH. TIMES, April 1, 2001, at B5.

72. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 50-51 (1988) (listing Herma Hill Kay and other notable "elite matrimonial lawyers" as a significant impetus for no-fault divorce reform in California); see generally JUDY PAREJKO, *STOLEN VOWS: THE ILLUSION OF NO-FAULT DIVORCE AND THE RISE OF THE AMERICAN DIVORCE INDUSTRY* (2002) (describing the rise of the divorce industry in the wake of no-fault divorce).

73. See CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW* 77-78 (2d ed. 2000) (positing that, in 1980, only 700 lawyers nation-wide specialized in the entire family law arena).

by the other spouse, and obtaining such demanding factual evidence was both unattractive and expensive. Accordingly, an attorney could not charge his client a sufficient amount to be adequately compensated for the time and resources expended. Meanwhile, a client in the throes of a divorce loses resources once provided by the other spouse (lost economies of scale); therefore, a divorce case client rarely possessed the ability to pay the hourly sum a lawyer justifiably could charge for his time and effort. Due to these financial strains, lawyers were forced to balance their divorce practice with cases in other areas of the law.

Since the 1970s, family law specialization has increased exponentially.⁷⁴ What the lawyer may be forced to try in a divorce case is ordinarily limited to economic matters, such as alimony or division of marital property. The matter of child support has now been reduced to a mechanical calculation of a sum based upon specific guidelines.⁷⁵ Nonetheless, contrary to what opponents of reform claim, not all unsavory divorce matters, especially egregious fault committed by a spouse, have been eliminated from judicial consideration. Rather than alleging fault on the part of the other spouse to obtain the divorce, today a more pernicious form of family law litigation has emerged: contested child custody cases containing allegations of sexual or physical abuse. This form of litigation has proliferated such that many veteran family law practitioners express deep concern about its effect on families and society at large.⁷⁶ The injustice to one spouse of being repudiated by the other spouse, who is often the one who has breached the marital relationship by a serious fault, occurs without an opportunity to express indignation publicly and to seek redress. Is it preferable for the spouses to direct indignation toward each other as a reason to gain sole custody of a child, rather than direct anger against each other as grounds for divorce?

Any claim by the legal profession that no-fault divorce reduces the acrimony that once existed in divorce proceedings rings hollow.

74. *Id.* at 78 (revealing that, in 2000, “[a]t least 4,000 attorneys specialize[d] in divorce mediation”).

75. See Catherine Moseley Clark, *Imputing Parental Income in Child Support Determinations: What Price for a Child’s Best Interests?*, 49 CATH. U. L. REV. 167, 171-72 (1999) (detailing the uniformity in child support calculations mandated by the Child Support Enforcement Amendments of 1984, 42 U.S.C. § 667(a) (1994)).

76. See AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM THE FAMILY COURTS—AND WHAT CAN BE DONE ABOUT IT 25-28 (2005); see also Colleen McMahon, *Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings*, 39 CATH. LAW. 153, 153 (1999).

The acrimony that exists between divorcing spouses continues unabated and, unfortunately, most often appears not in the divorce proceeding itself but in the ancillary matter of child custody. The reward for a successful physical or sexual abuse claim—no visitation or severely restricted visitation by the abusing parent—is significant.⁷⁷ Proving such allegations, however, usually requires a physical examination of the child.⁷⁸ How could divorce proceedings be more distasteful than custody contests in which allegations are made against a parent that necessitate a gynecological or urological examination of a child?

Recognition of the opponents to divorce reform and knowledge of their arguments better equips the individuals who encourage and support divorce law reform. One of the most attractive features of covenant marriage as a divorce reform, to be thoroughly discussed in Part IV, is its optional nature. No one seeks to impose upon other citizens her “religion” or her understanding of marriage viewed through the prism of natural law. Reform advocates who promote covenant marriage simply propose permitting citizens the ability to choose a more committed form of marriage that is entered into only after serious deliberation. Legal academicians need not choose it for themselves, and family lawyers need not represent covenant spouses seeking a divorce.

III. COVENANT MARRIAGE: A MORE COMPLETE, BUT IMPERFECT, REALIZATION OF GOD’S DESIGN FOR, AND THE CATHOLIC VISION OF, MARRIAGE

Covenant marriage statutes in Louisiana, Arizona, and Arkansas contain three general features: (1) mandatory premarital counseling about the seriousness of marriage and *the intention of the couple that it be lifelong*; (2) the *legal* obligation to take all reasonable steps to preserve the couple’s marriage if marital difficulties arise; and (3) restricted grounds for divorce consisting of *fault* on the part of the other spouse or a significant period of time living separate and apart.⁷⁹ Thus, covenant marriage tightens the rules on entry into marriage as well as exit from marriage.⁸⁰ At the same time, this

77. See, e.g., LA. REV. STAT. ANN. §§ 9:364 to :369 (2000).

78. See Melinda L. Moseley, *Civil Contempt and Child Sexual Abuse Allegations: A Modern Solomon’s Choice?*, 40 EMORY L.J. 203, 205, 211 (1991).

79. See *supra* notes 9-15 and accompanying text.

80. See Witte & Nichols, *supra* note 7, at 1.

reform option seeks to strengthen the marriage during its existence by imposing a legal responsibility to try to preserve the marriage upon the spouses, a responsibility that they agreed to in advance.

Mandatory premarital counseling in a covenant marriage may be performed by a member of the clergy or a professional marriage counselor, which permits Catholic Pre-Cana programs of preparation for engaged couples to constitute satisfaction of this statutory requirement.⁸¹ In cities with a Community Marriage Covenant or Policy (“CMP”) signed by clergy in the community, signatories ordinarily agree to: (1) a minimum number of counseling sessions with the minister or priest; (2) a premarital inventory such as PREPARE or FOCCUS (Facilitating Open Couple Communication, Understanding, and Study); and (3) the guarantee of a mentoring couple assigned to the engaged couple.⁸² When the premarital counseling ends, the couple signs a document called a Declaration of Intent that contains the content of their *covenant*. In Louisiana, the Declaration includes the agreement to take reasonable steps to preserve the marriage as well as the couple’s agreement to be bound by the Louisiana law of covenant marriage (choice-of-law clause).⁸³ Both spouses sign the agreement and then execute an affidavit, signed by a notary, attesting to having received the required counseling and having read the Covenant Marriage Act.⁸⁴ In their Declaration of Intent, the couple agrees in advance to take steps to preserve the marriage, a legal obligation which begins when marital difficulties arise and “should continue” until rendition of the divorce judgment.⁸⁵ Clearly, a covenant couple understands that their commitment to marriage is

81. Pre-Cana is the premarital counseling portion of the recent Cana Conferences movement. In 1949, the United States Conference of Catholic Bishops urged the widespread acceptance of this movement. ROBERT C. BRODERICK, *THE CATHOLIC ENCYCLOPEDIA* 89 (1976).

82. See PAUL JAMES BIRCH ET AL., EXECUTIVE SUMMARY, *THE INSTITUTE FOR RESEARCH AND EVALUATION, ASSESSING THE IMPACT OF COMMUNITY MARRIAGE POLICIES ON U.S. COUNTY DIVORCE RATES* (March 2004), <http://www.smartmarriages.com/cmp.weed.pdf> (examining the decline in divorce rates in certain cities with CMP’s after its adoption).

83. See LA. REV. STAT. ANN. § 9:273.1 (2000). See also Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1093-97, 1112-13 (1999). But see Peter Hay, *The American “Covenant Marriage” in the Conflict of Laws*, 64 LA. L. REV. 43, 48 n.31 (2003) (“The choice-of-law clause is a contract that other states may or may not honor.”).

84. LA. REV. STAT. ANN. § 9:237 (2000 & Supp. 2005); § 9:273.1 (2000). The Covenant Marriage Act is a pamphlet prepared by the Attorney General that explains the differences between a covenant and a standard marriage. *Id.*

85. *Id.* § 9:307(C) (Supp. 2005). The only exception to this legal obligation to take reasonable steps to preserve the marriage is when the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses. *Id.* § 9:307(D) (Supp. 2005).

stronger by virtue of the time necessary to plan and complete this process. Research suggests that the attitudes of spouses upon entry into marriage ultimately determines marriage quality; if spouses enter marriage with the belief that divorce is the solution to any problems that arise, “their marriages are of significantly lower quality and thus often end in divorce.”⁸⁶

During a Louisiana covenant marriage, spouses owe to each other not only the explicit obligations of fidelity (not to share one’s sexual potential with another and to affirmatively submit to the reasonable sexual desires of the other),⁸⁷ support (to provide the other with not only the necessities of life but its conveniences),⁸⁸ and assistance (to cooperate in the tasks resulting from a life in common, including to help an ill or infirm spouse),⁸⁹ but also explicit legal obligations unique to covenant couples. Six special provisions borrowed from other countries add depth to the *covenant* for Louisiana covenant couples.⁹⁰ Not all of the provisions reflect the traditional role of law—to constrain or punish. Instead, some of these provisions simply teach and exhort, the so-called expressive function of law.⁹¹ The first provision directs that “spouses [in a covenant marriage] owe each other love and respect and they commit to a *community* of living. Each spouse should attend to the satisfaction of the other’s needs.”⁹² Essentially, in a covenant marriage, the law interprets the spouses’ commitment as one to a “community of living.”⁹³ Marriage, the foundation of the family, is described by the law as a community in

86. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 615 (citing Paul R. Amato & Stacy J. Rogers, *Do Attitudes Toward Divorce Affect Marital Quality?*, 20 J. FAM. ISSUES 69, 70 (1999)). Amato and Rogers stated that:

Although most Americans continue to value marriage, the belief that an unrewarding marriage should be jettisoned may lead some people to invest less time and energy in their marriages and make fewer attempts to resolve marital disagreements. In other words, a weak commitment to the general norm of life-long marriage may ultimately undermine people’s commitments to particular relationships.

Amato & Rogers, *supra*, at 70.

87. LA. CIV. CODE ANN. art. 98, cmt. (b) (1999).

88. *Id.* art. 98, cmt. (c).

89. *Id.*

90. See Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 622-24 (discussing the foreign sources for the new provisions enacted in 2004).

91. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992); see generally Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

92. LA. REV. STAT. ANN. § 9:294 (Supp. 2005) (emphasis added).

93. *Id.*

which each spouse is obligated to love and respect (deferential regard) the other and attend to the other's needs—such requirements strongly reflect notions of mutual giving and sacrificial love.

Second, a covenant marriage is a marriage of equal regard: each spouse has the right and the duty to manage the household.⁹⁴ Third, determining where the covenant couple shall live requires mutual consent, “according to [both] their requirements and those of *the family*.”⁹⁵ By treating the couple as a couple (“their requirements”) and the *family* as a unit, covenant marriage appears to reject the radical autonomy of the individual, hence what Cardinal Trujillo describes as the freedom of the *individual*. Fourth, covenant spouses, after collaboration, “shall make decisions relating to *family* life in the best interest of the *family*.”⁹⁶ Again, the family as a unit takes center stage, implying that more people are involved, not simply the couple themselves. The final requirement directly refers to those other people: “[t]he spouses are bound to maintain, to teach, and to educate their *children born of the marriage* in accordance with their capacities, natural inclinations, and aspirations, and shall prepare them for their future.”⁹⁷ Children, the other individually unique people, are welcomed in a covenant marriage, and the law affirms their centrality to a covenant marriage.

Not only does the law directly regulate covenant marriage by describing its content, it also indirectly governs the conduct of covenant couples toward each other and the family by prescribing “fault” grounds for divorce. One spouse can obtain a divorce or legal separation from the other spouse by proving that the other spouse committed adultery, was convicted of a felony, physically or sexually abused the plaintiff spouse or a child of the parties, or abandoned the spouse for a year.⁹⁸ Otherwise, to obtain a divorce, the spouses must live separate and apart for two years.⁹⁹ Thus, inferentially, the grounds for divorce speak to the appropriate conduct of the spouses during a covenant marriage: each spouse is to “yield to the other in sexual matters as long as the request [is] reasonable and to conduct himself so as not to bring dishonor and shame to the family formed

94. *Id.* § 9:296 (Supp. 2005) (“The management of the household shall be the right and the duty of both spouses.”).

95. *Id.* § 9:295 (Supp. 2005) (emphasis added).

96. *Id.* § 9:297 (Supp. 2005) (emphasis added).

97. *Id.* § 9:298 (Supp. 2005) (emphasis added).

98. *Id.* §§ 9:307A(1)-(4), B(1)-(4) (2000 & Supp. 2005).

99. *Id.* § 9:307A(5) (2000 & Supp. 2005).

by the marriage, which could occur by adulterous affairs, outrageous or felonious behavior, and constant intemperance."¹⁰⁰

With the enactment of the first covenant marriage statute in Louisiana in 1997, Steven L. Nock began an empirical study entitled *Can Louisiana's Covenant Marriage Law Solve America's Divorce Problem?*¹⁰¹ The five-year study yielded a wealth of information that "offers a glimpse of the effect of cultural changes on the understanding of marriage, as well as the self-selection effects of [the covenant marriage] experiment and the *sanctification* of marriage created by the choice of a more committed form of marriage."¹⁰² A Gallup poll conducted in 1998 to measure the attitudes of a random sample of citizens in Louisiana began the study.¹⁰³ Next, the research team identified six hundred newly married couples, fifty percent covenant and fifty percent standard married couples, and observed them over a five-year period.¹⁰⁴

In comparing covenant and standard couples, Nock and his research team identified women as the leaders in selecting covenant marriage, "particularly women with a vested interest in childbearing who apparently fe[lt] the need for the protection of stronger divorce laws."¹⁰⁵ Men led in selecting "standard" marriage.¹⁰⁶ Covenant

100. Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 294 (2002).

101. See Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, app. A at 629-30 (letter from Steven L. Nock to author (May 4, 2004)).

102. *Id.* at 606 (footnotes omitted).

103. *Id.* at 615-16.

Of the 527 respondents to the survey in Louisiana conducted in May 1998, eighty-one percent of respondents believed that premarital counseling was very or somewhat important compared to nineteen percent who believed that it was not very or not at all important; 92.3 percent of respondents believed that the couple agreeing in advance to seek counseling if marital difficulties arise during the marriage was very or somewhat important, whereas 7.7 percent believed that it was not very or not at all important. Not unexpectedly, the most controversial of the components of covenant marriage—restricted divorce—proved to be the least popular: Overall, [only] two-thirds (65.7 percent) agreed that longer waiting periods for a divorce are a good idea.

Id. at 616 (internal quotations and footnotes omitted).

104. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, app. A at 629-30 (letter from Nock to author (May 4, 2004)). The final data collected by the research team will be part of a nearly-completed book by Nock on covenant marriage.

105. Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 52 (2003) [hereinafter Spaht, *Revolution and Counter Revolution*] (citing e-mail from Maggie Gallagher to author (May 3, 2002) (on file with the author)).

106. Katherine Shaw Spaht, *What's Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists*, 47 LOY. L. REV. 709, 721 (2001) [hereinafter Spaht, *What's Become of Louisiana Covenant Marriage*] (quoting Siobhan Roberts, 'God Hates Divorce': *Covenant*

couples were more educated, held more traditional attitudes,¹⁰⁷ and expressed the conviction that their choice of a covenant marriage was very important.¹⁰⁸ The results also indicated that covenant couples [were] “far more likely to choose communication strategies that do not revolve around attacking or belittling their partner. They [were] less likely to respond to conflict with sarcasm or hostility, two communication strategies that [John] Gottman (1994) indicate[d] [were] particularly strongly associated with poor marriage outcomes.”¹⁰⁹

In follow-up surveys two years after marrying, covenant couples “described their overall marital quality as better than did their standard counterparts. [C]ovenant couples were more committed to their marriage . . . whereas, their standard counterparts had changed little in their level of commitment.”¹¹⁰ In addition, the follow-up surveys posited that:

With the growing centrality of marriage for covenant couples, they experienced higher levels of commitment . . . , higher levels of agreement between partners . . . , fewer worries about having children . . . , and *greater sharing of housework*. It is not too early . . . to conclude that covenant marriages are better marriages Steven Nock, the director of the study, expresses the view that internally, the [covenant] marriages are vastly better, and covenant couples agree about who does what, the fairness of things, etc. much more than standard couples.¹¹¹

Not surprisingly, during hearings in the 2004 legislative session in Louisiana for the bill proposing six new provisions concerning covenant marriage content,¹¹² Nock submitted commentary on each

Marriage Allows Couples to Safeguard Their Commitment, NAT'L POST, Dec. 30, 2000, available at <http://www.fact.on.ca/news/news0012/np00123a.htm>.

107. Laura Sanchez et al., *Is Covenant Marriage a Policy that Preaches to the Choir?: A Comparison of Covenant and Standard Married Newlywed Couples in Louisiana* 30 (Bowling Green St. U., Working Paper Series 02-06), available at http://www.bgsu.edu/organizations/cfdr/research/pdf/2002/2002_06.pdf.

108. Spaht, *Revolution and Counter Revolution*, *supra* note 105, at 53.

109. Sanchez et al., *supra* note 107, at 31.

110. Spaht, *Revolution and Counter Revolution*, *supra* note 105, at 54 (footnote and internal quotations omitted).

111. *Id.* (footnotes and internal quotations omitted).

112. LA. REV. STAT. ANN. §§ 9:293 to :298 (Supp. 2005).

new provision and the extent to which those provisions “reflect[ed] many of the findings from” his research.¹¹³

Covenant couples are participating in a new form of marriage “that reserves the traditional, conventional, and religious aspects of the traditional institution, but also resolves the various inequities often associated with gender in modern marriages.”¹¹⁴ In Nock’s words, “a central theme that discriminates between the two types of unions . . . [is] *institutionalization of the marriage*.”¹¹⁵ By institutionalization, Nock simply meant that the couple shares the view that

the marriage warrants consideration apart from the individualistic concerns of either partner. In regard to some matters, covenant couples appear to defer to the interests of their marriage even when the individual concerns of the partners may appear to conflict. *And this orientation to married life . . . helps resolve the customary problems faced by newly married couples in regard to fairness and equity.*¹¹⁶

By viewing marriage institutionally, covenant couples essentially “elevat[e] the normative (expected) model of marriage to prominence in the relationship.”¹¹⁷ One may, at this point, be pondering the following question:

What accounts for this institutional view? The centrality accorded religion by the couple and beliefs about the life of marriage independently of the individual. Two individuals do not easily make a strong marriage. Rather, it takes the presence of a set of guiding principles around which these two individuals orient their behaviors and thinking.¹¹⁸

Covenant couples, by their choice, seemingly offer themselves “collectively as witnesses to others about sacrificial love and its

113. See Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, app. A at 629 (letter from Nock to author (May 4, 2004)).

114. *Id.* at 621.

115. Steven L. Nock et al., *Intimate Equity: The Early Years of Covenant and Standard Marriages* 11 (Bowling Green St. U., Working Paper Series 03-04), available at http://www.bgsu.edu/organizations/cfdr/research/pdf/2003/2003_04.pdf.

116. *Id.* (emphasis added).

117. *Id.*

118. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 622 (footnotes and internal quotations omitted).

central role in binding male and female to each other and their offspring."¹¹⁹ Covenant couples, who already view marriage as a form of transcendent reality, reject post-modern marriage and its notion of a "loose union of two radically autonomous selves acting always in each person's own self-interest."¹²⁰ A covenant couple's vision of marriage, although not perfectly aligned with God's, more closely reflects His design. Why then are only two to three percent of Louisiana couples choosing a covenant marriage? What are the obstacles to increasing the number of covenant marriages and the "goods" they obviously deliver for the couple and society at large?

IV. PRACTICAL SOLUTIONS: ELIMINATING BUREAUCRATIC OBSTACLES AND ENCOURAGING ENTHUSIASM AMONG CHRISTIAN DENOMINATIONS, INCLUDING CATHOLICS

A. *Eliminating Bureaucratic Obstacles*

Nock and his research team also received a grant from the Smith Richardson Foundation to study the implementation of a Louisiana public policy change pertaining to the covenant marriage issue in policy.¹²¹ The state civil servants involved in the implementation of covenant marriage consist of staff at local Clerk of Court offices located in sixty-three of the sixty-four parishes; New Orleans residents must obtain a marriage license from the State Bureau of Vital Statistics.¹²²

The study reveals that the staff at these offices, who are responsible for issuing marriage licenses and required by statute to distribute a pamphlet on covenant marriage to each applicant, "have obstructed, rather than facilitated, the implementation of the legislation."¹²³ Using a confederate study as a vehicle, Nock and his team found that clerks offered the pamphlet information in only

119. Katherine Shaw Spaht, *A Proposal: Legal Re-Regulation of the Content of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 261 (2004).

120. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 628.

121. Spaht, *What's Become of Louisiana Covenant Marriage*, *supra* note 106, at 712-13. The research team studied seventeen of the sixty-four Louisiana parishes, selecting them "by probability proportionate to size, based on the number of marriages they registered in 1998." *Id.* at 723 (quoting Laura Sanchez et al., *The Implementation of Covenant Marriage in Louisiana*, 9 VA. J. SOC. POL'Y & L. 192, 203 (2001)).

122. *Id.* at 724-26 (noting the role of Clerk of Court staff in the covenant marriage process). See also Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 615-20 (discussing the results of Nock's study aimed at the Clerk of Court offices' implementation of the covenant marriage legislation).

123. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 616 (footnote omitted).

thirty-five percent of the parishes, while another forty-seven percent offered the information only when asked to produce it.¹²⁴ Furthermore, the team reported that most staff expressed negativity about covenant marriage:

In 53 percent of the parishes, clerks made pessimistic or derogatory comments. For example, when a confederate asked a clerk about covenant marriage, after being presented a marriage license with the option already checked “no,” a clerk in the background called out, “she won’t want one.” In another parish, a clerk told our confederate to “just put no” on the line. The clerks presupposed that the confederate would not want a covenant marriage because it is “a whole lot of paperwork” and that if she had really wanted one, she would have “known ahead of time.” In fact, the overwhelming sentiment was that applicants would have to know about the option before applying for the license. In almost all parishes, the office’s tasks were defined as helping knowledgeable couples fulfill the requirements, but not as serving as a source of education to the public about the availability of the option.¹²⁵

Staff in only twelve percent of the parishes gave accurate information if asked about the option, while in fifty-three percent of the parishes, the explanations were inaccurate or misleading.¹²⁶ In the remaining thirty-five percent, the staff gave “patently wrong information.”¹²⁷

After the confederate study was complete, Nock and fellow researchers interviewed the staff of selected clerks’ offices to get their personal opinions on covenant marriage. Most of those interviewed assumed that covenant marriage was a religious movement and expressed the view that only couples who learned about it from their pastor or priest would get one.¹²⁸ Many clerks ultimately expressed the view that the covenant marriage option was

“just a line we have to have on the form in case someone wants one.”
As one said, “I think that there was someone in the legislature that

124. Sanchez et al., *supra* note 121, at 206.

125. *Id.* at 206-07 (footnote omitted). In most offices, “the clerk simply took the verifying information from the applicant . . . and completed the marriage license form, checking the covenant option as ‘no’ without inquiry or comment.” *Id.* at 204.

126. *Id.* at 205 tbl.4.

127. *Id.* at 206.

128. *Id.* at 207 (footnote omitted).

had nothing else to do. . . . I don't think it's catching on. I think this is an idea that will just run its course and disappear."¹²⁹

At least two staff members surveyed opined that engaged couples reject covenant marriage because of the increased difficulty in getting a divorce.¹³⁰

It could be argued that the state of Louisiana is blameworthy to some extent because its civil servants do not approach the implementation of choice afforded Louisiana citizens with a desire to serve. On two separate occasions, I have been a speaker at a state-wide gathering of the staff members of the Clerk of Court offices, and my observation is that we cannot expect a more enthusiastic endorsement of covenant marriage from staff members. Yet, that does not entirely absolve the state of Louisiana from responsibility. The state government, if truly dedicated to reducing divorce or at least encouraging covenant marriage, would benefit from a mass public education campaign; without it, the growth of covenant marriage is doubtful.

In a forthcoming marriage handbook commissioned by the state of Louisiana using TANF (Temporary Assistance to Needy Families) funds, a section exists that explains and emphasizes the choice between a standard marriage and a covenant marriage, including the differing legal consequences. This extremely attractive and informative handbook, unfortunately, has yet to be printed and distributed to Clerk of Court offices, and no mass media public education efforts currently exist. The only new initiative by the state has been a consolidation and redrafting of the pamphlet published by the Attorney General's office as required by the Covenant Marriage Act.¹³¹ This new version, entitled *Some Things You Should Know Before You Get Married: A Brief Summary of the Louisiana Law on Community Property and Covenant Marriage*, devotes multiple pages to explaining covenant marriage law, community property law, and the purpose of covenant marriage.¹³² According to the pamphlet, the covenant marriage legislation was intended to strengthen

129. *Id.* (quoting Laura Sanchez et al., Marriage Matters Confederate Couple Marriage License Application Study (1999-2000) (on file with the author)).

130. *Id.* at 219. One interviewee said, "The couples tell us that when they are ready to divorce, they don't want the law telling them they can't"; the other added, "[b]ecause they don't want to be stuck. They say that they don't want to have to go through the hassle." *Id.*

131. LA. REV. STAT. ANN. § 9:237(A) (2000 & Supp. 2005).

132. CHARLES C. FOSTI, JR., LA. ATT'Y GEN., *SOME THINGS YOU SHOULD KNOW BEFORE YOU GET MARRIED: A BRIEF SUMMARY OF THE LOUISIANA LAW ON COMMUNITY PROPERTY AND COVENANT MARRIAGE* (2005) (on file with the *Ave Maria Law Review*).

marriage in light of the results of two decades of empirical data demonstrating the effect of a divorce culture on spouses and children.¹³³ That may be all that can realistically be expected from the state of Louisiana, especially considering its precarious financial condition in the wake of Hurricanes Katrina and Rita, as well as the lack of gubernatorial leadership on covenant marriage that the state of Arkansas enjoys. Yet, the state of Louisiana should not bear the principal responsibility for increasing the number of covenant marriages; that responsibility lies with Christian churches.

B. *Encouraging Unenthusiastic Christian Denominations*

If, as the staff members of the Clerk of Court offices believe, covenant marriage is a religious movement, then why are so few Christians choosing covenant marriage? In 1997, after the covenant marriage legislation enactment, the Louisiana Bishops of both the Episcopal and Methodist churches explicitly rejected "covenant marriage" because it would restore "more difficult" divorce law and devalue "standard" marriages performed in a church.¹³⁴ Until 1999, the Catholic Church refused to permit its priests to participate in the counseling required by the statute because the counselor was required by the statute to inform the couple of the grounds for divorce in a covenant marriage.¹³⁵ That objection was remedied by an amendment to the counseling statute,¹³⁶ which was publicly recognized by the Bishops' Committee as curing their objections. Southern Baptists, the second largest denomination in Louisiana after Catholics, make decisions on such matters individually, local church by local church. Even still, the organized Association of Southern Baptists has spotlighted the option in at least one of its national gatherings. Thus, according to the Clerks' staff, covenant marriage is a religious movement without followers. Christian couples are *not* choosing covenant marriage in significant numbers; only two to three percent of the newly married couples in Louisiana in any given year are covenant couples.¹³⁷

133. *Id.* at 10.

134. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 618.

135. *Id.*

136. LA. REV. STAT. ANN. § 9:273(A)(2)(a) (2000).

137. See Christina Nuckols, "Covenant Marriage" Measure Clears House, *THE VIRGINIAN-PILOT*, Feb. 5, 2003, at A1.

The ultimate success of covenant marriage and the protection that it offers depends upon the action of pastors, ministers, and priests. It is the clergy who are usually among the first to be informed of an engagement and pending nuptials, and they have a moral responsibility, at the very least, to inform couples marrying in their churches about the option of a covenant marriage—an option that more nearly conforms to God’s plan for marriage. Visiting the Clerk’s office for a marriage license often occurs too late to obtain the requisite counseling and execution of documents because a marriage license in Louisiana is valid for only thirty days.¹³⁸ If, as estimated, a majority of Louisiana couples marry in a house of worship, future empirical research should focus on the attitudes of the clergy toward covenant marriage. In the meantime, Christian denominations must do more to promote, if not require, covenant marriage in their congregations.

1. *Marriage Preparation: Secular and Bishops’ Initiative*

As part of any religious marriage preparation program, covenant marriage, in states with such legislation, should not simply be explained, it should be promoted. In Louisiana, the Catholic Bishops have approved a simple pamphlet explaining that the statutory covenant marriage is distinguishable from sacramental marriage as understood by the Catholic Church.¹³⁹ This pamphlet, drafted by the Bishops’ staff with the assistance of Maggie Gallagher, presumably is included in material distributed during Pre-Cana preparation for couples to be married in the Catholic Church. The Church, however, should do more. At least one priest who is well-versed in canon law has suggested that if such an option is available in a state like Louisiana and a Catholic couple does not choose it, then that marriage may be subject to annulment due to a lack of serious intention to commit to marriage.¹⁴⁰

2. *Emphasizing the Legal Obligation to Preserve Marriage and Church’s Role*

If Catholic couples are also covenant couples, they are obligated by law to take reasonable steps to preserve their marriage. This

138. LA. REV. STAT. ANN. § 9:235 (2000).

139. The pamphlet is on file with the author.

140. Personal conversation between author and Father David-Maria A. Jaeger, O.F.M. (Apr. 2004).

obligation, imposed by law only by virtue of the couple's agreement to do so in advance, reinforces the Catholic Church's teaching about the indissolubility of marriage and the availability and commitment of Catholic counseling as a form of compliance with that obligation. Furthermore, a covenant marriage statute, unlike the law in so many states today, permits the option of a legal separation, which serves to honor the indissolubility of marriage while offering a spouse a solution for an extremely bad marriage that threatens her safety by physical abuse, alcoholism, or serial adultery.

One must also remember that a covenant marriage in the three states that permit it does not *prohibit* divorce; it merely delays it. Those within the Church who fear promoting a legal option that *makes divorce more difficult* must remember that more difficult does not mean indissoluble. To that extent, the covenant marriage law falls short of God's plan for marriage; it is an imperfect instrument designed by men. The Church, through lay ministers or volunteers, needs to rededicate itself to preserving marriages. Christians, of all people, cannot act agnostic regarding divorce issues.

CONCLUSION

Covenant marriage laws capture the traditional ideal that marriage is more than just a piece of paper, more than just a transient private contract. The foundation of covenant marriage is a pledge of permanent sacrifice The formation of covenant marriage is a public and deliberative event—requiring a waiting period, and at least the consent of the couples' parents or guardians and the counseling of therapists or clerics, and by implication the communities whom those third parties represent. The dissolution of covenant marriage comes only upon betrayal of the fundamental goods of this institution—through adultery, abuse, desertion, or capital felony—or after a suitable period of careful deliberation.¹⁴¹

When comparing this description of a covenant marriage to Cardinal Trujillo's article on the major aspects of marriage and its goods, there is little doubt that the optional statutory covenant marriage more nearly approximates the Christian understanding of marriage than does a *contract* marriage.¹⁴² Yet, the resistance of the

141. Witte & Nichols, *supra* note 7, at 3-4.

142. *Id.* at 24 ("Covenant marriage laws thus go further than contract marriage laws in reflecting and protecting some of the higher dimensions of marriage.")

legal academy and the family law bar to any restoration of a more committed form of marriage is tenacious and should not be underestimated. Not only are covenant marriage statutes needed in every state, but it is also incumbent upon citizens, especially Christians, in Louisiana, Arkansas, and Arizona to embrace the covenant marriage option. All Christian premarital preparation programs in these three states should emphasize the choice of a more committed form of marriage and, more importantly, communicate the position that covenant marriage is the only acceptable choice for Christians. Christian denominations should facilitate the premarital counseling required for a covenant marriage and the execution of necessary documents, thus effectively overcoming the obstacles erected by state-level bureaucrats.

“Covenant marriage statutes serve a particularly valuable teaching function—instructing the community on the higher regard that the state has for marriage, instructing the couple of the higher rigor that marriage has for them, instructing religious communities that marriage is more than a mere contract.”¹⁴³

In a prayer offered by the former Archbishop Oscar Romero, he explains that “[t]his is what we are about”: planting seeds or watering those already planted, laying foundations for further development, the end result we understand we may never see, “but that is the difference between the master builder and the worker. We are workers, not master builders, ministers, not messiahs. We are prophets of a future not our own.”¹⁴⁴ Amen. I drafted the first covenant marriage statute that passed a state legislature for Representative Tony Perkins, now Director of the Family Research Council in Washington, D.C. We were sowers and workers, not

143. *Id.* Witte and Nichols continue:

A fuller legal response requires additional strategies of reform and engagement, particularly on the part of religious communities. The first step is for America’s religious communities to get their legal and theological houses on marriage and the family in order. Too many religious communities in America today, Christian churches notably among them, are losing the capacity to engage the hard legal, political, and social issues of our day with doctrinal rigor, moral clarity, and canonical authenticity. . . . [T]heir marital norms and habits have increasingly become simple variations on the cultural status quo.

American religious communities must think more seriously about restoring and reforming their own bodies of religious law on marriage, divorce, and sexuality, instead of simply acquiescing in state laws and culture.

Id. at 24-25.

144. Spaht, *Covenant Marriage Seven Years Later*, *supra* note 15, at 605 n.* (quoting Oscar Romero, *A Future Not Our Own*, (date unknown) (unpublished prayer), available at <http://www.simonbarrow.net/reflect3.html>).

master builders. We will probably not see the end result of this work. The future of covenant marriage as a means to renew and revitalize marriage, a means of reminding human beings about God's unimpeachable plan for marriage, lies in the hands of another generation of engaged couples and those leading religious denominations. May covenant marriage and those who participate as covenant couples receive God's blessings.