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Beyond *Baehr*:
Strengthening The Definition of Marriage

*Katherine Shaw Spaht*°

Words strain,
Crack and sometimes break, under the burden,
Under the tension, slip, slide, perish,
Decay with imprecision, will not stay in place,
Will not stay still. Shrieking voices
Scolding, mocking, or merely chattering,
Always assail them.

—from T.S. Eliot, *Burnt Norton*,
FOUR QUARTETS

I. INTRODUCTION

It is one of the curiosities of the strange age in which we live that the word "marriage" has lost much of its cultural meaning. The "shrieking voices" of America's most influential opinion-shapers, which relentlessly

° Copyright © 1998 by Katherine Shaw Spaht. Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center. This text was originally delivered in November, 1997 at *Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*, at the Catholic University of America, co-sponsored by the Columbus School of Law, Howard University School of Law, and the J. Reuben Clark School of Law at Brigham Young University. Additionally, the author drafted Louisiana's Covenant Marriage legislation.

The author wishes to express her gratitude to her husband of twenty-six years, Paul H. Spaht, with whom she is now married in a "Covenant Marriage" for his patience and support throughout the 1997 legislative session and its aftermath; to Representative Tony Perkins, the representative who authored the “Covenant Marriage” legislation and selected it from among many options as the most appropriate way to change divorce law; to Mr. Marshall Shaw, her brother and best friend who offered advice and editing assistance; to Ms. Candace Cenac, her research assistant who compiled two notebooks of state statutes and judicial opinions passed and rendered since *Baehr v. Miike* for the conference in Washington, D.C. and who prepared a memorandum on the effects of divorce on children that helped convince Louisiana legislators that changes had to be made in divorce law; to Mrs. Madeline Babin, who worked tirelessly to produce the final copy of the outline for the conference and this manuscript; and lastly, to the three law schools who sponsored the conference on marriage—Catholic University, Howard University, and Brigham Young University.
assail the traditional meaning of marriage, have had their effect in legal arenas as well as in the broader culture. The culture wars of the late twentieth century thus find a focus in the intensifying struggle over how to define the word “marriage” as a legal term of art.

Past generations did not necessarily require a legally binding definition of marriage, for people who are instructed in the tenets of Christian morality have an instinctive understanding of what the word means. The received model of Christian marriage is grounded in universal truths, natural orders, and enduring moral boundaries. As a unique institution, Christian marriage has traditionally been defined by three elements: 1) sexual complementarity, the “ordering” purpose of which is procreation; 2) mutual faithfulness; and 3) “the special bond of permanence conferred by God as a ‘sacrament,’ a gift of grace.”

The modern meaning of the word “marriage,” understood as a legal term of art, began to evolve away from this religiously grounded definition concurrently with the de-Christianization of the broader American culture. This evolution in meaning accelerated at the end of the 1960s, as federal judges began more actively to reshape the law of the family to accord with their own secularized ideals. It has now culminated in the current debate over same-sex marriage, which is frequently dominated by popular culture’s “shrieking voices.”

The evolution of the definition of marriage manifested in judicial opinions began with the United States Supreme Court’s 1967 opinion in *Loving v. Virginia* and culminated in *Baehr v. Miike*, a 1993 decision of the Hawaii Supreme Court. In *Loving v. Virginia* marriage begins as a traditionally understood relationship and progressively evolves into a vehicle for publicly expressed personal fulfillment. No doubt the evolution of the definition of marriage partially influenced the discovery of a constitutional right to intimate association of a lesbian couple recently recognized

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2. *Id.* at 31.
3. *Id.*
in *Shahar v. Bowers,* a decision ultimately vacated by a three-judge panel, then reversed by an *en banc* panel of the United States Court of Appeal.

Reacting to the specter of *Baehr*’s recognition of same-sex marriage, we “The People” through our state and federal representatives responded overwhelmingly and almost immediately by defining “marriage” in statutory terms as a union between one man and one woman. Yet, we “The People” ourselves bear responsibility for diminishing the definitional model of marriage and progressively diluting its meaning. Marriage in judicial opinions evolved from an institution into a personal right, an evolution condoned by “The People” who welcomed a far less restrictive and binding personal arrangement, freeing the individual from the oppression of a sacred relationship. Thus, do we “The People” indignant reap what we sow, all the while ignorant that we “The People” bear the responsibility.

To strengthen the definition of marriage as a unique institution and to restore its meaning, we “The People” must not only assure that marriage contains the defining element of sexual complementarity represented by the union of a man and a woman, but also that it contains the elements of mutual faithfulness, and more importantly, “the special bond of permanence.” Despite the fact that the traditional model of marriage has “retained a strong hold on the American cultural and legal imagination,” we “The People” abandoned marriage’s “special bond of permanence” first by permitting increasingly easier divorce. To strengthen the definition of marriage it is essential that we “The People” enact laws that make divorce more difficult. For it is only by promoting the defining element of marriage, permanence—which represents the ultimate self-sacrifice—that we “The People” can silence the “shrieking voices” that continue to assail the institution of marriage, as traditionally understood.

This paper will examine the crisis concerning the definition of marriage and its effect on marriage as a social institution in three steps. First, it will trace the evolution of the legal definition of marriage through the judicial opinions of the past thirty or so years. Second, it will examine the response of we “The People” to the crisis facing marriage as an institution. Third, it will propose a solution to the crisis through the use of “Covenant Marriage” which will act to restore permanence to marriage thereby returning it to its status as a social institution.

8. See infra notes 46-50.
10. *Id.* at 33.
II. THE EVOLUTION OF THE DEFINITION OF MARRIAGE IN JUDICIAL DECISIONS

In Loving v. Virginia\textsuperscript{11} the recognition of the right to marry as fundamental entailed a description of marriage as one of the "‘basic civil rights of man,’ fundamental to our very existence and survival."\textsuperscript{12} Later in the opinion, the court describes the freedom to marry as "one of the vital personal rights essential to the orderly pursuit of happiness by free men."\textsuperscript{13} A right described as essential to the existence and survival of mankind and essential to the orderly pursuit of happiness is entirely consistent with the traditional model of marriage. However, the focus on marriage as a personal right in the description in Loving transforms an institution of society into a personal right of the individual seeking to marry which allows them to be free of certain governmental restrictions on that right.

Considered as an institution, rather than merely a personal right, the definition of marriage focuses on the unit of husband and wife, committed to each other and forming the foundation of another institution, the family, which is essential for the training of children "to participate in the religious, civil and political life of society."\textsuperscript{14} Described as a personal right essential to the pursuit of happiness, however, the emphasis shifts to the individual and why he or she desires to marry. Thus, language probably not intended to affect drastically the traditional model of marriage becomes the seed for the description almost twenty years later in Turner v. Safley\textsuperscript{16} of the important attributes of marriage.

The United States Supreme Court, in Turner, decided that for incarcerated inmates certain important attributes of marriage remain, and those attributes are sufficient to create a constitutionally protected marital relationship "in the prison context."\textsuperscript{17} The attributes described as sufficient to constitute the core of the "right to marry" include: (1) "expressions of emotional support and public commitment,"\textsuperscript{18} a form of personal dedication; (2) "an exercise of religious faith,"\textsuperscript{19} giving the marriage a spiritual dimension; (3) "the expectation that marriage will be fully consum-
mated"; 20 and (4) "the receipt of government benefits." 21 Obviously, such a conception of marriage, or the marital relationship is predicated on the perspective of the individual person who seeks to achieve personal happiness from marriage. What remains of the traditional model of marriage is a hint of sexual complementarity conveyed by the word "consummated," but without reference to the ordering purpose of procreation. 22

The description of a marital relationship in Turner almost twenty years after Loving suggests much had happened in American society in the intervening years to reduce marriage to a personal right to be pursued by the individual with the intention of accomplishing, at least as articulated, selfish purposes. 23 By comparison, the new conception of marriage articulated in Turner bears little resemblance to the traditional model of marriage as a unique institution defined by: sexual complementarity for the purpose of procreation; mutual faithfulness; and the special bond of permanence conferred by God as a "sacrament." 24 The attributes of marriage described in the Turner case could be ascribed to a contract of donation to a church for the purpose of establishing a counseling center in your name. The evolution in meaning of marriage occurred despite the general warning not to expand constitutional rights by redefining them, a warning that came from the same United States Supreme Court in the same year Turner was decided. 25

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20. Id.
21. Id.

   No-fault divorce legislation was, from one perspective, merely part of a larger cultural change that expanded personal autonomy, not merely in marriage laws, but in the area of sexuality generally (and more broadly as well). It is surely not the sole cause of declining family stability."

   On the other hand, even if it is, to a considerable extent, an epiphenomenon of deeper cultural changes, once ensconced in the law, divorce becomes part of the "moral ecology" of our culture and shapes the attitudes and expectations of many citizens about marriage.

   Id.

   Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause . . . .

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... There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category, or rights deemed to be fundamental.

Id.
The evolving social conception of marriage articulated in United States Supreme Court opinions from an institution to the individual's right to pursue personal happiness led not illogically seven years later in *Baehr v. Miike* to a challenge by persons denied such a personal right by state statute. State statutes and judicial opinions, by virtue of the universal acceptance of the traditional understanding of the meaning of marriage, obviously denied such a personal right to persons of the same sex just as others are also denied the right to marry because they fall outside the traditional understanding of the meaning of marriage. Even though *Baehr v. Miike* ultimately concluded that the right was not "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sac-

Interestingly, the *Bowers* case had occasion to comment on marriage: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent." *Id.* at 191; See Richard F. Duncan, The Narrow and Shallow Bit of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman, 6 WM & MARY BILL OF RTS J. 147 (1997) (concluding that the *Bowers* case is unaffected by *Romer v. Evans*, 116 S. Ct. 1620 (1996)).

Naturally, the *Bowers* case has been the target of many scholarly critiques, especially as the debate about same-sex marriage has intensified. Nonetheless, the same caution about discovery of new fundamental rights, or the redefining of such rights, was repeated three years later in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). According to the Court, identifying a fundamental right, such as marriage, requires identifying "the most specific level at which [there is] a relevant tradition protecting the asserted right ...." *Id.* at 127-28, n.6.


27. 852 P.2d 44.

28. See, e.g., William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1427-28 (1993), for a sympathetic view of the extension of "marriage" to same-sex couples. Professor Eskridge's article is simply one example among many such articles. For a contrary view, see, e.g., RICHARD POSNER, SEX AND REASON 312 (1992); see also Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. ILL. L. REV. 601.

America's concentration on rights rather than responsibilities in their legal conversations is discussed in GLENDON, supra note 26.


30. For example polygamy is prohibited in all states so that a person who is already married cannot marry another. In addition, those related by blood, and in some cases adoption, within certain degrees, which vary from state to state, are prohibited from marrying.

31. 852 P.2d 44. The Hawaii Supreme Court vacated the lower court's order and remanded the case for a decision not inconsistent with their opinion. Although the Hawaii Supreme Court refused to extend the right of privacy to protect same-sex couples in their right to marry, the Court did hold that sex is a "suspect category" for purposes of equal protection analysis under Article I, § 5 of the Hawaii Constitution. The majority further held that HRS 572-1 was subject to "strict scrutiny" and presumed unconstitutional unless the State of Hawaii could show that there were compelling state interests to justify the sex-based classification and that the statute was narrowly drawn to avoid unnecessary infringement on the applicant's constitutional rights.

On remand, the First Circuit Court of Hawaii ruled that the state did not have a compelling interest in preventing same-sex couples from obtaining a marriage license. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, reprinted in 23 Fam. L. Rep. 2801 (Haw. Cir. Ct. 1996). For an excellent account of the political and legal history to this point, see Coolidge, supra note 1.

For a detailed account of the continuing litigation, see David Orgon Coolidge, in this symposium.
rificed,"4 the plaintiffs nonetheless succeeded in convincing a plurality of the Hawaii Supreme Court that the prohibition against same-sex marriage was "an example of sex discrimination"5 under the Hawaii state constitution.6 The reasoning of the plurality of the Hawaii Supreme Court relied in part upon the characterization of marriage as essentially a legal partnership created by the state to recognize couple relationships. As Coolidge notes: "[t]he practical effect of the plurality opinion is to define marriage wording to the view of two parties, rather than the people . . . . [T] It is no longer the people's choice. The 'evolving social order' is being defined and enacted into law by these justices."7 The weakened definition of marriage simply could not resist the incessant claims of individuals who hoped to obtain its personal benefits as a matter of constitutional right.

Not surprisingly then, three years later in 1996 the federal court of appeal in Shahar v. Bowers8 concluded somewhat ambiguously that the constitutionally protected right of intimate association includes a lesbian relationship with contours similar to marriage as currently defined in judicial opinions: "[t]hough the religious-based marriage in which Shahar participated was not marriage in a civil, legal sense it was intimate and highly personal in the sense of affection, commitment, and permanency and, as we have spelled out, it was inextricably entwined with Shahar's exercise of her religious beliefs."9 The opinion has been vacated, and reversed by an

32. 852 P.2d at 57.
33. Coolidge, supra note 1, at 19.
34. The Hawaii Constitution states: "No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." HAW. CONST., art. I, § 5 (1978).
35. Coolidge, supra note 1, at 27.
36. 70 F.3d 1218 (11th Cir. 1995).
37. "What Shahar claims is that she proposed to—and did—engage in a Jewish religious ceremony that is recognized as a marriage ceremony by the branch of Judaism [Reconstructionist Movement] to which she adheres; that this conferred upon her and her partner a religious-based status that is apart from and independent of civil marriage as provided by Georgia law . . . ." Id. at 1222.
38. 70 F.3d 1218, 1225 (11th Cir. 1995) (emphasis added).

Judge Kravitch, concurring in part and dissenting in part, reviewed the jurisprudence recognizing a constitutionally protected right to intimate association:

Intimate associations involve 'choices to enter into and maintain certain intimate human relationship' . . . . In Roberts, the Supreme Court enumerated several characteristics typical of relationships entitled to constitutional protection as intimate associations: 'relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and exclusion from others in critical aspects of the relationship.' Family relationships, which by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life, 'exemplify'—but do not exhaust—this category of protected associations . . . . Kenneth L. Karst, "The Freedom of Intimate Association," 89 Yale L. J. 624, 629-37 (1980) (defining intimate associations as 'a close and familiar personal relationship with another that is in some significant way COMPARABLE to a marriage or family relationship')
en banc panel, and certiorari was denied by the United States Supreme Court. Without deciding whether the plaintiff had a constitutional right to intimate association, the majority opinion contained the following statement: "Given the culture and traditions of the nation, considerable doubt exists that Plaintiff has a constitutionally protected right to be 'married' to another woman." The question, of course is whether the courts are correct in articulating the current social conception of "marriage." 39

III. REACTION OF WE "THE PEOPLE" THROUGH FEDERAL AND STATE LEGISLATION

As David Coolidge has observed the traditional model of marriage has retained a strong hold on the American cultural and legal imagination. 40 Thus, the reaction of we "The People" has generally been similar to the response contained in We Hold These Truths: A Statement of Christian Conscience and Citizenship, signed by numerous American religious leaders and moral commentators: "[w]e are confronted by a radical redefinition

(emphasis added). A relationship that fits these descriptions is no less entitled to constitutional protection just because it is between individuals of the same sex.

. . . .

. . . Even if Shahar and Greenfield were not religious, I would still find that their relationship involves the type of personal bond that characterizes a First Amendment intimate association... Where intimacy and personal identity are so closely intertwined as in the relationship between Shahar and Greenfield, the core values of the intimate association right are at stake.

Id. at 1128, 29 (emphasis added).

Obviously, Judge Kravitch, with the help of a 1980 Yale Law Journal article, draws the comparison between marriage and the relationship involved in Shahar v. Bowers, the defining characteristic of which is personal bond.


The Court declined to decide whether Plaintiff had a constitutional right to intimate association, stating:

So, today we do stop short of making a final decision about such claimed rights. Instead, we assume (for the sake of argument only) that Plaintiff has these rights; but we conclude that the Attorney General's act — as an employer — was still lawful.

Id.

In regard to the issue of Plaintiff's being "married to another woman," Judge Godbold reasons that marriage is a word with no necessary meaning:

In a common law/statutory/traditional sense "marriage" describes a ceremony as a relationship or status between two persons as defined by common law or statute, involving two heterosexual persons, one male and one female. But as this case tells us, that is not the only and ineluctable meaning.”

Id. at 1121.

40. Coolidge, supra note 1, at 33.
of marriage as courts declare marriage to be not a covenanted commitment ordered to the great goods of spousal unity and procreation but a mere contract between autonomous individuals for whatever ends they happened to seek.\footnote{41}

The immediate and overwhelming response of we \textit{The People}\footnote{42} through our representatives at both the federal and state level has been to make clear our understanding of the uniqueness of marriage as inherently designed for the sexual complementarity between a man and a woman.\footnote{43} Even the Hawaii Legislature in 1994 expressly found that \textit{“heterosexuality is intrinsic to marriage because the institution of marriage is \textquoteleftintended to foster and protect the propagation of the human race.’\textquoteright\footnote{44}} The Defense of Marriage Act passed by Congress defines marriage as \textit{“only a legal union between one man and one woman as husband and wife.”}\footnote{45} Likewise, the legislative responses to the \textit{Baehr} decision in twenty-nine states\footnote{46} and

\begin{itemize}
\item \footnote{41. In \textit{First Things}, Oct. 1997, at 51, 53.}
\item \footnote{42. See Comment, \textit{The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage}, 34 \textit{Hous. L. Rev.} 425, 429 n. 25 (1997).}
\item \footnote{43. See infra notes 46-50.}
\item \footnote{45. \textit{1 USC} § 7 (Supp. 1996). The section Act defines \textquoteleft‘marriage’\textquoteright and \textquoteleft‘spouses’\textquoteright as follows:
In determining the meaning of any Act of Congress or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word \textquoteleft‘marriage’\textquoteright means only a legal union between one man and one woman as husband and wife, and the word \textquoteleft‘spouse’\textquoteright refers only to a person of the opposite sex who is a husband or a wife.
\textit{Id.}
Another section of the Act, \textit{28 USC} § 1738 (C) provides:
No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

pending legislation in another twelve states reconfirm "The People['s]" conception of marriage as an institution defined by sexual complementarity. When four other states are included because of statutory, judicial, or doctrinal definitions of marriage as a relationship between a man and a woman prior to the Baehr decision, the overwhelming response of "The People" affirms the traditional model of marriage as between a man and a woman.

IV. THE RESPONSIBILITY WE "THE PEOPLE" BEAR AND A POTENTIAL CURE: LOUISIANA'S COVENANT MARRIAGE LAW

As mentioned previously, we "The People" bear some responsibility for the diminished stature of marriage. We have permitted an increasing dissonance between the marriage of our cultural imagination and the marriage we "The People" have endorsed, or at the least, come to accept:


48. CAL. PAM. CODE. § 301(West 1992).


50. See N.Y DOM. REL. Ch. 14, art. 2, General Commentary (1988).

51. "[M]ost advocates of same-sex marriage fail to make the case for AIDS prevention because they are generally careful not to make the case for marriage, but simply for the RIGHT to marriage . . . . Like the noted advocate Andrew Sullivan, Mr. Rotello assumes that same-sex marriage would have to be marriage with infidelity loopholes built in. Moreover, settling down 'for significant periods of time' is something less than a 'solid foundation' for the rearing of children. In this mimicry of marriage, however, the homosexual advocates may simply be reflecting the pattern of a divorce-prone culture." Richard John Neuhaus, The Public Square, FIRST THINGS, (Nov. 1997), at 78.

Richard John Neuhaus writes:

Here is a different take on the much discussed question of "same-sex marriage." Julie Loesch Wiley writes: 'Some Christians say that gay marriage is impossible, but I would strongly disagree. I would say that gay marriage is so typical for everybody in this society—so matter what their sexual orientation—that it takes a heroic effort for any couple to eat into anything but a "gay marriage."' Her point is that what many people mean by marriage today is something that homosexuals can undertake as well as anyone else. Ms. Wiley writes, 'If you say that marriage need not be sexually exclusive, nor irrevocable, nor devoted to child-rearing, nor a sacred sign of anything beyond the participants' mutual self-interest—then you have taken away all its essential parts but, obscurely, retained the same label.' The conclusion: 'From a Christian point of view it is, of course, impossible for two men or for two women to join each other in holy matrimony. But from a secular, civil point of view, it does make a kind of weird sense that gays would want in on gay marriage. Because from a secular, civil point of view,
marriage, the hallmark of which is personal autonomy, a commitment with loopholes galore.\textsuperscript{52} Far from that traditional model of marriage, we "The People" first unceremoniously dumped the notion of permanent, or almost permanent.

"The free terminability of marriage changes the definition of marriage, just as there is an essential difference between a contract terminable at will by either party and a contract terminable only after ten years. Such laws promote a certain image of marriage, with terminability as one of its features."\textsuperscript{53}

In \textit{The Last Decade(s) of the American Family Law}, Lee E. Teitelbaum explains the shift in marriage policy that occurred from the 1950s to the 1990s:

Until the 1950s or 1960s, the connection between family stability and social welfare was taken for granted. The interests of society were understood to require that spouses remain together except in cases of proven serious physical or mental injury . . . . Current policy regarding marital dissolution is fundamentally different . . . . [F]ormal policy no longer requires continuation of marriages that have become unsatisfactory to at least one of the spouses . . . . [C]urrent policy approves their termination . . . . The effect of this new approach . . . . is to transfer authority for deciding on the duration of marriage from the law, which once sharply limited the occasion for divorce, to individual spouses.\textsuperscript{54}

To recapture the meaning of marriage with all of its traditional elements, or even if we adopt the social pluralist model emphasizing marriage as a "community,"\textsuperscript{55} we "The People" must restore the notion of the per-

\textit{In the Public Square, First Things, Dec. 1997, at 76.}
\textsuperscript{52}. Peter Kramer, Divorce and Our National Values, N.Y. Times, August 29, 1997, at A23 (Peter Kramer is clinical professor of psychiatry at Brown University).
\textsuperscript{53}. Wolfe, \textit{supra} note 23, at 37, 39. Wolfe continued:
[\textit{w}hat this makes clear is that liberal society is not neutral on the autonomous life (as 'autonomy' is conceived by contemporary liberals). Traditional communities—such as groups of Catho\'liques—within the larger political community that deny the absolute value of the autonomous life are put at a distinct disadvantage, as things stand, by American law. They are not permitted to make legally enforceable contracts binding themselves to abide by what they take to be the moral law. From one perspective, one might say that they are 'forced to be free.'
\textit{Id.} at 39.
\textsuperscript{55}. In his article \textit{Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage.} 38 S.
manence of marriage. By restoring the notion of permanency, we assure that the man and woman who marry make "total commitments, give fully of themselves, [and] nourish intimacy . . . ." 56 It is not enough to simply add to the definition of marriage, "intended for life." 57 When Steve Forbes writes, "Reinforce the concept that marriage is a legally binding contract . . . ." 58 surely his view reflects the fact that the concern over the impermanence of marriage has reached our collective conscience.

Citizens of the State of Louisiana have begun the process of restoring more permanence to marriage with the enactment of "Covenant Marriage" 59 legislation that took effect on August 15, 1997. The legislation permits spouses to choose a more binding, more permanent marriage 60 by

Tex. L. Rev. 1, 52 (1997), David Orgon Coolidge proposes a "transmodern" model of marriage consistent with the social pluralist view of marriage that incorporates the following dimensions, "but frames them in the context of total sexual community . . . . The four central elements of marriage as a total sexual community might be described as follows:

Consummation: a bodily union which is open to life (structural dimension);
Companionship: a relationship of mutuality (the social dimension);
Consent: a choice to marry a particular individual (the subjective dimension);
Covenant: a vow of total commitment (the spiritual dimension).

Understood this way, entering into marriage is a moral act that embodies substantive premises. Coolidge, supra note 1, at 52.

From these dimensions, Coolidge derives the following principles for the governance of the community of marriage by the most basic institution, marriage:

Marriage should be male-female (structural);
Marriage should be monogamous (social);
Marriage should be exclusive (subjective);
Marriage should be permanent (spiritual).

Id. at 53.

56 Id.
57 This suggestion made by David Coolidge is an improvement over current definitions of marriage, especially if coupled with required pre-marital counseling so that the couple knew what society, the larger community, expected of their union. I believe that more is required. The larger community through law needs to impose practical mechanisms to assure that the couple adheres to the commitment that marriage is intended for life. Supra note 1, at 58.

58 Steve Forbes, The Moral Basis of a Free Society, POL’Y REV., Nov.-Dec. 1997, at 21, 28. Forbes continued, "[m]ost Americans still marry in places of worship, acknowledging the sacred nature of the vows they make to one another. To them, of course, marriage is much more than a legal contract, but it is certainly not LESS than one." Id.

60 On the issue of permanence in marriage Christopher Wolfe argued:

My contention, however, is that the law is not neutral. In treating marriage as a contract revocable at the will of either party, the law adopts one of the competing views of marriage. It does not permit people to really bind themselves to a permanent and exclusive marriage, by reinforcing the personal commitment with the force of the law.

Wolfe, supra note 23, at 38.

Interestingly, "Covenant Marriage" may have come at an opportune moment in history. In an essay in TIME MAGAZINE Lance Morrow writes:

But off in a range of the male psyche audible only to guys and dogs, there vibrated the sneaking thought that the fugitive groom—however big a jerk, nay, slimeball—had made good an escape that men, in the yet undomesticated zones of their hearts, always applauded. Something in every man abhors a wedding. Not for nothing are such ceremonies performed by authority—and—punishment figures in black—clergy, judges. And as a guy
civic covenant and encourages the participation of the Church, an institution which possesses moral authority and is uniquely qualified to help preserve marriage. The Church, an institution of civil society or a "community," participates in preserving marriage prior to its celebration through mandatory pre-marital counseling about the purpose of marriage, its seriousness, and the engaged couple's intent that their marriage be lifelong.

contemplates the $125,000 trap, his premature hanging, with rosebuds flown in from France, the something in that man's mind cheers a miracle of last-minute escape—even if it is an ignominious miracle. Huck has lit out for the territory."


A. A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.

B. A man and woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license, as provided in R.S. 9:224(c), and executing a declaration of intent to contract a covenant marriage, as provided in R.S. 9:273. The application for a marriage license and the declaration of intent shall be filed with the official who issues the marriage license.


An affidavit by the parties that they have received premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor, which counseling shall include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board.


63. These mediating structures or "communities" that mediate between the individual and the State or the market need nourishing and have long been the concern of communitarians generally, such as Mary Ann Glendon of Harvard University Law School. The family is the first community a human being knows so it is of ultimate importance. Coolidge, supra note 1, at 46. See SEEDBEDS OF CIVIC VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon and David Blankenhorn eds., 1995) (hereinafter referred to as Seedbeds).

64. Coolidge, supra note 1, at 46. Concerning the lifetime nature of marriage Christopher Wolfe has written:

... some people might want to have that unbreakable, legally enforceable bond for themselves, on various grounds. It would provide very strong incentives for each person to make his or her own initial decision to marry carefully and reassure each person about the seriousness with which his or her perspective spouse makes that decision. It would provide similar incentives for each of them to exert the maximum effort to make the marriage work, and again, reassure each one that his or her spouse has the same incentives. This could be viewed as one 'strategy' for maximizing the likelihood of a successful marriage.

Wolfe, supra note 23, at 38.
The content of the counseling purposefully is not specified beyond requiring only a discussion of the seriousness of marriage and the mutual intention of the spouses that the marriage be lifelong. To have been more specific concerning the content of the counseling would have been too intrusive into religion’s appropriate role in encouraging and preserving marriage. The legislation sought cooperation and assistance, not coercion. The content of the counseling need not be specified in detail, as the legislation seeks to provide a secular alternative that does not require religious participation. The declaration of intent signed by the prospective spouses after the counseling restores integrity to the dedicating promise itself; for what we say and mean shapes the nature and destiny of the marriage.

65. At least one Louisiana denomination failed to see the distinction. The Bishop Dan E. Solomon of the Methodist Church in Louisiana issued the following statement on June 27, 1997, four days after the Covenant Marriage legislation passed:

In contrast to other religious leaders in the state, Bishop Dan E. Solomon, the highest ranking official in the Louisiana Conference of the United Methodist Church, today announced he views Louisiana’s covenant marriage license as defined in House Bill No. 756, which offers Louisiana residents a second option to the existing marriage license, as “unnecessary,” “confusing” and “intrusive.”

“The church’s covenant marriage is sufficient for all seasons and circumstances of marriage,” Solomon stated at his office at the United Methodist Conference Headquarters in downtown Baton Rouge. “For the state to develop a covenant marriage license utilizing the language of the church’s ceremony is to imply that persons will be more faithful to their vows if the state so requires than if their religious faith so requires.

“Regardless of the type of license obtained, for Christians, the marriage covenant entered into at the time of the marriage ceremony is the same for all person,” he continued. “There are no levels of commitment or range of choices for couples married in a United Methodist ceremony; there is one ceremony, and thereby one covenant, applicable to all. Thus, for United Methodists, the covenant marriage license is redundant.”

The Bishop explained, “covenant is the intent and purpose of the church’s marriage ceremony while the license is the state’s authorization for persons to enter into a legally binding relationship.

“The United Methodist marriage ceremony already is and always will be clearly focused on a life-long commitment. The language of the ceremony includes, ‘forsaking all others,’ and ‘being faithful as long as you both shall live,’ ” Solomon said. “Also, the Discipline of the United Methodist Church (the law of the church) requires United Methodist clergy to engage in due counsel with the parties involved prior to marriage.”


An affidavit by the parties that they have received premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor, which counseling shall include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board.

Marriage effectively makes each spouse legally accountable for the promise he or she made.

Covenant Marriage did not originate as an idea unique to the state of Louisiana. In 1990, Representative Daniel Webster of Florida introduced a Covenant Marriage bill that was never acted upon by the Florida legislature. Professor Margaret Brinig used the term covenant to describe marriage in a book review she wrote. Professor Amitai Etzioni suggested the possibility of "super-vows" in an article he wrote in Time Magazine. Professor Christopher Wolfe proposed the possibility of an even more binding

abjures modern American marriage vows because they reflect a "loving relationship" of undetermined duration created of the couple, by the couple and for the couple. He makes the point in his article that the marriage vow is deeply connected to the marriage relationship.

68. H.R. 1585, Reg. Sess. (Fla. 1990) provides:

Covenant marriage.—There is created in the state a union between man and woman to be known as 'covenant marriage.' In order to be eligible to enter into a covenant marriage, each party shall make a declaration of intent to do so upon application for a marriage license. The declaration of intent shall contain the following:

1. Written permission of both parents of both parties, unless deceased at the time of the application, or unless extraordinary circumstances render written permission untenable.

2. Presentation of proof that both parties have attended premarital counseling by a clergymen or marriage counselor, which premarital counseling included a discussion of the seriousness of covenant marriage.

3. Signatures of both parties on notarized documents which state: 'I, ..., do hereby declare my intent to enter into Covenant Marriage. I do so with the full understanding that a Covenant Marriage may not be dissolved except by reason of adultery. I have attended premarital counseling in good faith and understand my responsibilities to the marriage. I promise to seek counsel in times of trouble. I believe that I have chosen my life-mate wisely and have disclosed to him or her all facts that may adversely affect his or her decision to enter into this covenant with me.'

6131. Dissolution of covenant marriage. Notwithstanding any provision of this chapter to the contrary, a covenant marriage may not be dissolved except by reason of adultery. A divorce may be granted on grounds of adultery if the defendant has been guilty of adultery, but if it appears that the adultery complained of was occasioned by collusion of the parties with the intent to procure a divorce, or if it appears that both parties have been guilty of adultery, a divorce shall not be granted.


70. Amitai Etzioni, How to Make Marriage Matter, TIME, Sept. 6, 1993, at 76. The Communitarian Network has now produced a booklet entitled OPPORTUNING VIRTUE: THE LESSONS TO BE LEARNED FROM LOUISIANA'S COVENANT MARRIAGE LAW: A COMMUNITARIAN REPORT (1997). It was prepared by Amitai Etzioni and Peter Rubin. The publication consists essentially of William Galston, Making Divorce Harder is Better, WASH. POST, Aug. 10, 1997, at C3; Amitai Etzioni, Marriage With No Easy Outs, N.Y. TIMES, Aug. 13, 1997; Amitai Etzioni, Give Couples the Tools to Make Marriage Last, USA TODAY, Nov. 18, 1996, at 25A; Elizabeth S. Scott, Rational Decision-Making About Marriage and Divorce, 76 VA. L. REV. 9 (1990). In the introduction to the publication, the authors also refer to an article by Margaret Brinig and Steven M. Crafton, Marriage and Opportunism, 23 J. LEGAL STUDIES 869 (1994).

See also William A. Galston, PROGRESSIVE FAMILY POLICY FOR THE TWENTY-FIRST CENTURY, BUILDING THE BRIDGE 149, 156.
Covenant Marriage: one that could not be dissolved for any reason, a position consistent with Christian doctrine.  

The two practical mechanisms of "Covenant" Marriage that accomplish a MORE permanent union are (1) the agreement of the parties to take all reasonable steps to preserve their marriage if difficulties arise, including marital counseling and (2) limited grounds for divorce. The Cove-

71. Wolfe, supra notes 23, at 37-41. Concerning this Wolfe wrote:

The proposal is this: let us amend state marriage laws so as to make it possible for a man and woman to choose freely to enter into an indissoluble marriage. Note: possible, not mandatory . . . . As the current legal order stands, all American marriages can be dissolved by divorce decrees.

Yet some people might want to have that unbreakable, legally enforceable bond for themselves, on various grounds. [see note 63 for his explanation of its benefits.] This could be viewed as one 'strategy' for maximizing the likelihood of a successful marriage. Liberal divorce law not only rejects this strategy as a general one for all marriages—it rules it out even for those who would freely choose it.

Id. at 37, 38.

For the citation to Christian authority that divorce is impermissible, see Mark 10:2-12.


A declaration of intent to contract a covenant marriage shall contain all of the following: A recitation by the parties to the following effect:

'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.


Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following:

(1) The other spouse has committed adultery.

(2) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.

(3) The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.

(4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.

(5) The spouses have been living separate and apart continuously without reconciliation for a period of two years.

(6) (a) The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.

(b) If there is a minor child or children of the marriage, the spouses have been
living separate and apart continuously without reconciliation for a period of one year and six months from the date the judgment of separation from bed and board was signed; however, if abuse of a child of the marriage or a child of one of the spouses is the basis for which the judgment of separation from bed and board was obtained, then a judgment of divorce may be obtained if the spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.


Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of separation from bed and board only upon proof of any of the following:

1. The other spouse has committed adultery.
2. The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.
3. The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.
4. The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.
5. The spouses have been living separate and apart continuously without reconciliation for a period of two years.
6. On account of habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable.


Separation from bed and board in a covenant marriage does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their conjugal cohabitation, and to the common concerns, which existed between them.

(2) Spouses who are judicially separated from bed and board in a covenant marriage shall retain that status until either reconciliation or divorce.

B. (1) The judgment of separation from bed and board carries with it the separation of goods and effects and is retroactive to the date on which the original petition was filed in the action in which the judgment is rendered.


Notwithstanding any other law to the contrary, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following:

1. The other spouse has committed adultery.
2. The other spouse has abandoned the matrimonial domicile for one year and constantly refuses to return.
3. The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed; or if there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for one year and six months from the date the judgment of separation from bed and board was signed.
abuse of a spouse or a child of one of the spouses. Obviously, the bill was amended significantly during the legislative process resulting in six grounds for divorce and six grounds for legal separation. Despite the increase in number of grounds for legal separation and divorce, the no-fault ground for divorce requires that the spouses live separate and apart for two years, rather than six months in the case of a standard marriage. The more limited grounds for divorce in a Covenant Marriage represent the first time in almost two hundred years that the general trend in the United States, as well as most Western societies, to make divorce easier has been reversed. Furthermore, the legislation restores broader notions

Notwithstanding any other law to the contrary, a spouse to a covenant marriage may obtain a judgment of separation from bed and board only upon proof that either:

1. the other spouse has physically abused the spouse who is seeking a separation from bed and board.
2. the other spouse has physically or sexually abused a child of the marriage or a child of one of the spouses.

78. These six grounds are adultery, commission of a felony and a sentence to death or imprisonment at hard labor, abandonment for one year, physical or sexual abuse of the plaintiff spouse or a child of the spouses, living separate and apart for two years, or living separate and apart for one year or one year and six months after the judgment of separation from bed and board. 1997 La. Sess. Law Serv. 1380, 9:307 A. (as added by 1997 La. Acts. No. 1380, 4). See supra note 73 for the text.

79. These six grounds are: adultery, commission of a felony and a sentence to death or imprisonment at hard labor, abandonment for one year, physical or sexual abuse of the plaintiff spouse or a child of the spouses, living separate and apart for two years, or habitual intemperance, excesses, cruel treatment, or outrages of the other spouse. 1997 La. Sess. Law Serv. 1380 9:307 B. (as added by 1997 La. Acts. No. 1380, 4). See supra note 74 for text (emphasis added).


81. LA. Civ. CODE art. 102 (as amended by 1997 La. Acts. No. 1380, 1) provides:
Except in the case of a covenant marriage, a divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously for at least one hundred eighty days prior to the filing of the rule to show cause.

of objective morality to the relationship of marriage,\textsuperscript{83} for example, for the first time under Louisiana law, but only in a Covenant Marriage, domestic violence is a ground for divorce.\textsuperscript{84}

Had the Covenant Marriage legislation not miraculously passed, the author could have further refined the legislation to: (1) make abundantly clear that the pre-divorce counseling agreed to by the couple emphasize reconciliation and preserving the marriage, rather than counseling or therapy concerned only with the individual adult,\textsuperscript{85} and (2) sever the explanation of the different grounds for divorce in a Covenant Marriage as compared to a standard marriage from the pre-marital counseling so that denominations\textsuperscript{86} concerned with the teaching of the Church about indissolu-


\textsuperscript{84} 1997 La. Sess. Law Serv. 1380, 9:307 A(4) (as added by 1997 La. Acts, No. 1380, 4) requires that "[t]he other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses."


\textsuperscript{86} The Catholic Bishops of Louisiana issued the following Pastoral Statement on October 29, 1997:

The Legislature and the citizens of the State of Louisiana have manifested a commendable concern for the permanence and stability of marriage by enacting the Covenant Marriage Act. Strong and stable marriages are crucial for children and a healthy society.

The Church's understanding of covenant is a broader and deeper reality moving beyond the meaning contained in this new legislation. The Catholic Church considers a marriage validly entered into to be permanent and, if between Christians, a sacrament. As such, the Church requires significantly more than the State in preparation for and the living of a marriage.

The Catholic Dioceses of Louisiana will continue to offer the marriage preparation programs and teaching on the understanding of marriage to those who present themselves
bility of marriage\textsuperscript{87} can fully embrace the concept without compromising for marriage in the Church. The Louisiana Catholic Dioceses, over the last twenty years, have developed a common policy requiring premarital preparation and counselling.

Because there are elements in this particular Covenant Marriage Act which require those preparing couples for marriage to offer instruction on divorce contrary to the Church's teaching, Catholic ministers preparing couples for marriage will concentrate their focus on the Church's responsibility and teaching. The task to offer guidance with regard to the specifics of the Covenant Marriage Act will then be left to those who render this service in the name of the State. It would be inappropriate for those ministering to couples preparing for marriage in the Catholic Church to confuse or obscure the integrity of the Church's teaching and discipline by also providing this service, contradictory to Church teaching and mandated by this state law.

For these reasons, the Catholic Bishops of the State of Louisiana will ask our parishes to focus on the marriage preparation proper to the Church, support the aims of the Covenant Marriage Act but relegate to state sanctioned counsellors the role of handling the state required preparation for those who choose to use the Covenant Marriage license.

Diocesan Procedures for Marriage Preparation

1. Catholic clergy are to accept either the standard or the covenant civil marriage license for the celebration of weddings. It should be noted that should a couple seeking marriage in the Catholic Church choose the non-covenant marriage license, this, according to the teaching of Christ and His Church, can in no way be interpreted as diminishing their total commitment to a permanent union.

2. The Catholic policy of marriage preparation is not changed. Catholic ministers* are to continue the marriage preparation program currently being used. Regardless of the choice of civil marriage license, couples are to participate in the usual Catholic marriage preparation.

3. If a couple wishes to obtain a civil covenant marriage license, it will be necessary for the couple to approach a marriage counsellor acceptable to the State to fulfill the state regulations for this marriage license, namely, one who can instruct them about the divorce laws of the State and sign the affidavit that this has been done. Catholic ministers may not give pre-marital instructions on divorce laws and therefore may not sign such an affidavit. Catholic ministers should not refer a couple to specific individual marriage counsellors in order to preserve the distinction between these two roles and to avoid potential legal entanglements.

*The term "Catholic ministers" in these norms includes all clergy and any persons offering pre-marital instruction in the name of the Church.

The Catholic Bishops are continuing discussion of the legislation on Covenant Marriage for the purpose of considering curative legislation. Their first meeting was held on November 25, 1997, without definitive action. The next legislative session during which amendments could be offered to sever the divorce information from the pre-marital counseling would be 1999.

87. Mark 10:2-12:

The Pharisees came and asked Him, 'is it lawful for a man to divorce his wife?' testing Him. And He answered and said to them, 'What did Moses command you?' They said, 'Moses permitted a man to write a certificate of divorce, and to dismiss her.' And Jesus answered and said to them, 'Because of the hardness of your heart he wrote you this precept. But from the beginning of the creation, God made them male and female.' For this reason a man shall leave his father and mother and be joined to his wife. "And the two shall become one flesh" so then they are no longer two, but one flesh. Therefore, what God has joined together, let not man separate.' In the house His disciples also asked Him again about the same matter. So He said to them, 'Whoever divorces his wife and marries another commits adultery against her. And if a woman divorces her husband and marries another, she commits adultery.'

Another alternative to severing the pre-marital counseling from information about divorce would be to provide an alternative legislatively, a third option, that corresponds to the teaching of the
the integrity of its pre-marital counseling. By virtue of the content of the legislation, a Covenant Marriage requires that each heart be reached and each couple convinced that marriage is an institution that is intended to be lifelong for the ordering purpose of procreation. Without the unanimous support of the leaders of all religious denominations and with the legal

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Churc—a “Covenant Marriage” that is indissoluble. Christopher Wolfe makes just such a suggestion. See supra note 71 and accompanying text.

88. In addition to the Pastoral Statement by the Louisiana Catholic Bishops noted earlier, the Louisiana Baptist Convention (Southern Baptist) passed the following resolution on November 17, 1997:

WHEREAS, In the regular session of the 1997 Louisiana Legislature, there was passed what some have labeled the Covenant Marriage Act; and

WHEREAS, The so-called no-fault divorce laws in Louisiana and throughout the United States, generally are considered by many to be a miserable failure; and

WHEREAS, There already exists misinformation and in some instances a lack of information surrounding this issue; and

WHEREAS, Louisiana Baptists have historically supported the position that God's Word clearly indicates that marriage originated in the mind of Almighty God and is defined by Him as a commitment uniting a man and a woman into a holy relationship meant to last a lifetime and not be broken except in limited circumstances; and

WHEREAS, the intent of the legislation is to strengthen the God given institution of marriage and to move the legal standards for marriage and divorce closer to the standards of the Word of God;

THEREFORE, BE IT RESOLVED, That the messengers of this 150th annual session of the Louisiana Baptist Convention, meeting November 10-11, 1997, in Alexandria, Louisiana, encourage the Family Development Department of the Executive Board of the Louisiana Baptist Convention to make materials available to pastors and churches concerning Covenant Marriage; and

BE IT FURTHER RESOLVED, That Associational Moral and Social Concerns Committees be encouraged to ascertain the interest in hosting seminars addressing this subject matter, and if interest is evident, invite the Louisiana Moral and Civic Foundation to facilitate the seminars, using qualified and informed presenters in this area of the law, along with local pastors or Bible teachers who can address this area of Biblical instruction; and

BE IT FINALLY RESOLVED, That we encourage pastors and churches to become familiar with the law concerning Covenant Marriage and to use any tool available to strengthen the institution of marriage among the people to whom we minister.

The Baptist Missionary Association of Louisiana unanimously adopted a similar resolution, specifically encouraging its member churches and pastors “to marry those who choose the Covenant Marriage as opposed to the Contract Marriage.” Furthermore, other evangelical Protestant denominations, such as the Assembly of God, Pentecostal Church, are very supportive of the legislation.

Contrary to the position of the Baptists, the Bishop of the Methodist Church released a statement on June 27, 1997, four days after the Covenant Marriage legislation passed essentially describing the legislation as intrusive and redundant. See supra note 65 for text of the statement.

As reported in The Times-Picayune, Episcopal Bishop-Elect Charles Jenkins of Baton Rouge criticized the law:

By bringing couples in covenant marriages back to a fault-based divorce system, with its cynicism and occasional collusion for the sake of a divorce, ‘it goes back to the bad old days regarding divorce and dissolution of a household,’ Jenkins said. ‘We’ve been there; it doesn’t work. Those old ideas compromised the moral character of couples, they compromised the integrity of judges, courts and attorneys.

and documentary requirements of the legislation, someone has to educate the individual ministers and secular marriage counselors who support Covenant Marriage about the process of pre-marital counseling and the execution of documents. Furthermore, citizens of the State need to be informed and educated about the option of a Covenant Marriage and why it is de-

A1.

According to the same article Jewish leaders already had signaled little support for the new civil contract, but no official statement was ever issued or reported identifying the Jewish leaders. Id. 89. 1997 La. Sess. Law Serv. 1380, 9:273 A. (as added by 1997 La. Acts, No. 1380, §3) provides:

A declaration of intent to contract a covenant marriage shall contain all of the following:

(1) A recitation of the parties to the following effect . . . .

(2)(a) An affidavit by the parties that they have received premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor, which counseling shall include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board.

(b) A notarized attestation, signed by the counselor and attached to or included in the parties’ affidavit, confirming that the parties were counseled as to the nature and purpose of the marriage and the grounds for termination thereof and acknowledging that the counselor provided to the parties the informational pamphlet developed and promulgated by the office of the attorney general, which pamphlet entitled the Covenant Marriage Act, provides a full explanation of the terms and conditions of a covenant marriage.

(3)(a) The signature of both parties witnessed by a notary.

(b) If one or both of the parties are minors, the written consent or authorization of those persons required under the Children’s Code to consent to or authorize the marriage of minors.

B. The declaration shall contain two separate documents, the recitation and the affidavit, the latter of which shall include the attestation either included therein or attached thereto. The recitation shall be prepared in duplicate originals, one of which shall be retained by the parties and the other, together with the affidavit and attestation, shall be filed as provided in R.S. 9:272(B).

90. Legislators or individuals interested in Covenant Marriage legislation should enlist the support of an existing organization or create such an organization to disseminate information about Covenant Marriage, including not simply how to contract a Covenant Marriage but also why to contract a Covenant Marriage. For it is not only engaged couples who may contract a Covenant Marriage, "but also presently married couples:"

A. On or after August 15, 1997, married couples may execute a declaration of intent to designate their marriage as a covenant marriage to be governed by the laws relative thereto.

B. (1) This declaration of intent in the form and containing the contents required by Subsection C of this Section must be presented to the officer who issued the couple’s marriage license and with whom the couple’s marriage certificate is filed. . . . (provision if couple married outside of Louisiana) The officer shall make a notation on the marriage certificate of the declaration of intent of a covenant marriage and attach a copy of the declaration to the certificate.

C. (1) A declaration of intent to designate a marriage as a covenant marriage shall contain all of the following:
sirable in a more comprehensive manner than that provided by the Attorney General’s pamphlet.\(^9\)

V. CONCLUSION

It is still too early to tell whether the “shrieking voices” of popular culture and high courts have changed once and for all the received meaning of

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(a) A recitation by the parties to the following effect:

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 understand the nature, purpose, 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 Marriage, and we renew our promise to love, honor, and care for one another as husband and wife for the rest of our lives.

(b)(i) An affidavit by the parties that they have discussed their intent to designate their marriage a covenant marriage with a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor, which included a discussion of the obligation to seek marital counseling in times of marital difficulties and the exclusive grounds for legally terminating covenant marriage by divorce or by divorce after a judgment of separation from bed and board.

(ii) A notarized attestation, signed by the counselor and attached to the parties' affidavit, acknowledging that the counselor provided to the parties the information pamphlet developed and promulgated by the office of the attorney general, which pamphlet entitled the Covenant Marriage Act provides a full explanation of the terms and conditions of a covenant marriage.

(iii) The signature of both parties witnessed by a notary.

(2) The declaration shall contain two separate documents, the recitation and the affidavit, the latter of which shall include the attestation either included therein or attached thereto. The recitation shall be prepared in duplicate originals, one of which shall be retained by the parties and the other, together with the affidavit and attestation, shall be filed as provided in Subsection B of this Section.

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A notarized attestation, signed by the counselor and attached to or included in the parties’ affidavit, confirming that the parties were counseled as to the nature and purpose of the marriage and the grounds for termination thereof and an acknowledging that the counselor provided to the parties the informational pamphlet developed and promulgated by the office of the attorney general, which pamphlet entitled the Covenant Marriage Act provides a full explanation of the terms and conditions of a covenant marriage. See Appendix B (emphasis added).

Section 5 of 1997 La. Acts, No. 1380, reads as follows:

The office of attorney general, Department of Justice shall, prior to August 15, 1997, promulgate an informational pamphlet, entitled ‘Covenant Marriage Act,’ which shall outline in sufficient detail the consequences of entering into a covenant marriage. The informational pamphlet shall be made available to any counselor who provides marriage counseling as provided for by this Act.
the word marriage. It is still possible that we "The People," acting purposively through political agencies, will retrieve the traditional model of marriage and restore it whole within our cultural imagination. Louisianans, at least, can no longer ignore the dissonance between the marriage of our cultural imagination and marriage as it actually exists; they have a choice. It may be that, as Dr. Peter Kramer, clinical professor of psychiatry at Brown University, opines: "contrary to claims on behalf of Louisiana's Covenant Marriage, it is out of touch with our traditional values: self-expression, self-fulfillment, self-reliance." As Christopher Wolfe has confirmed, "[t]he ideal of autonomy, an autonomy so broad as to preclude fixed, permanent, lifelong commitments, is the foundation of our contemporary marriage laws. It is a substantive moral ideal."92

I hope Dr. Kramer is wrong, and I interpret Christopher Wolfe's statement as a "call to arms."94 How can personal autonomy be a moral ideal? I, for one, cannot defend those values or that moral ideal to the children of

93. Wolfe, supra note 23, at 41.
94. Wolfe stated:

And this moral ideal is incompatible with and hostile to the substantive moral ideal of marital fidelity that is embraced by certain traditional communities that from one perspective are 'within' the American community and from another perspective are not; most notably, by Catholicism. This is why it is fair to say that there is a 'culture war' going on in our society today and why contemporary liberalism's claim to be simply 'a procedural republic' is indefensible.

Id. at 41; see also JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 NOTRE DAME L. REV. 393 (1994).
How do you respond to the child whose parents divorced twenty-five years ago when she comments:

I don't remember anything, except I remember living together and then not. I don't remember anybody explaining anything to me . . . . I didn't have anyone as support . . . . I spent so much time alone that I tried to become my own support. But, how do you do that as a child? I would go for days without saying a word. 96

Likewise, "[t]he day of the divorce my childhood ended." 97

Midge Decter summarized the dilemma posed by impermanent marriages and "too much divorce" in her review of Barbara Dafoe Whitehead's book, The Divorce Culture. She stated, "[i]n short, there is no merely social cure for what ails us. But Barbara Dafoe Whitehead has at

95. See Katherine Spaht, Symposium, Would Louisiana's 'Covenant Marriage' Be a Good Idea for America? Yes: Stop Sacrificing America's Children on the Cold Altar of Convenience for Divorcing Spouses, INSIGHT MAGAZINE, Oct. 6-13, 1997 at 24-27. In this respect consider the following:

If, as Professor Kramer wrote in the New York Times, 'an increase in divorce signals social progress,' how do we explain to the children of divorce that 'social progress' is defined without considering their welfare? Are we willing to look each one of those children in the eye and respond to them as Kramer would that their parents' willingness to stay together would have been . . . out of touch with [Americans'] traditional values: self-expression, self-fulfillment, self-reliance? Should we shrug our shoulders and say, as he suggests, 'that the divorce rate reflects our national values with great exactness, and that conventional modern marriage—an eternal commitment with loopholes galore—expresses precisely the degree of loss of autonomy that we are able to tolerate' regardless of its effect on children?


97. Wallerstein and Lewis, supra note 96.
least helped us to stop kidding ourselves about one aspect of our lives, and that is a help. The rest—who knows?—may require the power of God himself.98 Or, it may require law that gives a couple the choice to make a binding civil commitment to a more permanent married life together, more nearly in accord with God’s plan.

APPENDIX A

DECLARATION OF INTENT TO CONTRACT
A COVENANT MARRIAGE

“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 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.

________________________________________
Signature of Covenanting Parties
STATE OF LOUISIANA

PARISH OF

BEFORE ME, the undersigned Notary Public, personally came and appeared:

_________________________________  _______________________________________
(Insert names of prospective spouses)

who after being duly sworn by me, Notary, deposed and stated that:

Affiants acknowledge that they have received premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor, which marriage counseling included:

- a discussion of the seriousness of Covenant Marriage,
- communication of the fact that a Covenant Marriage is a commitment for life,
- a discussion of the obligation to seek marital counseling in times of marital difficulties,
- a discussion of the exclusive grounds for legally terminating a Covenant Marriage by divorce or by divorce after a judgment of separation from bed and board.

Furthermore Affiants sayeth not.

_________________________________

_________________________________

SWORN TO AND SUBSCRIBED
BEFORE ME THIS _________
DAY OF ________
19____

_________________________________

NOTARY PUBLIC
ATTESTATION

The undersigned does hereby attest that the affiants did receive counseling from me as to the nature and purpose of marriage and the grounds for termination thereof, and did receive from me the information pamphlet developed and promulgated by the office of the Attorney General, which pamphlet entitled “Covenant Marriage Act” provides a full explanation of the terms and conditions of a Covenant Marriage.

________________________________________
COUNSELOR

SWORN TO AND SUBSCRIBED
BEFORE ME THIS ________
DAY OF __________________
19____

________________________________________
NOTARY PUBLIC
APPENDIX B

COVENANT MARRIAGE ACT PAMPHLET

COVENANT MARRIAGE ACT

CONTRACTING A COVENANT MARRIAGE

The couple who chooses to enter into a “Covenant Marriage” agrees to be bound by two serious limitations on obtaining a divorce or a separation. These limitations, that do not apply to other couples married in Louisiana, are as follows:

The couple legally agrees to seek marital counseling if problems develop during the marriage;

and

The couple can only seek a divorce or legal separation for limited reasons as explained herein.

DECLARATION OF INTENT

In order to enter into a Covenant Marriage, the couple must sign a recitation that provides:

A marriage is an agreement to live together as husband and wife forever; the parties have chosen each other carefully and disclosed to each other “everything which could adversely affect” the decision to marry; the parties have received premarital counseling; a commitment that if the parties experience marital difficulties they commit to take all reasonable efforts to preserve their marriage, including marital counseling; and the couple must also obtain premarital counseling from a priest, rabbi, or similar clergyman of any sect or a marriage counselor.

After discussing the meaning of a Covenant Marriage with the counselor, the couple must also sign, together with an attestation by the counselor, a notarized affidavit to the effect that the counselor has discussed with them:

the seriousness of a Covenant Marriage;
the commitment to marriage is for life;
the obligation of the couple to seek marital counseling if

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1. The following is a reproduction of the pamphlet. Any changes were made solely for the purpose of clearer presentation.
problems arise in the marriage; and
the exclusive grounds for divorce or legal separation.

The two documents which comprise the Declaration of Intent—the recitation and the affidavit with attestation—must be presented to the official who issues the marriage license.

**LEGAL SEPARATION IN A COVENANT MARRIAGE**

In order to obtain a legal separation (which is not a divorce and therefore does not end the marriage), a spouse to a Covenant Marriage must first obtain counseling and then must prove:

- adultery by the other spouse;
- commission of a felony by the other spouse and a sentence of imprisonment at hard labor or death;
- abandonment by the other spouse for one year;
- physical or sexual abuse of the spouse or of a child of either spouse;
- the spouses have lived separate and apart for two years;
- or habitual intemperance (for example, alcohol or drug abuse), cruel treatment, or severe ill treatment by the other spouse.

**DIVORCE IN A COVENANT MARRIAGE**

A marriage that is not a Covenant Marriage may be ended by divorce more easily than a Covenant Marriage. In a marriage that is not a Covenant Marriage, a spouse may get a divorce for adultery by the other spouse, conviction of a felony by the other spouse and his imprisonment at hard labor or death; or by proof that the spouses have lived separate and apart for six months before or after filing for divorce.

In a Covenant Marriage a spouse may **ONLY** get a divorce after receiving counseling and may **ONLY** get a divorce for the following reasons:

- adultery by the other spouse;
- commission of a felony by the other spouse and sentence of imprisonment at hard labor or death;
- abandonment by the other spouse for one year;
- physical or sexual abuse of the spouse or of a child of either spouse;
- the spouses have lived separate and apart for two years;
- or the spouses are judicially or legally separated and have lived separate and apart since the legal separation for:
  - (a) one year and six months if there is a minor
child or children of the marriage
(b) one year if the separation was granted for abuse of a child of either spouse;
(c) one year in all other cases

A NOTE TO PRESENTLY MARRIED COUPLES

Couples who are already married may execute a declaration of intent to designate their marriage a Covenant Marriage. They must sign a recitation and an affidavit similar to those described in this pamphlet, after receiving counseling. The counselor must attest to the counseling. This intent to designate their marriage a Covenant Marriage must be filed with the official who issued their marriage license and with whom the marriage certificate of the couple is filed.

If the couple was married outside of Louisiana, a copy of their marriage certificate, with the declaration of intent, shall be filed with the officer who issues marriage licenses in the parish of the couple’s domicile.