University of St. Thomas Law Journal

Volume 5 | Issue 2 Article 14

2008

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Recommended Citation

Nichols, Joel A. (2008) "More Than A Mere Contract: Marriage as Contract and Covenant in Law and Theology," *University of St. Thomas Law Journal*: Vol. 5: Iss. 2, Article 14. Available at: http://ir.stthomas.edu/ustlj/vol5/iss2/14

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ARTICLE

MORE THAN A MERE CONTRACT: MARRIAGE AS CONTRACT AND COVENANT IN LAW AND THEOLOGY

JOHN WITTE, JR. AND JOEL A. NICHOLS*

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I. COVENANT MARRIAGE V. CONTRACT MARRIAGE[1]

On August 15, 1997, the State of Louisiana put in place the nation's first modern covenant marriage law. The law creates a two-tiered system of marriage. Couples may choose a contract marriage, with minimal formalities of formation and attendant rights to no-fault divorce. Or couples may choose a covenant marriage, with more stringent formation and dissolution rules. The licensing costs for either form of marriage are the same. In order to form a covenant marriage, however, the parties must receive detailed counseling about marriage from a professional marriage counselor or a religious official, and then swear an oath, pledging "full knowledge of the nature, purposes, and responsibilities of marriage" and promising "to love,

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1. This article is part of a larger project on "Multi-Tiered Marriage," which draws upon ideas from Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135 (Jan. 2007). The project on Multi-Tiered Marriage has received generous funding from Emory University's Center for the Study of Law and Religion, Pepperdine University and Pepperdine University School of Law, and the University of St. Thomas School of Law. *See* Joel A. Nichols, *Foreword: Marriage, Religion, and the Role of the Civil State*, 5 U. ST. THOMAS L.J. 544 (2008).

honor, and care for one another as husband and wife for the rest of our lives."[2] Divorce is allowed such covenanted couples only on grounds of serious fault (adultery, capital felony, malicious desertion, and/or physical or sexual abuse of the spouse or one of the children) or after two years of separation.[3] Separation from bed and board is allowed on any of these same fault grounds as well as on proof of habitual intemperance, cruel treatment, or outrages of the other spouse. Comparable covenant marriage statutes are now in place in Arizona and Arkansas as well.[4] At least twenty-seven other states either have considered or have under consideration covenant marriage alternatives to contract marriages.[5]

These new covenant marriage laws are designed, in part, to help offset the corrosive effects of America's experiment with a private contractual model of marriage. Historically, in America and in much of the West, marriages were presumptively permanent commitments, and marriage formation and dissolution were serious public events. Marriage formation required the consent of parents and peers, the procurement of a state certificate, the publication of banns, and a public ceremony and celebration after a period of waiting and discernment. Marriage dissolution required public hearings, proof of serious fault by one party, alimony payments to the innocent dependent spouse, and ongoing support payments for minor children.[6]

In the last third of the twentieth century, many of these traditional rules gave way to a private contractual model of marriage grounded in new cultural and constitutional norms of sexual liberty and privacy. In virtually all states, marriage formation rules were simplified to require only the acquisition of a license from the state registry followed by solemnization before a licensed official—without banns, with little or no waiting, with no public celebration, and without notification of others. Marriage dissolution rules were simplified through the introduction of unilateral no-fault divorce. New streamlined and inexpensive marital dissolution procedures aimed to release miserable couples from the shackles of unwanted marriages and to relieve swollen court dockets from the prospects of protracted litigation. Either the husband or the wife could now file a simple suit for divorce. No fault by either party would need to be proved—or staged. Courts would dissolve the

2. LA. REV. STAT. § 9:273(A)(1) (2008).

3. LA. CIV. CODE ANN. art. 103 (2008).

4. LA. REV. STAT. § 9:272 (2006); ARIZ. REV. STAT. § 25-901 (2008); ARK. CODE ANN. § 9-11-801 (2007).

5. Alabama, California, Colorado, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin.

6. For a comprehensive survey of these earlier American marriage laws, see CHARLES F. VERNIER, 1 AMERICAN FAMILY LAW (5th ed. 1931).

union, often making a one-time division of marital property to give each party a clean break to start life anew.[7]

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] From 1975–2000, a quarter of all children were raised in single-parent households.[9] One-quarter of all pregnancies were aborted. One-third of all children were born to single mothers.[10] One-half of all marriages ended in divorce. Two-thirds of all African-American children were raised without a father.[11] Mother-only homes had less than a third of the median income of homes with a regular male present, and four times the rates of foreclosure and eviction.[12] Teenagers who grew up in broken homes proved two to three times more likely to have behavioral, learning, and socialization problems than teenagers from two-parent homes.[13] More than two-thirds of juveniles and young adults convicted of major felonies from 1970 to 1995 came from single- or no-parent homes.[14]

Covenant marriage laws have been one of several legal responses to these mounting social and psychological costs of America's experiment with easy-in/easy-out marriage. Covenant marriage laws capture the traditional ideal that marriage is "more than just a piece of paper," more than just a transient and terminal private contract for sexual intimacy.[15] The foundation of covenant marriage is a pledge of presumptive permanent sacrifice—"to love, care, and honor one another as husband and wife for the rest of our lives." 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

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7. JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997) [hereinafter FROM SACRAMENT TO CONTRACT].

8. JUDITH WALLERSTEIN, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (15th ed. 2004); DON S. BROWNING, MARRIAGE AND MODERNIZATION (2003); LINDA J. WAITE, DOES DIVORCE MAKE PEOPLE HAPPY? FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES (2002); JUDITH S. WALLERSEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE (2000); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1996); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998).

9. Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law*, 47 EMORY L.J. 929, 931 (1998).

10. *Id.*

11. *Id.*

12. *Id.* at 930.

13. *Id.*

14. Nichols, *supra* note 9, at 931. For more recent studies, some with more encouraging recent statistics, see generally FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE (Steven M. Tipton & John Witte, Jr., eds., 2005); MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999); ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998).

15. MARRIAGE: JUST A PIECE OF PAPER? (Katherine Anderson, Don Browning & Brian Boyer eds., 2002).

dissolution of covenant marriage comes only upon betrayal of the fundamental goods of this institution or after a suitable period of separation and careful deliberation.

Covenant marriage laws reflect the historical lesson that rules governing marital formation and marital dissolution must be balanced in their stringency—and that separation must be maintained as a release valve. Stern rules of marital dissolution require stern rules of marital formation. Loose formation rules demand loose dissolution rules. Proponents of covenant marriage have insisted that the task of fixing the modern problem of transient marriages requires reforms at both ends of the marital process.[16] A number of states have recently responded to the problem of transient marriage simply by tightening their rules of no-fault divorce, but without corresponding attention to the rules of marital formation and separation. Such efforts, standing alone, are misguided. The cause of escalating marital breakdown is not only no-fault divorce, as is so often said, but also no-faith marriage.

Covenant marriage laws allow prospective marital couples to contract out of the state's laws of marriage contract by choosing a covenant marriage. Couples who consider covenant marriage must fully apprise themselves of the costs and benefits of protracting the process of marital formation and waiving their rights to no-fault divorce. But the choice of marital form is theirs. Having this choice encourages inaptly matched couples to discover their incompatibility before marriage, rather than after it. If one engaged party wants a contract marriage and the other a covenant marriage, the disparity in prospective commitment should, for many couples, be too plain to ignore. Couples should delay their wedding until their mutual commitment has deepened, or cancel their wedding if their respective commitments remain disparate. Better to prepare well for a marriage than to rush into it. Better to cancel a wedding than to divorce shortly after it. Such is the theory of the new covenant marriage laws.

These covenant marriage laws seek both to respect the virtues of marriage contracts and the values of enduring marriages. These laws have been attacked as an undue encroachment on sexual liberty and on the rights of women and children; as a "Trojan horse" designed to smuggle biblical principles back into American law; as an improper delegation of state responsibilities to religious officials; and as a reversion to the days of staged and spurious charges of marital fault which no-fault laws had sought to overcome.[17] But such constitutional objections seem largely unavailing, given the religiously-neutral language of these laws; their explicit protections of

16. For a chapter written by one of the principal drafters of the Louisiana covenant marriage statute, see Katherine Shaw Spaht, *The Modern American Covenant Marriage Movement: Its Origins and Its Future*, *in* COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE 239 (John Witte, Jr. & Eliza Ellison eds., 2005) [hereinafter COVENANT MARRIAGE].

17. *Id.*

both voluntary entrance and exit from the covenant union; their insistence that religious counselors be restricted in the marriage counseling they can offer on behalf of the state; and the overriding commitment of these laws to the freedom of contract of both parties.[18]

II. Marriage as More Than a Mere Contract

Covenant marriage laws are not only a new form of social engineering designed to counter the rise of privatized marriage and no-fault divorce, but they are also a new forum for the expression of traditional common law teachings that marriage is "more than a mere contract." In the American common law tradition, marriage has long been regarded as a natural if not a spiritual estate, a useful if not an essential association, a pillar if not the foundation of civil society.[19] Marriage has required more than the general rules of private contract—of offer and acceptance, consideration and rescission, reformation and remedy. It has drawn to itself special rules and rituals of betrothal and espousal, of registration and consecration, and of consent and celebration. It has also provided the basis for a long series of special rights and duties of husband and wife, and parent and child, that are respected at both public and private law. As the American jurist Joseph Story (1779–1845) put it in 1834:

> Marriage is treated by all civilized societies as a peculiar and favored contract. It is in its origin a contract of natural law. . . . It is the parent, and not the child of society; the source of civility and a sort of seminary of the republic. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; . . . it is a great mistake to suppose that because it is the one, therefore it may not be the other.[20]

These traditional common law teachings that marriage is both a contract and something more was rooted in ancient Christian teachings. These Christian teachings, in turn, had antecedents and analogues in ancient Jewish and Islamic teachings. Jewish, Christian, and Islamic traditions alike have long taught that marriage is a contract—called the *ketubah* in Judaism,

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18. *See id.*; *see also* Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, *in* Covenant Marriage, *supra* note 16, at 265.

19. *See* John Witte, Jr., God's Joust, God's Justice 322, 322–63, 364–85 (2006); John Witte, Jr., From Sacrament to Contract, *supra* note 7.

20. Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies 100, at § 108 (1834). In his second edition, Story added this note to the quoted passage:

> It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of operation, different from what belongs to ordinary contracts.

the *pactum* in Christianity, and the *kitab* in Islam. But these traditions have also long taught that marriage is more than a mere contract—more than simply a private bargain to be formed, maintained, and dissolved as the two marital parties see fit. For all three traditions, marriage is an institution that is both private and public, individual and social, and temporal and transcendent in quality. Its origin, nature, and purpose lie beyond and beneath the terms of the marriage contract itself.[21]

A. Marriage as Contract

It is important to recognize that, while the three traditions of Judaism, Christianity, and Islam have long taught that marriage is more than a contract, they have also insisted that marriage is not less than a contract.

Nearly two millennia ago, Jewish Rabbis created the *ketubah*, the premarital contract in which the husband and the wife spelled out the terms and conditions of their relationship before, during, and after the marriage, and the rights and duties of husband, wife, and child in the event of marital dissolution or death of one of the parties. The Talmudic Rabbis regarded these marriage contracts as essential protections for wives and children who were otherwise subject to the unilateral right of divorce granted to men by the Mosaic law.[22] While the terms of the *ketubah* could be privately contracted, both the couple's families and the rabbinic authorities were often actively involved in their formation and enforcement.[23]

More than a millennium and a half ago, Christian theologians adopted the marriage pact or bond.[24] These contracts forged a new relationship between husband and wife and their respective families. They adopted and adapted a number of the marital and familial rights and duties set out in the household codes of the New Testament, in the apostolic church constitutions' canons, as well as in Jewish, Greek, Roman, and Patristic writings.[25] The early rules governing these marriage contracts, as well as related con-

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21. See analyses and primary texts on the theological, ethical, and legal teachings on marriage in these three traditions and others in SEX, MARRIAGE AND FAMILY IN THE WORLD RELIGIONS (Don S. Browning, M. Christian Green & John Witte, Jr. eds., 2006).

22. *Deuteronomy* 24:1–4.

23. *See* David Novak, *Jewish Marriage: Nature, Covenant, and Contract*, *in* COVENANT MARRIAGE, *supra* note 16, at 26; Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, *in id.*, at 53; ZE'EV W. FALK, JEWISH MATRIMONIAL LAW IN THE MIDDLE AGES (1966).

24. See examples and analysis in TO HAVE AND TO HOLD: MARRYING AND ITS DOCUMENTATION IN WESTERN CHRISTENDOM (Philip L. Reynolds and John Witte, Jr. eds., 2007); PHILIP LYNDON REYNOLDS, MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS (J. Den Boeft et al. eds., 1994).

25. *See Colossians* 3:18–4:1; *Ephesians* 5:21–6:9; *1 Peter* 2:11–3:12; *1 Timothy* 2:8–15; 5:1–2; 6:1–2; *Titus* 2:1–10, 3:1. See sources and discussion in CAROLYN OSIEK & DAVID BALCH, FAMILIES IN THE NEW TESTAMENT WORLD (1997); DON S. BROWNING, ET AL., FROM CULTURE WARS TO COMMON GROUND (2d ed. 2000); EARLY CHRISTIAN FAMILIES IN CONTEXT: AN INTERDISCIPLINARY DIALOGUE (David Balch & Carolyn Osiek eds., 2003).

tracts respecting dowries and other marital property, were later systematized and elaborated by Christian jurists and theologians—in the eighth and ninth centuries by Eastern Orthodox, in the twelfth and thirteen centuries by Catholics, and in the sixteenth and seventeenth centuries by Protestants.

More than a millennium ago, Muslim jurists and theologians created the *kitab*, a special form of contract (*'adq*) that a devout Muslim was religiously bound to uphold in imitation and implementation of the Prophet's example and teaching. The *kitab* ideally established a distinctive relationship of "affection, tranquility, and mercy" between husband and wife.[26] It defined their respective rights, duties, and identities vis-à-vis each other, their parents and children, and the broader communities of which they were part. The signing of the *kitab* was a solemn religious event involving a cleric who instructed the couple on their marital rights and duties as set out in the Qur'an. While the Qur'an and Hadith set out basic norms of marriage life and liturgy, it was particularly the Shari'a, the religious laws developed in the centuries after the Prophet, which crystallized much of this tradition of marital contracts, with ample variation among the Islamic schools of jurisprudence.[27]

While these marriage contracts differed markedly within and among these three Abrahamic traditions, several broad features were common.

First, Jewish, Christian, and Islamic traditions alike made provision for two contracts—betrothals or future promises to marry and spousals or present promises to marry—with a mandatory waiting period between them. The point of this waiting period was to allow couples to weigh the depth and durability of their mutual love. It was also to invite others to weigh in on the maturity and compatibility of the couple, to offer them counsel and commodities, and to prepare for the celebration of their union and their life together thereafter.

Second, all three traditions insisted that marriage depended in its essence on the mutual consent of the man and the woman. Even if the man and woman were represented by parents or guardians during the contract negotiation, their own consent was essential to the validity of their mar-

26. Azizah al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual?*, *in* COVENANT MARRIAGE, *supra* note 16, at 182, 198–99.

27. *See id.*; ISLAMIC FAMILY IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (Abdullahi A. An-Na'im, ed., 2002); An exception to the usual rules of Islamic jurisprudence was the *muta'a*, a temporary marriage contract traditionally recognized by some Shi'ite Muslims and now becoming newly popular among the majority Shi'ite populations in Iraq. The *muta'a* was traditionally reserved to circumstances when a man was involved in protracted absences from home or on dangerous pilgrimages and became a way not only of channeling his incontinence but also devising some of his property to his temporary wife. Today, the *muta'a* is also becoming a convenient form of effectively legalizing prostitution and concubinage, with *muta'a* contracts as short as an hour being upheld by Shi'ite clerics. *See* SHAHLA HAERI, LAW OF DESIRE: TEMPORARY MARRIAGE IN SHI'I IRAN (1989); ABU AL QASIM GURJI, TEMPORARY MARRIAGE (MUT'AH) IN ISLAMIC LAW (Sachicho Murata trans., 1986); Rick Jervis, *'Pleasure Marriages' Regain Popularity in Iraq*, USA TODAY, May 12, 2005, at 4A.

riage. Jewish and Muslim jurists came to this insight early in the development of their law of marriage contracts. The Catholic tradition reached this insight canonically only in the twelfth century, after which it was absorbed in Orthodox and later in Protestant teachings. All three traditions continued to tolerate the practice of arranged marriages and child marriages, particularly when those were politically or commercially advantageous, but the theory was that both the young man and the young woman reserved the right to dissent from the arrangement upon reaching the age of consent.

Third, while all three traditions taught that every person of the age of consent was free to choose a marital partner, persons were not free to choose just anyone. God and nature set a first limit to the freedom of marital contract. Parties could not marry those who were related to them by blood or by marriage—by bonds of consanguinity and affinity, as these relations were called in Scripture. Custom and culture set a second limit. The parties had to be of suitable piety and modesty, of comparable social and economic status, and ideally (and, in some communities, indispensably) of the same faith. The general law of contracts set a third limit. Both parties had to have the capacity and freedom to enter contracts, and had to follow proper contractual forms and ceremonies. Parents and guardians set a fourth limit. A valid marriage at least for minors required the consent of both sets of parents or guardians—and sometimes as well the consent of political and/or spiritual authorities who stood in *loco parentis*.

Fourth, all three traditions often accompanied marriage promises with elaborate exchanges of property, which sometimes gave rise to their own marital property contracts. The prospective husband gave to his fiancée (and, sometimes her father or family as well) a betrothal gift, sometimes a very elaborate and expensive gift. In some cultures, husbands followed this by giving a wedding gift to the wife. The wife, in turn, brought into the marriage her dowry, which was at minimum her basic living articles, sometimes a great deal more. These property exchanges were not an absolute condition to the validity of a marriage, but breach of a contract to deliver property in consideration of marriage could often result in dissolution at least of the engagement contract.

Fifth, all three traditions eventually developed a marriage liturgy. In the Jewish tradition, the Talmud provided detailed liturgies and prayers for both the betrothal and the marriage, building in part on prototypes in the book of Tobit. In the Jewish tradition, weddings were essential community events, presided over by the Rabbi, and involving the entire local community.[28] The Christian tradition celebrated wedding liturgies of some sort from the start, but the earliest surviving marriage liturgies are from the

28. KENNETH STEVENSON, NUPTIAL BLESSING: A STUDY OF CHRISTIAN MARRIAGE RITES 3–8 (1982).

eighth century.[29] Particularly among the Eastern Orthodox, these liturgies became extraordinary visual and verbal symphonies of prayers, blessings, oaths, and rituals, including the Eucharist. These liturgies grew more slowly in the Christian West, not becoming mandatory among Catholics until 1563, and subject to wide and perennial variation and disputation among Protestants. The Islamic tradition mandated an engagement ceremony, which was a private, religious occasion involving the couple, their families, a cleric, and two or more witnesses. It began with readings from the Qur'an and marital instruction followed by final negotiation of the terms of the marriage contract, and execution and attestation by the parties. The wedding was a separate and joyous celebration, entirely secular in nature and significance, and optional.[30]

Finally, all three traditions gave husband and wife standing before their religious tribunals to press for the vindication of their marital rights. The right to support, protection, sexual intercourse, and care for the couple's children were the most commonly litigated claims in all three traditions. But any number of other conjugal rights stipulated in the marriage contract or guaranteed by general religious law could be litigated. Included in all three traditions was the right of the parties to seek dissolution of the marriage on discovery of an absolute impediment to its validity (such as incest) or on grounds of a fundamental breach of the marriage commitment (such as adultery).

B. Marriage as More than Contract

The insistence on a marriage liturgy, with its solemn rituals, prayers, blessings, and oaths, is one important indication that, for Jews, Christians, and Muslims, marriage was more than a simple bilateral contract. It was also a fundamental public institution and religious practice. Other media complemented the liturgies in reflecting these higher dimensions of marriage—the beautiful artwork, ornate iconography, lofty religious language of the marriage contracts themselves, elaborate rituals and etiquette of courtship, consent, communal involvement in establishing the new marital household, the impressive production of poems, household manuals, and books of etiquette detailing the proper norms and habits of love, marriage, and parentage of a faithful religious believer. All these media, and the ample theological writings on them, helped to confirm and celebrate the deeper origin, nature, and purpose of marriage in Judaism, Christianity, and Islam.

First, all three traditions recognized that marriage has its ultimate origin in the creation and commandments of God. The Jewish and Christian traditions shared the teaching of Genesis that, already in Paradise, God had

29. *Id.* at 33–122. *See also* MARK SEARLE & KENNETH W. STEVENSON, DOCUMENTS OF THE MARRIAGE LITURGY 3ff (1992).

30. *See* al-Hibri, *supra* note 26.

brought the first man and the first woman together, and commanded them to "be fruitful and multiply."[31] God had created them as social creatures, naturally inclined and attracted to each other. God had given them the physical capacity to join together and to beget children. God had commanded them to love, help, and nurture each other and to inculcate in each other and in their children the love of God, neighbor, and self. "Therefore a man leaves his father and mother and cleaves to his wife, and the two become one flesh," Genesis 2:24 concludes. Both the Jewish tradition and the Christian tradition eventually built on this primeval commandment, and its later biblical echoes, many of the basic norms of heterosexual monogamous marriage and sexual ethics.[32]

The Muslim tradition rooted marriage not only in the teachings of the Qur'an but also in the example of Mohammed. The Qur'an speaks of marriage as a "solemn covenant" (*mithaquan*),[33] indeed a form of worship (*'ibadat*) and religious observance enjoined upon each Muslim as a way of keeping faith with the tradition of Islam. In the Hadith, the Prophet provided that "marriage is my Sunnah, so the one who turns away from my Sunnah, turns away from me."[34] Also in the Hadith, the Prophet set out in great detail the principles of proper marriage for a Muslim that were elaborated in later books of Islamic law and etiquette.[35] A number of these teachings emulated, if not echoed, Jewish and Christian rules—the requirement of monogamy notably excepted.

Second, all three traditions recognized that marriage is by nature a multidimensional institution, whose formation, maintenance, and dissolution involves a variety of parties besides the couple themselves. Yes, marriage is a contract, formed by the mutual consent of the marital couple and subject to their wills and preferences. But in all three traditions, marriage is also a spiritual association, subject to the creed, code, cult, and canons of the religious community. Marriage is a social estate, subject to special laws of property and association, and to the expectations and exactions of the local community. Marriage is an economic institution, involving the creation and merger of properties, and triggering obligations of mutual care, nurture, and sacrifice between husband and wife, and parent and child. And marriage is a ritual institution, formed through liturgical prayers, oaths, and blessings, and functioning thereafter as a vital site of religious instruction, piety, and worship alongside the synagogue, church, or mosque.

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31. *Genesis* 1:28.

32. See illustrative texts from all three traditions in EVE & ADAM: JEWISH, CHRISTIAN, AND MUSLIM READINGS ON GENESIS AND GENDER (Kristen E. Kvam, Linda S. Schearing & Valarie H. Ziegler, eds., 1999).

33. *Qur'an* 4:20.

34. al-Hibri, *supra* note 26, at 199.

35. For a detailed study, see Richard C. Martin, *Marriage, Love, and Sexuality in Islam: An Overview of Genres and Themes*, *in* COVENANT MARRIAGE, *supra* note 16, at 217.

Third, all three traditions recognized that marriage has inherent goods that lie beyond the preferences of the couple, or the terms of their marriage contract. Fundamental to all three traditions is the ideal of marriage as the divinely-sanctioned means of perpetuating the faith—not only by the couple maintaining their own household rites as vital sites of confessional identity, but also by the couple's procreation and teaching of children who will form the next Schul, the next Church, or the next Umma. Hence, the emphasis in all three traditions of avoiding marriages with a non-believer.

The emphasis on the procreation and nurture of children in the faith and the corresponding prohibition on interreligious marriage were particularly prominent themes in biblical and diaspora Judaism. These rules were not only fundamental safeguards against assimilation into (an often hostile) gentile culture, but they were also essential conditions for the Jewish community to continue to flourish and grow despite its aversion to proselytism.[36] These same emphases on procreation and against intermarriage also emerged among some later Christian and Islamic communities, particularly when they were placed in minority contexts, for example, Catholics in nineteenth-century America, and Muslims and Orthodox in twentieth-century America.

The Christian tradition devised the most elaborate lists of the inherent goods and goals of marriage, beyond the good of producing the next generation of the faithful. Among the most famous formulations was St. Augustine's fifth-century discourse on the marital goods of *fides, proles, et sacramentum*.[37] Marriage, said Augustine, is an institution of *fides*—faith, trust, and love between husband and wife, and between parent and child that goes beyond the faith demanded of any other temporal relationship.[38] Marriage is a source of *proles*—children who carry on the family name and tradition, perpetuate the human species, and fill God's Church with the next generation of saints.[39] And marriage is a form of *sacramentum*—a symbolic expression of Christ's love for his Church, even a channel of God's grace to sanctify the couple, their children, and the broader community.[40] This trilogy of marital goods became axiomatic in later medieval Catholic theology, and remains at the core of Catholic marriage teaching to this day.

An overlapping formulation, drawn from Roman law and Patristic lore, was captured by the early seventh-century encyclopedist, St. Isidore of Seville. Marriage, Isidore argued, provides husbands and wives with: (1) mu-

36. *See* David Novak, *Jewish Marriage: Nature, Covenant, and Contract*, *in* COVENANT MARRIAGE, *supra* note 16; Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, *in* COVENANT MARRIAGE, *supra* note 16; see also chapters by Novak, Broyde, and Jocelyn Hellig in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM,17–78 (John Witte, Jr. & Richard C. Martin, eds., 1999).

37. *See* WITTE, JR., GOD'S JOUST, GOD'S JUSTICE, *supra* note 19, at 361.

38. *Id.*

39. *Id.*

40. *Id.*

tual love and support; (2) the mutual procreation and nurture of children; and (3) the mutual protection from sexual sin and temptation.[41] This formula of marital goods confirmed the divine origins of marriage without ascribing to it sacramental status. It also placed greater emphasis on the virtues of marital love and the need for protection from sexual sin alongside procreation. Isidore's triology of marital goods eventually became a popular formulation of marital goods among both Orthodox and Protestant Christians, and has strong analogues if not echoes in contemporaneous Islamic tracts on marriage.[42]

The Christian tradition, building on Graeco-Roman sources, also emphasized the broader social goods of marriage—teaching that marriage is good not only for the couple and their children, but also for the broader civic communities of which they are a part. Ancient Greek philosophers and Roman Stoics called marriage "the foundation of the republic," and "the private font of public virtue."[43] The Church Fathers called marital and familial love "the seedbed of the city," and "the force that welds society together."[44] Catholics called the family "a domestic church," and "a kind of school of deeper humanity."[45] Protestants called the household a "little church," a "little state," a "little seminary," a "little commonwealth," and "the first school" of justice and love, authority and liberty, and rule and citizenship.[46] At the core of all these metaphors was a perennial Western ideal that stable marriages and families are essential to the survival, flourishing, and happiness of the greater commonwealths of church, state, and civil society—and that a breakdown of marriage and the family will eventually have devastating consequences on these larger social institutions.

III. Marriage as Covenant

The idea of covenant is emerging in Western law, theology, and ethics today as a common trope to capture some of these higher dimensions of marriage.[47] It is also emerging as a common term to connect the interreligious dialogue among Jews, Christians, and Muslims and the interdisciplinary dialogue among jurists, theologians, and ethicists about marriage. The

41. *See* The Etymologies of Isidore of Seville (Stephen A. Barney et al. trans., 2006).

42. Among the most famous formulations was that developed by the great eleventh-century medieval jurist and theologian, Abu Hamid al-Ghazali (1058–1111), who listed as marital goods: (1) procreation; (2) proper satisfaction of natural sexual desires; (3) love and companionship; (4) efficient ordering of the household; and (5) disciplining oneself. *See* Richard C. Martin, *Marriage, Love, and Sexuality in Islam: An Overview of Genres and Themes*, *in* Covenant Marriage, *supra* note 16, at 231–32.

43. Witte, Jr., God's Joust, God's Justice, *supra* note 19, at 363.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See, e.g.*, William Johnson Everett, Religion, Federalism, and the Struggle for Public Life (1997); Max L. Stackhouse, Covenant and Commitments: Faith, Family, and Economic Life (Don S. Browning & Ian S. Evison eds., 1997).

connections between these layers of dialogue about marriage and covenant are still developing. It is no coincidence, however, that the covenant marriage movement in American law has been orchestrated, in ample part, by proponents of a covenantal theology and ethics of marriage.

"Covenant" is a common Scriptural term for Jews, Christians, and Muslims alike. It appears two hundred eighty-six times in the Hebrew Bible (as *berit*), twenty-four times in the New Testament (as *foedus)*, and twenty-six times in the Qur'an (as *mithaquan*). "Covenant" has multiple meanings and purposes in these three sacred scriptures. But it is used most importantly and most frequently to describe the special relationship between Yahweh and Israel, God and His elect, and Allah and His chosen ones.

In each of these three scriptures, "covenant" is also occasionally used to describe marriage. The Hebrew Bible analogizes Yahweh's special covenantal relationship with Israel to the special relationship between husband and wife. Israel's disobedience to Yahweh, in turn, particularly its proclivity to worship false gods, is frequently described as a form of "playing the harlot." Idolatry, like adultery, can lead to divorce, and Yahweh threatens this many times, even while calling his chosen to reconciliation. This image comes through repeatedly in the writings of the Prophets: Hosea (2:2–23), Isaiah (1:21–22; 54:5–8; 57:3–10; 61:10–11; 62:4–5), Jeremiah (2:2–3; 3:1–5, 6–25; 13:27; 23:10; 31:32), and Ezekiel (16:1–63; 23:1–49).[48]

The Hebrew Bible also speaks about marriage as a covenant in its own right.[49] The Prophet Malachi's formulation is the fullest:

> You cover the Lord's altar with tears, with weeping and groaning because he no longer regards the offering and accepts it with favor at your hand. You ask, "Why does he not?" Because the Lord was witness to the covenant between you and the wife of your youth, to whom you have been faithless, though she is your companion and your wife by covenant. Has not the one God made and sustained for us the spirit of life? And what does he desire? Godly offspring. So take heed to yourselves, and let none be faithless to the wife of his youth. "For I hate divorce," says the Lord the God of Israel, "and covering one's garments with violence," says the Lord, the God of hosts. "So take heed to yourselves and do not be faithless."[50]

The Qur'an has comparable verses about marriage as a "solemn covenant" (*mithaquan ghalithan*) which cannot be easily broken:

> But if you decide to take one wife in place of another, even if you have given the latter a quintal for dowry, take not the least

48. For a detailed study, see GORDON P. HUGENBERGER, MARRIAGE AS A COVENANT: A STUDY OF BIBLICAL LAW AND ETHICS GOVERNING MARRIAGE DEVELOPED FROM THE PERSPECTIVE OF MALACHI (1994).

49. *Proverbs* 2:17; *Malachi* 2:14–16.

50. *Malachi* 2:13–16.

> amount of it back; would you take it by slander and a manifest wrong? And how could you take it when you have gone into one another, and they have taken from you a solemn covenant?[51]

Jews, Christians, and Muslims alike have long used these kinds of scriptural verses to speak of marriage, inter alia, as a covenant and to encourage the procreation of children and to discourage the practice of easy divorce. This comes through in many theological, pastoral, and liturgical texts already in the first millennium of the common era.[52] What has not been common in these three traditions until more recently is to link explicitly the divine covenant between God and humanity and the marital covenant of husband and wife—in effect to make God a third party to the marriage covenant, and in turn to make marriage a forum for the expression of the divine-human covenant. What has also not been common until recently is to develop a theology and jurisprudence of covenant marriage, a way of describing the higher dimensions of marriage in concrete covenantal terms, and linking those terms to the concrete contractual terms of marriage that all three traditions have long had in place.

In the Jewish and Muslim traditions, the development of a covenant model of marriage is very recent, indeed. David Novak and David Hartman are pioneering the creation of a new covenantal theology, ethic, and law of marriage within Judaism.[53] Azizah al-Hibri is doing the same in the Islamic tradition.[54] What makes their respective efforts so promising is their insistence on grounding their covenantal models of marriage in long-neglected texts of the Hebrew Bible and Talmud and of the Qur'an and Hadith respectively, and rereading and rethinking their own traditions in light of these original canonical texts.

Covenant marriage has a longer pedigree in the Christian tradition. The emerging scholarly consensus is that John Calvin (1509–1564), the sixteenth-century Protestant reformer of Geneva, was the first to develop a detailed covenant model of marriage in place of the prevailing Catholic

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51. *Qu'ran* 4:20–21.

52. *See, e.g.*, David Novak, *Jewish Marriage: Nature, Covenant, and Contract*, *in* COVENANT MARRIAGE, *supra* note 16, at 26; Max L. Stackhouse, *Covenantal Marriage: Protestant Views and Contemporary Life*, *in* COVENANT MARRIAGE, *supra* note 16, at 153; Michael G. Lawler, *Marriage as Covenant in the Catholic Tradition*, *in* COVENANT MARRIAGE, *supra* note 16, at 70; Stanley Samuel Harakas, *Covenant Marriage: Reflections from an Eastern Orthodox Perspective*, *in* COVENANT MARRIAGE, *supra* note 16, at 92; James Turner Johnson, *Marriage As Covenant in Early Protestant Thought: Its Development and Implications*, *in* COVENANT MARRIAGE, *supra* note 16, at 124. *See also* STACKHOUSE, *supra* note 47; DANIEL J. ELAZAR, COVENANT & COMMONWEALTH: FROM CHRISTIAN SEPARATION THROUGH THE PROTESTANT REFORMATION (1996); DANIEL J. ELAZAR, COVENANT AND CIVIL SOCIETY: THE CONSTITUTIONAL MATRIX OF MODERN DEMOCRACY (1998).

53. *See* al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual?*, *in* COVENANT MARRIAGE, *supra* note 16, at 182.

54. *See id.*; *see also* Azizah al-Hibri & Raja' M. El Habti, *Islam*, *in* SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS, *supra* note 21, at 150.

sacramental theology and canon law of marriage.[55] Much of Calvin's general covenant theology was not new. Calvin expounded the traditional biblical idea of a divine covenant or agreement between God and humanity. He followed conventional Christian teachings in distinguishing two interlocking biblical covenants: (1) the covenant of works whereby the chosen people of Israel, through obedience to God's law, are promised eternal salvation and blessing; and (2) the covenant of grace whereby the elect, through faith in Christ's incarnation and atonement, are promised eternal salvation and beatitude. The covenant of works was created in Abraham, confirmed in Moses, and consummated with the promulgation and acceptance of the Torah. The covenant of grace was created in Christ, confirmed in the Gospel, and consummated with the confession and conversion of the Christian.[56]

These traditional teachings on the covenant were common among Catholics, Orthodox, and Protestants, many of them rooted in the earlier teachings of the Church Fathers.

Calvin went beyond the tradition, however, in using the doctrine of covenant to describe not only the vertical relationships between God and humanity, but also the horizontal relationships between husband and wife. Just as God draws the elect believer into a covenant relationship with him, Calvin argued, so God draws husband and wife into a covenant relationship with each other. Just as God expects constant faith and good works in our relationship with Him, he also expects connubial faithfulness and sacrificial works in our relationship with our spouses.[57] As Calvin put it:

> God is the founder of marriage. When a marriage takes place between a man and a woman, God presides and requires a mutual pledge from both. Hence Solomon in Proverbs 2:17 calls marriage the covenant of God, for it is superior to all human contracts. So also Malachi [2:14–16] declares that God is, as it were, the guarantor [of marriage] who by his authority joins the man to the woman, and sanctions the alliance.[58]

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55. See sources and discussion in Michael G. Lawler, *Marriage As Covenant in the Catholic Tradition*, *in* COVENANT MARRIAGE, *supra* note 16, at 70; Richard C. Martin, *Marriage, Love, and Sexuality in Islam: An Overview of Genres and Themes*, *in* COVENANT MARRIAGE, *supra* note 16, at 217; Max L. Stackhouse, *Covenantal Marriage: Protestant Views and Contemporary Life*, *in* COVENANT MARRIAGE, *supra* note 16, at 153. See elaboration of this thesis in JOHN WITTE, JR., *Marriage as Covenant in the Calvinist Tradition*, FROM SACRAMENT TO CONTRACT, *supra* note 7, at 74 and in JOHN WITTE, JR. & ROBERT M. KINGDON, SEX, MARRIAGE AND FAMILY IN JOHN CALVIN'S GENEVA I: COURTSHIP, ENGAGEMENT, AND MARRIAGE (2006).

56. WITTE, JR. & KINGDON, *supra* note 55, at 482–83.

57. See the following writings of Calvin: Comm. *Isaiah* 1:21–22; 54:5–8; 57:3–10; 61:10–11; 62:4–5 (1551); Serm. *Deuteronomy* 5:18, 22:22 (1555); Comm. Harm. Gospel *Luke* 1:34–8 (1555); Comm. *Psalms* 16:4, 45:8–12, 82:1 (1557); Lect. *Hosea* 1:1–4, 2:19–20, 3:1–2, 4:13–14, 7:3, 9–10 (1557); Lect. *Zechariah* 2:11, 8:1–2 (ca. 1560); Lect. *Malachi* 2:13–16 (ca. 1560); Lect. *Jeremiah* 2:2–3, 25; 3:1–5, 6–25; 13:27; 23:10; 31:32, 51:4 (1563); Comm. Harm. Law *Deuteronomy* 11:26–32 (1563); and Lect. *Ezekiel* 6:9, 16:1–63 (1564).

58. Calvin, Comm. *Malachi* 2:14.

Calvin believed that God participates in the formation of the covenant of marriage through his chosen agents on earth. The couple's parents, as God's "lieutenants" for children, instruct the young couple in the mores and morals of Christian marriage and give their consent to the union. Two witnesses, as "God's priests to their peers," testify to the sincerity and solemnity of the couple's promises and attest to the marriage event. The minister, holding "God's spiritual power of the Word," blesses the union and admonishes the couple and the community of their respective biblical duties and rights. The magistrate, holding "God's temporal power of the sword," registers the parties, ensures the legality of their union, and protects them in their conjoined persons and properties. This involvement of parents, peers, ministers, and magistrates in the formation of marriage was not an idle or dispensable ceremony. These four parties represented different dimensions of God's involvement in the marriage covenant, and they were thus essential to the legitimacy of the marriage itself. To omit any such party in the formation of the marriage was, in effect, to omit God from the marriage covenant. On this foundation, Calvin worked out in great detail a covenantal theology of the origin, nature, and purpose of marriage and a covenantal law of marital formation, maintenance, and dissolution, spousal rights, roles, responsibilities, child care, custody, control, and much more. This was the first comprehensive covenantal model of marriage in the Christian tradition, and it informed the policies of the Genevan church and state alike.

Calvin may have developed the first covenantal model of marriage, but by no means the last. An analogous covenantal model of marriage emerged from the hand of contemporary Zurich reformer, Heinrich Bullinger (1504–1575), whose work was tremendously influential both on the Continent and in England. By the later sixteenth century, the writings of Calvin and Bullinger, separately and together, catalyzed a veritable industry of Protestant covenant theology, jurisprudence, and ethics. These writings on covenant, which crested in seventeenth- and eighteenth-century England and New England, provided a detailed integrated understanding not only of marriage per se, but also of the place of marriage in church, state, and broader society.[59] In the last two centuries, covenantal language has also become prominent in Protestant marriage and wedding liturgies. Indeed, today, Protestant liturgies more than Protestant theologies are strongholds for covenant marriage lore.

In the Catholic tradition, the Council of Trent closed the door firmly on covenant marriage language in 1563. In its decree *Tametsi*, the Council declared canonical the pervasive medieval teaching that marriage is a sacrament. Heretical Protestant teachings on marriage, including the emerging

59. *See* John Witte, Jr., *An Apt and Cheerful Conversation on Marriage*, *in* God's Joust, God's Justice, *supra* note 19, at 295–321; David A. Weir, Early New England: A Covenanted Society (2005).

teaching on covenant marriage in Reformed circles, could henceforth have no place in the Catholic tradition.[60] Four centuries later, however, the Second Vatican Council reopened this door, using the language of covenant as an organizing idiom to describe the origins, nature, and purpose of marriage. In *Gaudium et spes,* one of the Council's most influential documents, the Vatican Fathers put in thus:

> The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is rooted in the marriage covenant of irrevocable personal consent. . . . [A] man and a woman, who by the marriage covenant of conjugal love "are no longer two but one flesh" (Mt. 19:6), render mutual help and service to each other through an intimate union of their persons and of their actions. Through this union they experience the meaning of their oneness and attain to it with growing perfection day by day. As a mutual gift of two persons, this intimate union, as well as the good of children, imposes total fidelity on the spouses, and argues for an unbreakable oneness between them. Christ the Lord abundantly blessed this many-faceted love, welling up as it does from the fountain of divine love and structured as it is on the model of His union with the Church. For as God of old made himself present to His people through a covenant of love and fidelity, so now the Savior of men and the Spouse of the Church comes into the lives of married Christians through the sacrament of matrimony.[61]

Since Vatican II, a number of Catholic ethicists, jurists, theologians, and catechists have come to adopt the language of covenant marriage, alongside the traditional language of marriage as sacrament. A number of these same Catholic scholars have used the language of covenant to engage in rigorous ecumenical discussions of the higher dimensions of marriage and to find common cause with Protestants, Jews, and others in pressing reforms of state marriage law.

IV. Concluding Reflections

The Jewish, Christian, and Muslim traditions have long taught that marriage is a contract. Marriage is predicated on the mutual consent of man and woman. It is recorded in written instruments. It is celebrated in formal rituals. It triggers exchanges of property. It creates a new legal entity, the

60. *See* H.J. Schroeder, *Doctrine of the Sacrament of Matrimony*, *Twenty-Fourth Session* (November 11, 1563), *in* Canons and Decrees of the Council of Trent 180 (1941, 3d prtg. 1955); Catechism of the Council of Trent for Parish Priests 338 (John A. McHugh & Charles J. Callan trans., 14th prtg. TAN Books and Publishers 1982) (1976). See discussion of occasional pre-Tridentine Catholic references to marriage as covenant in Michael G. Lawler, *Marriage as Covenant in the Catholic Tradition*, *in* Covenant Marriage, *supra* note 16, at 70.

61. Second Vatican Council, *Gaudium et Spes*, para. 48, *in* The Document of Vatican II (Walter M. Abbott & Joseph Gallagher eds., and trans., Guild Press, 1966).

marital household, with a complex of new rights and duties between husband and wife, parent and child, and couple and state. It grants husband and wife alike the right to press lawsuits to vindicate their marital rights. Contract is the backbone of marriage, and gives marriage its legal structure, stature, and strength.

The Jewish, Christian, and Muslim traditions have also long taught, however, that marriage is more than a mere contract. Marriage is also one of the great mediators of individuality and community, revelation and reason, and tradition and modernity. Marriage is at once a harbor of the self and a harbinger of the community, a symbol of divine love and a structure of reasoned consent, and an enduring ancient mystery and a constantly modern invention. Marriage is rooted in primeval commands and prophetic examples. It is reflected in religious, ceremonial, social, economic, political, and cultural norms and forms. It is at once private and public, contractual and spiritual, voluntary and natural, and psychological and civilizational in origin, nature, and function.

The term "covenant" is emerging today as a convenient and cogent means to capture these higher dimensions of marriage—though this is by no means the only language available. "Covenant" is an ancient trope, with deep roots in Jewish, Christian, and Muslim canonical texts, and with ample and diverse expression in the legal traditions that emerged under the influence of these religious traditions. In contemporary American law, "covenant" has the kind of neutrality and plasticity needed to signal that marriage has higher dimensions, even while leaving the definition of these higher dimensions to individual choice and community accent.

While, historically, the Jewish, Christian, and Muslim traditions found ways to reconcile the contractual and covenantal dimensions of marriage, American law today juxtaposes them. In all but three states, parties who wish to marry must choose the state's contract marriage option. Contract marriage has minimal rules of formation and dissolution, and hundreds of built-in state and federal rights and duties for the couple and their children. Couples may add rights and duties beyond those defined by the state's contract marriage law. These can be set out in prenuptial contracts negotiated between the parties. Or they can be set out in the religious laws and customs of the community of which these marital parties are voluntary members. Even here, however, the contractual dimensions of marriage are preferred. Some private prenuptial contracts will be enforced by state courts, but religious laws of marriage and divorce will not be enforced—even if the couple's prenuptial contract stipulates that religious law should govern their contract in the event of dispute. New York's *get* statute—which allows an Orthodox Jewish couple to divorce only if their Rabbis first give them a

Jewish divorce—is a rare and remarkable exception to the usual rules.[62] State courts usually will not enforce religious laws of marriage and divorce, particularly if those religious laws differ from state laws. Religious authorities are thus largely powerless to enforce their religious rulings on marriage against one of their members who sues in state court. They may apply spiritual pressure and sanctions to get a party to comply with their internal religious norms—and even shun or excommunicate that party for defying their authority.[63] If the party persists in the civil suit, however, the state court will enforce its own state marriage and divorce laws, not those of the religious community. Religious norms and forms of marriage and divorce are subordinate to the state's contract laws of marriage.

This is not altogether true in Louisiana, Arkansas, and Arizona today. In these three states, parties who wish to marry may choose either contract marriage or covenant marriage. The contract marriage option in these three states is largely the same as that available in any other state. The covenant marriage option, however, is unique in that it tightens marital formation and dissolution rules considerably. In particular, covenant marriage requires parties to involve third party counselors, including the parties' own religious authorities if they are licensed to be counselors. It also requires parties to waive their rights to unilateral no-fault divorce and to accept rules of marital dissolution that are closer to the grounds and procedures traditionally recognized by Jewish, Christian, and Muslim authorities. Covenant marriage laws thus go further than contract marriage laws in reflecting and protecting some of the higher dimensions of marriage. 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, and instructing religious communities that marriage is more than a mere contract.

It is the state authorities, however, not the religious authorities, who enforce covenant marriages in these three states. As with contract marriage, so with covenant marriage, parties may supplement the rights and duties set out by state law with voluntarily-chosen or religiously-mandated norms. But the same limitations on the enforceability of these supplementary norms by religious authorities will apply in these three covenant marriage states as prevail in contract marriage states. State formulations of what marriage entails in the individual case will still trump countervailing religious formulations—even if the state is interpreting the meaning of a "covenant" marriage.

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62. *See* MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW (2001).

63. *See* Michael J. Broyde, *Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 203 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

Moreover, outside of Louisiana, Arkansas, and Arizona, the state will not even recognize a covenant marriage, only a contract marriage. An estranged spouse can thus escape a covenant marriage simply by moving to and filing for divorce in any of the forty-seven American states or any number of foreign countries without covenant marriage options. Current conflict of laws rules, both domestic and international, do not favor the enforcement of covenant marriage laws over the contract marriage laws of the forum state where the divorce case is litigated. And the trend in many non-covenant states and many foreign nations in the past decade has been to weaken, rather than strengthen, traditional forms and norms of marriage.[64] These unfavorable conflicts rules, though not yet strongly tested through litigation, underscore the reality that covenant marriage laws are an important, but only a partial, legal response to the fallout of the modern revolution of marriage and divorce.

A fuller legal response requires additional strategies of reform and engagement, particularly on the part of religious communities.[65] 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. In centuries past, the Jewish, Christian, and Muslim traditions alike produced massive codes of religious law and discipline that covered many areas of private and public life, including domestic life. They instituted sophisticated tribunals for the equitable enforcement of these laws. They produced exquisite works of theology and jurisprudence that worked out the precepts of proper domestic living in great detail. Some of that sophisticated legal work still goes on among some religious communities today. Some religious jurists and ethicists still take up some of these questions. But the legal structure and sophistication of modern American religious communities as a whole is a pale shadow of what went on before, and their marital norms and habits are increasingly becoming simple variations on the cultural status quo.[66]

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. American states, in turn, must think more seriously about granting greater deference to the marital laws and customs of legitimate religious

64. See detailed analysis and sources in Peter Hay, *The American "Covenant Marriage" in the Conflict of Laws*, *in* COVENANT MARRIAGE, *supra* note 16, at 294.

65. See various options outlined in Don S. Browning & David A. Clairmont, *Introduction* to AMERICAN RELIGIONS AND THE FAMILY: HOW FAITH TRADITIONS COPE WITH MODERNIZATION AND DEMOCRACY (Don S. Browning & David A. Clairmont eds., 2007).

66. *See also* John Witte, Jr., *The Goods and Goals of Marriage in the Western Tradition*, *in* GOD'S JOUST, GOD'S JUSTICE, *supra* note 19, at ch. 16.

and cultural groups that cannot accept a marriage law of the common denominator or denomination. Other sophisticated legal cultures—such as England, India, and South Africa—grant semi-autonomy to Catholic, Hindu, Jewish, Muslim, and other groups to conduct their subjects' domestic affairs in accordance with their own laws and customs, with the state setting only minimum conditions and limits. It might well be time for America likewise to translate its growing cultural pluralism into a more concrete legal pluralism on marriage and family life.[67]

67. *See id.* at 322–63.